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CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

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JUDGES

OF THE

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

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
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Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

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Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. HOYT H. WHEELER, District Judge, Vermont.....Brattleboro, Vt.

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Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.

[1] Retired June, 1906.

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Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
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Hon. SOLOMON H. BETHEA, District Judge, N. D. Illinois.....Chicago, Ill.
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Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
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Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

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Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
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Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
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Hon. ROBERT E. LEWIS, District Judge, Colorado.[2].....Denver, Colo.
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Hon. WM. LOCHREN, District Judge, Minnesota.....Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
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Hon. THOMAS P. HAWLEY, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

[2] 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.

LOVE v. EXPORT STORAGE CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 1, 1906.)

No. 1,422.

1. APPEAL—PARTIES.

The rule established in the federal appellate courts requiring all parties against whom a judgment or decree is rendered, in the absence of severance, to join in suing out a writ of error or prosecuting an appeal therefrom, applies only to a joint judgment or decree against such parties, and has no application to separate judgments or decrees, though rendered at the same time and contained in the same entry.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1798–1803.]

2. SAME—STAKEHOLDERS.

Where certain trustees of a bankrupt as individuals became mere stakeholders of a fund in controversy after the institution of their suit in a state court, which was removed to the federal courts, and obtained and held the stake subject thereto, they were not necessary parties in their individual capacity to an appeal from a portion of a decree determining that appellee was entitled to the fund as against appellant, as to which such stakeholders had no individual concern.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1798–1805.]

3. WAREHOUSEMEN—WAREHOUSING GOODS—ELEMENTS.

The only thing essential to the warehousing of goods is that their possession be changed from that of their owner to that of the warehouseman, and hence it was immaterial that they were warehoused on premises belonging to the owner at the time of the warehousing, which was leased to the warehouseman for such purpose.

4. SAME—CHANGE OF POSSESSION—EVIDENCE.

Evidence *held* sufficient to establish a complete change of possession of lumber, alleged to have been warehoused by a corporation, from such corporation to the warehouseman.

5. CORPORATIONS—ACTS OF OFFICERS—AUTHORITY—DENIAL—ESTOPPEL.

Where a corporation received the proceeds of certain notes which were placed to its credit with plaintiff bank by means of certain transactions conducted by its president, by which he warehoused the corpora-

tion's property and pledged the warehouse receipts to secure the discounts, and thereafter such proceeds were checked from the bank in its name by the president and treasurer, as he was authorized by the by-laws to do, the corporation was estopped to deny that the president had no authority to conduct such transactions.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1704.]

6. WAREHOUSEMEN—TAXES—FAILURE TO PAY—EFFECT.

Where a warehouseman, which was a foreign corporation, issued warehouse receipts for certain lumber located in Tennessee on property leased to it by the owner of the lumber, the fact that such warehouseman had failed to pay a privilege tax to which warehousemen in Tennessee were subject, as provided by Acts 1901, c. 128, pp. 200, 221, 227, declaring that any person carrying on their business without paying such tax should be guilty of a misdemeanor, did not invalidate warehouse receipts issued for such lumber in the hands of a bona fide pledgee.

7. BANKRUPTCY—PLEDGES—FRAUD—GOOD FAITH OF PLEDGEE.

Where certain warehouse receipts were pledged to a bank by a corporation, while insolvent, to secure a certain note then executed and any liability thereafter contracted, and there was no evidence to impugn the good faith of the bank, it was entitled to maintain its right to the property so pledged not only for the payment of such note, but for other notes subsequently discounted as against the corporation's trustee in bankruptcy, though the pledge was made within four months prior to the filing of the petition in bankruptcy.

8. SAME—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

Where certain notes indorsed by a bankrupt had matured and were treated as a part of the bankrupt's obligations in a trust agreement for the organization of a new corporation to take over the bankrupt's assets and continue its business, and at the trial the holder of such notes proved generally that they were a part of the liability of the bankrupt to it, and no objection was made to the form of such proof, the bankrupt's trustee was not entitled to urge for the first time on appeal that such notes were not valid claims against the bankrupt because of the absence of any proof of presentment for payment and protest.

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

9. PLEDGES—RELEASE—TRUST AGREEMENT.

Where a trust agreement for the organization of a new corporation to take over the assets of a bankrupt expressly provided that a bank, which was one of the bankrupt's creditors, should retain its right to the proceeds of certain lumber pledged to it over what was necessary to pay a certain note on account of the bankrupt's liability as indorser on certain other notes, and that to the amount it so received from the lumber it should not be entitled to the common stock in the new corporation, the bank's signature to such trust agreement did not constitute a waiver of the pledge.

10. BANKRUPTCY—TRUSTEE—STATE RECEIVERS—AGREEMENTS.

A bankrupt's trustee has no right to sue on an agreement made between state receivers of the bankrupt and one of its creditors.

11. APPEAL—FINDINGS OF MASTER.

A finding on a question of fact by a master will not be set aside on appeal, except on a clear showing that it is erroneous.

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

J. C. McReynolds and E. E. Barthell, for appellant.
W. L. Granbery, for Export Storage Co.
Lawrence Maxwell, Jr., for Third National Bank.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. On July 13, 1901, the American Hardwood Company, a Tennessee corporation, was engaged in the lumber business at West Nashville, in said state, and had been since March 8, 1900, date of its organization. The lumber yard, in which was a small frame building used as its office and a buggy house, was held under a lease and comprised about four acres of ground, bounded on the north by a railroad, on the south by the Centennial Boulevard, on the west by Thirteenth street, and on the east by an alley. It was surrounded by a fence composed of four wires and a string of plank, with gates in it, except on the side next to the railroad, which was open. The office building was in the center of the south side next to the boulevard, and on top of it was a large sign bearing the company's name on both sides. The company had in the yard over 1,000,000 feet of lumber distributed in 369 piles, worth about $30,000. William H. Lewis was its inspector and yard foreman. He was subject to a Miss Albright, who occupied the office building and may be said to have had general charge of the premises. No officer nor any other superior servant was stationed there. Its head or principal office was in the Union Savings & Trust Company building at Cincinnati, Ohio, and was in charge of its secretary, Clarence G. Corkran, who resided temporarily in that city. Charles E. Corkran was president and treasurer and resided in New York City. The two Corkrans, and K. W. Hobart, B. W. Cross, and G. W. Daniels, constituted its board of directors. The residence of the last three does not appear. Charles W. Corkran was interested in and officially connected with 10 or more other corporations engaged in like business at other points in the United States. He seems to have dominated all of said corporations, including said hardwood company. Indeed he was really the owner substantially, if not entirely, of all their capital stock. By the by-laws of the company it was provided, amongst other things, that it should be the duty of the president to sign and execute all contracts in the name of the company and affix the seal thereof thereto, when instructed so to do by the board; that the treasurer should have the care and custody of all funds that might come into his hands and deposit the same as treasurer in such bank or banks as the president might select; that the treasurer should have power to borrow money and execute and negotiate the promissory notes or bills of exchange received by the company in the course of its business, and should draw all checks against the bank account; and that either the president, vice president, secretary, or treasurer might, in the name of the corporation, issue checks, drafts, and notes and indorse or deposit for collection or discount, as the case might be, checks, drafts, or notes.

On the date aforesaid, to wit, July 13, 1901, the Export Storage Company, one of the appellees, an Ohio corporation, with its principal place of business in said Union Savings & Trust Company building at Cincinnati, was engaged in the business of warehousing, mostly,

if not entirely, in certain of the southern states. It had no warehouse of its own. Its business was confined to warehousing on the premises, whether actual warehouses or not, of those who desired to warehouse their goods. Prior to said date it had transacted a large amount of business, but had done but little, if any, in the state of Tennessee. It had a general agent for the state located at Nashville named Charles Sykes. A statute thereof provided for the payment of a certain annual tax by warehousemen for the privilege of carrying on their business therein, and declared it a misdemeanor for one to exercise such privilege without first paying the prescribed tax, punishable by a certain fine. Chapter 128, Acts 1901, pp. 200, 221, and 227. The appellee company had not paid this tax. The general agent, Sykes, had advised with the Comptroller of the state in regard to its payment, and had been told by him that there was no provision requiring a company like his to pay the tax. He stated that he stood ready to pay it if the company was liable, and an agreement was had that upon its being determined that it was, he was to be notified and to pay the tax. On said date, which was Saturday, the two Corkrans were in Cincinnati. Charles E. had been there for several days prior thereto and remained over until Monday, the 15th. One other director, G. W. Daniels, at the least, was also there on the 15th. It had been determined on behalf of said hardwood company, at the least by said Charles E. Corkran, its dominating personality and real substantial owner of its stock, to warehouse the lumber in its yard at West Nashville with the appellee storage company, to which it had given its consent, and two certain persons, T. J. Wilson and H. C. Yates, had been sent there to see to the taking of necessary steps to that end. Yates was inspector and yard foreman of the hardwood company at another yard, which it had in Tennessee, but Wilson does not appear to have had any further connection with it than in this particular matter. The former was to assist in inventorying the lumber and the latter to supervise what was done. Friday, the 12th, Yates and Lewis inspected and inventoried the lumber. They numbered the piles from 1 to 369, inclusive, ascertained the kind of lumber and number of feet in each pile and put a valuation thereon, and divided the piles into 13 distinct lots, designating them by the letters "A" to "M," inclusive. On Saturday, the 13th, at the office of Sykes in Nashville, a contract was entered into between Lewis and the appellee storage company for Lewis to act as custodian of the lumber, Sykes making the contract on the company's behalf, and a bond in the sum of $5,000 was executed for the faithful performance of his duties as such by him, with a Philadelphia surety company as surety. It is possible that the bond was not actually executed by that company until a later date, but it is dated the 13th. The contract provided that Lewis was to be paid $1 per month for his services as custodian. At the same time and place Lewis signed 13 statements, termed "inspection reports," one for each lot, giving the piles of lumber therein and the number of feet and kind and value of lumber in each pile, and executed 13 receipts for the lumber as custodian, one for each lot. Sykes prepared a lease from the hardwood company to the appellee

storage company of the lumber yard, dating it the 13th, and obtained the written consent of the former's landlord thereto, which was indorsed thereon. It was for one year and provided that the yard should be known as "Storage Premises No. 2," and should be used exclusively for storing personal property. The rental was recited to be $1 and other valuable considerations, receipt of which in advance was acknowledged. He also prepared 13 warehouse receipts, numbered from 2,035 to 2,047, to the hardwood company for the lumber and executed them on behalf of his principal. He then, the same day, mailed the lease, warehouse receipts, and Lewis' contract, bond, inspection reports and receipts to the appellee storage company at Cincinnati. That evening he and Lewis tacked on the inside of the plank forming the top of the fence, at each of the four corners of the yard, a yellow card, 10 inches long by 5 wide, having on it in print the words "Premises No. 2. Leased and Occupied by the Export Storage Company, of Cincinnati, Ohio. (Incorporated.)" Probably not more than one of the cards could be seen from the outside, and the printed matter thereon could hardly be read therefrom. Beginning on Sunday, and completing it in a day or so, Lewis, by Sykes' direction, fastened on each one of the piles a paper tag. The tags so used were advertising cards of the hardwood company and on the blank side thereof in pencil were the initial letters of the Export Storage Company's name, "E. S. C."; each tag having, also, the number of the pile to which it was fastened, the kind and quantity of lumber it contained, the lot to which it belonged, and the number of the warehouse receipt covering it. About a week afterward, by like direction, Lewis attached to each pile a wooden tag dressed on one side, upon which the name of the Export Storage Company was written in full, with the number of the warehouse receipt covering it and the number of the pile and the quantity of lumber it contained.

On Monday, the 15th, at Cincinnati, the papers from Sykes having been received, the lease from the hardwood company to the storage company was executed, Charles E. Corkran as president, acting on behalf of the former and affixing its seal thereto, and W. G. Coldeway, its general manager, acting on behalf of the latter. At the same time a contract between the two companies as to warehousing said lumber, dated the 13th, was executed in like manner, the warehouse receipts were further executed on behalf of the storage company by its said general manager and its secretary and treasurer, and registered with the Union Savings & Trust Company, and were then delivered to said Charles E. Corkran; he receipting therefor in the name of the hardwood company by him as president and treasurer. The warehousing contract provided that the hardwood company was to keep the premises in repair and that the storage company as full compensation for storing the property and issuing its receipts was to receive a premium of ¼ of 1 per cent. for each three months on the value of the property as inventoried; the salary paid by the storage company to the custodian not exceeding $1 per month and the expenses of ascertaining quantity and quality of the property and receiving and delivering same.

Thereafter, and upon the same day, said Corkran, on behalf of said hardwood company, obtained a loan of $21,000 from the appellee, the Third National Bank of Cincinnati, executing a note therefor, payable three months after date, to which the hardwood company's name was signed by him as president and treasurer, and pledged as collateral security therefor said 13 warehouse receipts, covering all the lumber in its yard at West Nashville, indorsed in said company's name by him as president and treasurer. In the pledge thereof, constituting a part of said note, it was provided that they were pledged as collateral security, not only for that note, but also for any other liability or liabilities of said company to the bank then existing or that might thereafter be contracted. The proceeds of the note, less the discount, were placed to the credit of the hardwood company, and on the same day and the next day thereto they were transferred, by checks drawn in its name by said Corkran as president, to another Cincinnati bank to pay drafts on said company by one Charles E. Roe, of Baltimore, Md., said Corkran's personal agent, held by it. It is claimed that in this way the proceeds of said note were diverted from the hardwood company to the personal use of said Corkran, and this would seem to have been the case. At the time of these transactions the hardwood company was insolvent, and it had been so since January preceding. It was, however, a going concern and in good credit. Subsequently thereto, to wit, between July 17th and 24th, that condition still existing, the hardwood company discounted to the appellee bank, before their maturity, 11 notes of certain of said lumber companies hereinbefore referred to, which were payable to it, amounting in all to the sum of $12,479.72, which notes were duly indorsed by said company to the bank. The proceeds thereof, less the several discounts, were placed to the company's credit in bank and were checked out the same as in the case of the proceeds of the $21,000 note.

Here it is necessary to go back a moment in our narrative. Nothing more was done in the way of placing the storage company, through its custodian, Lewis, in possession of the lumber than has already been stated. The sign of the hardwood company upon the office building was not removed. Lewis was not aware of the provision in the custodian contract that he was to be paid $1 per month for his services as custodian. He did not read carefully that contract or any of the other papers executed or prepared on July 13th. He simply glanced at them, and his knowledge of their contents was limited to what he observed in so glancing and what he was told in regard thereto. He knew that he was thereby created custodian of the lumber for the storage company and that thereafter it was to be regarded in his possession as such. Theretofore he had been paid by the hardwood company $9 per week or $1.50 per week day for his services as inspector and foreman. Thereafter he was at the lumber yard on Sundays, as well as week days, and was paid by the hardwood company $10.50 per week. The $1 per month provided in the custodian contract was never paid to him. Miss Albright prepared the inspection reports, met Wilson and Yates whilst at Nash-

ville, was informed by Lewis on July 13th that he had been appointed custodian in charge of the lumber and that the property had been leased to the storage company, and saw the tags placed on the inside corners of the fence and upon the piles of lumber. She remained in charge of the office as before and transacted whatever business of the hardwood company there was to be transacted there. It does not appear, however, that thereafter any business was transacted on behalf of that company other than to receive and answer whatever mail came to it there and receive the wages of herself and Lewis, a night watchman and possibly one or two other men under Lewis from the Cincinnati office and disburse and keep an account of them. Both she and Lewis seem to have understood that he was under her and subject to her directions the same as before. Neither seems to have fully understood the purpose and significance of what had taken place. There can be no doubt, however, that both understood that thereafter the lumber was in the possession of the storage company through Lewis as custodian and that Lewis was subject to no orders or directions in regard to the lumber except such as might emanate from the storage company.

Things so continued for about one month, to wit, until August 13th, when the inevitable crash came. On that date two alleged creditors of the hardwood company brought suit against it in the chancery court of Davidson county at Nashville, asking that a receiver be appointed to take possession of its assets and that it be wound up as insolvent. At once said Clarence G. Corkran, its secretary, and one of the plaintiffs, named Coleman Rogers, who in the meantime had become its treasurer, were appointed receivers. They continued to act as such until November 13th, when receivers were appointed by the United States District Court for the Middle District of Tennessee in bankruptcy proceedings against the hardwood company begun the day previous, November 12th. The state receivers, Corkran and Rogers, during their receivership, made no attempt to interfere with Lewis' custodianship or the control which the storage company had acquired of the lumber through the warehouse proceedings of July 13th. On the contrary, they recognized it and the lien which the bank obtained by reason thereof. They paid to the bank the invoice value of a large number of the piles and obtained from Lewis upon orders from the storage company the lumber contained in them, which lumber they subsequently sold for $874.10 less than what they so paid. This, however, was without any order from the state court and upon their own responsibility. They likewise so paid during their receivership Lewis' wages, the premium on his surety bond, the wages of a night watchman, an installment of rent under the hardwood company's lease, and the expenses for loading for shipment the lumber that had been released; the sums so paid amounting in all to $820.36. They paid nothing to Miss Albright, as she left August 20th. The sums they paid to secure the release of the lumber and on account of expenses were out of assets of the hardwood company which came into their hands from other sources, and they were credited by the appellee bank on the $21,000 note. Upon the appointment of the

federal receivers, the storage company began to pay Lewis his wages and continued to pay him until the termination of his custodianship as hereinafter stated. In one of his answers in his deposition Lewis states that he regarded his custodianship began at this time—i. e., with the payment to him of his wages by the storage company—but evidently there is a mistake here, as it is certain from all his answers considered together that he regarded that his custodianship began July 13th and continued until its termination. There can be no question as to this.

January 12, 1902, the hardwood company was adjudged a bankrupt, and on March 17th, at a meeting of its creditors, the appellant John W. Love, and Charles C. Tarbue and H. W. Williamson were elected as trustees. Previous to the adjudication an agreement, termed a "trust agreement," bearing date October 12, 1901, was entered into amongst said lumber companies, including the hardwood company, said Charles E. Corkran, who was stated therein to be the owner of all the stock in all of said lumber companies, except in so far as certain of said lumber companies, were stockholders of other of said companies, thus making him really the owner of all, certain creditors of said lumber companies, termed assenting creditors, it being contemplated that all might become parties thereto, and the North American Trust Company of New York. By said agreement said lumber companies assigned and transferred all their assets, said Corkran and lumber companies (stockholders in other said companies) all the stock thereof, and said assenting creditors their claims against said lumber companies, to said North American Trust Company, and said trust company was empowered to take such steps as were necessary to get possession of such assets and convert them into money, to pay the net assets realized after deducting a certain amount thereof as compensation for its services to a new corporation to be formed by a certain named committee of creditors, having a capital stock of the par value of $1,000,000, of which an amount equal to one-half of the net assets so paid to the corporation was to be preferred and the remainder common stock, in return for notes of said corporation equal to one-half of said net assets and the stock, preferred and common, of said corporation, and to distribute said notes and preferred stock and said common stock to the extent of the indebtedness in excess of said notes and preferred stock amongst the creditors ratably and deliver the balance of the common stock to said Corkran. The object of the agreement was to realize as much as possible out of the assets and to preserve the good will of said lumber companies for the benefit of their creditors and said Corkran. The appellee bank executed said agreement December 18, 1901, to the extent of the liability to it on account of said notes which were discounted by it subsequent to July 15th; i. e., between July 17th and 24th. It was recited therein that it held warehouse receipts for certain lumber of the hardwood company pledged to secure the $21,000 note and also its liability on account of said other notes, and it was provided therein that its right to said lumber was not released or to be in any way affected by said agreement, but that it should

be entitled to the proceeds of the sale thereof without affecting its right to the notes and stock of the new corporation as provided therein, except that it should surrender common stock of the new corporation at par to the amount, if any, realized by it from the sale of said lumber after the payment of said note of $21,000. At the same time it assigned and delivered said notes to the trust company and that company thereafter proved them as claims against the hardwood company in the bankruptcy proceedings.

April 20, 1902, this litigation began. Said John W. Love, Charles C. Trabue, and H. W. Williamson as trustees in bankruptcy filed a bill in the chancery court for Davidson county, Tennessee, against the appellees, Export Storage Company and Third National Bank of Cincinnati, Ohio. They asserted therein the right to the lumber remaining in the yard, which they alleged to be worth as much as $20,000, and to the sums which had been paid by the state receivers, Corkran and Rogers, during their receivership, to the bank to secure the release of the lumber turned over to them as hereinbefore stated, and sought judgment therefor. May 3d said trustee and said appellees entered into a written agreement. By it the trustees as individuals were to take possession of the lumber remaining in the yard, convert it into money and hold the proceeds subject to the determination by the court as to who was entitled thereto. It was further provided therein that said individuals were to receive a commission of 5 per cent. of the net proceeds of the sale of the lumber to be paid by the appellee bank, if it should finally be determined that it was not entitled to said proceeds, and out of the bankrupt estate, if it should be so determined that the trustees were not entitled thereto. Pursuant to this agreement, said individuals at once took possession of said lumber, terminating the custodianship of Lewis which had continued from July 13, 1901, until then, and subsequently sold the lumber, realizing therefrom about $15,000. May 5th said suit was removed into the lower court by petition for removal filed in the state court by the appellees. July 16th an original bill was filed in the lower court by the appellee bank against said John W. Love, Charles C. Trabue, and H. W. Williamson, as trustees in bankruptcy of the hardwood company and as individuals, in which they asserted a lien on said lumber so delivered to said Love, Trabue, and Williamson as individuals and the proceeds thereof to secure payment of the balance due on the $21,000 note and the amounts due upon the 11 notes of the hardwood company discounted by it, upon said company's indorsement, and sought to enforce it. By supplemental bill filed July 26th, said trustees set up said agreement of May 3d, and made themselves parties plaintiff as individuals, and on the same date the two suits were consolidated. Subsequently an amended bill was filed by the appellant John W. Love as sole trustee in bankruptcy, his co-trustees having theretofore resigned their trusts, against the appellee bank, in which he sought recovery of the expenses incurred by said state receivers, Corkran and Rogers, during their receivership, in relation to said lumber, amounting to the sum of $820.36, the loss sustained by them in securing the release of certain portions of

said lumber and selling same, amounting to the sum of $874.10, and the invoice value of certain of the piles so released, which, it was alleged, subsequently came into the hands of the trustees in their individual capacity under said agreement and was sold by them, to wit, the sum of $992.20, if it should be held that he was not entitled to the full relief sought in the original bill.

The consolidated causes coming on for hearing, it was adjudged by the lower court, in substance, that the appellant was not entitled to any portion of the proceeds realized from the sale of said lumber; that the appellee bank was entitled to the whole thereof to be credited upon the $21,000 note to the extent of the balance due thereon, and the additional notes held by it indorsed by the hardwood company, for which said company was liable to it; that said Love, Trabue, and Williamson, should pay same to said appellee by surrendering to it certificates of deposit thereof with it which they held, and that appellant was entitled to none of the relief sought by him and his cotrustees. It is from the decree so adjudging that this appeal is taken.

The appellee has moved this court to dismiss the appeal, and the motion was argued and submitted at the hearing of the appeal. The ground of the motion is that John W. Love, Charles C. Trabue, and H. W. Williamson, as indiviluals, were indispensable parties to the appeal in the absence of a severance. They have not been made such, and there has been no severance. The position that said individuals were indispensable parties to the appeal is based upon the subposition that they were indispensable parties to the consolidated causes in the lower court. In support of the subposition are cited the cases of Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; Massachusetts & S. Cons. Co. v. Cane Creek Township, 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152; and the expression of Judge Clark in the opinion delivered by him on behalf of this court in the case of Tug River Coal & Salt Co. v. Brigel et al., 67 Fed. 625, 628, 14 C. C. A. 577, to wit:

"Where the object of a suit is to recover possession of property real and personal, parties in possession, although as stakeholders claiming no interest, are not formal, but indispensable, parties."

It is to be noted, however, that in the two township cases cited the stakeholders held therein to be indispensable parties in the courts of original jurisdiction were stakeholders at the beginning of the litigation and their citizenship was held to affect the jurisdiction of those courts, and it was such stakeholders that Judge Clark had in mind in the expression quoted. Here Love, Trabue, and Williamson were not stakeholders at the beginning of the litigation. They became such after the institution of the trustees' suit in the state court, and obtained and held the stake subject thereto. It is true that thereafter the bank's suit was brought and they were made defendants thereto as individuals, as well as trustees. The relief therein sought, however, might well have been made the subject of a cross-bill in the trustees' suit with which it was afterwards consolidated. The stakeholders here, therefore, occupy a different relation to the litigation from what they occupied in the authorities relied on. But it does not follow

that, because a person is an indispensable party in the court of original jurisdiction, he is an indispensable party in the appellate court to which the case may be carried. He may be an indispensable party in the one and not such in the other. For him to be an indispensable party in the latter court, it is essential that he be concerned or interested in the questions that are carried there for decision by the appellate procedure. The rule firmly established in the appellate courts of the United States requiring all parties against whom a judgment or decree is rendered, in the absence of severance, to join in suing out a writ of error or prosecuting an appeal therefrom, has application only to a joint judgment or decree against such parties. It has no application to separate judgments or decrees against such parties, though rendered at the same time and contained in the same entry.

Whether a particular judgment or decree is a joint one or made up of separate decrees, or, as Judge Severens puts it in Ayres v. Polsdorfer, 105 Fed. 737, 35 C. C. A. 24, "whether the judgment or decree was in legal contemplation a joint or several one, is," as he says, often a "dubious question," and "in solving it the courts have looked to its substance rather than its form." The controlling consideration in determining the question is to be gathered from his further statement in these words, to wit:

"In many cases the rule has been held not applicable where the party claiming to be aggrieved, although he is one of several parties against whom the judgment was rendered, yet alone represents some distinct and substantial subject-matter in which the others have no concern, or are only indirectly concerned by reason of the allowance or negation of the claim in question."

In the prior case of The New York, 104 Fed. 561, 44 C. C. A. 38, decided by this court, it was held that where a decree in admiralty had been rendered against the owner of a vessel and its surety in a stipulation entered into under Rev. St. § 941 [U. S. Comp. St. 1901, p. 692], and the admiralty rules for the release of a vessel for damages caused by a collision of said vessel with another vessel, it was not necessary for the surety to join in the appeal or to be severed, but that an appeal from the decree might be prosecuted by the owner of the vessel alone. Judge Lurton, in delivering the opinion of the court said:

"Such a stipulation stands in the place of the vessel, and its obligation is discharged by compliance with the order or decree of the court against the owner or claimant, and the liability may be enforced by a judgment thereon against both the principal and sureties at the time of rendering the decree in the original cause. The suit or controversy in this case was between the intervening owner or claimant of the New York and the libelant and others, intervening as cargo owners or cargo underwriters. To that controversy the surety upon the stipulation was not a party. Neither does the record indicate that any question arose touching the obligation of the surety company or in any way involving the terms of the stipulation bond. If any such question had been made, the surety would doubtless have a right to be heard and to take an appeal from any decree affecting its liability."

This case has peculiar applicability here. For, though said individuals were actual parties to the litigation in the lower court by their own amended bill as well as by the appellee bank's original bill, they were mere stakeholders, and they obtained the stake after the

beginning of the litigation and held it subject thereto. They had no concern or interest whatever in the question as to who was entitled to the lumber placed in their hands by the agreement of the contending parties. Their sole concern and interest was with the question as to how much they should account for because of the lumber that came into their hands. So much of the decree as adjudged that the appellee was entitled to the net proceeds of the lumber in their hands, as against the appellant was a separate decree from so much thereof as adjudged the amount of the net proceeds and that they should pay same to the appellee. It was not essential, therefore, for them to join in appellant's appeal or be severed therefrom. Nor was it essential that they be made respondents to the appeal. The fact that the person who should pay their commission depended upon who should be finally decided to be entitled to the proceeds in their hands did not give them such concern or interest in the questions carried up to this court by the appeal as to cause any different ruling. But it is not to be understood by our considering the question as to whether said individuals were necessary parties to this appeal that we think that there has not been what should be construed to be a severance if it were held that they were necessary parties thereto. The parties who it is claimed were necessary parties to appellant's appeal are the appellant himself and his former co-trustees as individuals. In the lower court appellant and his former co-trustees both as trustees and individuals were represented by the same solicitors. Those solicitors appear here for appellant, and the appeal seems to have been taken and allowed in open court. In the case of Ayres v. Polsdorfer, supra, Judge Severens said: "Considerable liberality has been shown in regard to the method by which the severance is effected." The case of Johnson v. Trust Co. of America, 104 Fed. 174, 43 C. C. A. 458, is an illustration of such liberality. In view of this liberality, had appellant's co-trustees not resigned their trust before the decree, but had united with him as trustee in taking the appeal, it would have been open to claim that the right of appeal by them as individuals had been deserted; and, though they had resigned and did not unite, under the circumstances stated, claim of such desertion may still be urged. But it is not necessary that we determine this question. We refer to it simply to preclude any misunderstanding.

The motion to dismiss the appeal is, therefore, denied.

1. Coming to the merits of the appeal, we find that it is urged on behalf of the appellant that the appellee bank acquired no right or lien upon the lumber by virtue of the warehouse proceedings and the pledge of the warehouse receipts, and that therefore he was entitled to the full relief sought. It is so urged upon several grounds. In the original bill of the trustees it was charged that said proceedings and pledge were for the purpose of defrauding the creditors of the hardwood company and that both appellees knew of this fraudulent purpose and participated in it. Possibly the evidence would justify the conclusion that such was their purpose, but it discloses no warrant for the charge that either appellee knew of it or participated in it. One of the grounds upon which the position stated

is urged is that the lumber in question was not warehoused by those proceedings. Of course, an actual warehouse is not essential to the warehousing of goods. They may be warehoused upon a parcel of ground inclosed, or open, or partly so. And they may be warehoused upon what are the owner's premises at the time of the warehousing, and that, though they may then be on those premises and without changing their location thereon. The only thing essential to the warehousing of goods is that their possession be changed from that of their owner to that of the warehouseman. In any disputed case of warehousing like that in hand, then, the one thing to be understood in order to settle the dispute is what is essential to work a change of possession. That one thing is laid down by the Supreme Court of the United States in the recent case of Union Trust Company v. Wilson, 198 U. S. 534, 25 Sup. Ct. 766, 49 L. Ed. 1154, a case of warehousing on what was at the time the owner's premises, though in an actual warehouse. There the question was whether a wholesale dealer in leather had warehoused with a warehousing company in an actual warehouse of his own certain leather goods owned by him. He walled off a part of the basement of his place of business and let it to the warehousing company. There were doors to this part and padlocks bearing the name of the company which were kept locked and to which the company had the only keys. It had a key to the front door and access to the part let to it at all hours of day or night. No one else could get such access without breaking in. There were two signs on the outside stating in large letters that the premises were occupied by the company as a public warehouseman. It does not appear clearly whether those signs were on the outside of the building or only of the part walled off and let to the company. It would seem, however, that the latter was the case. The company received leather from the dealer into this place and issued its receipts therefor. It was a part of the contract of warehousing that the company was not to be liable for damage by fire, water, etc., and that the dealer assumed all risk of loss except from dishonesty of the company's servants. The dealer paid the expenses of the company in connection with storing the goods. The rent stipulated to be paid by the company was a nominal one, and it was to be paid for its services $20 a month for the first $10,000 worth of property or less and a dollar a month for each additional $1,000. The company, therefore, received this compensation for its services without a dollar of expense on its part beyond what it paid its servants, and without further responsibility than from their dishonesty. It was held that the leather had been warehoused and the transaction was upheld. Mr. Justice Holmes delivering the opinion of the court, said: "But there can be no doubt on the facts as stated, without more, that the company had possession of the goods." The general principle which he stated was applicable and determinative in all cases of disputed possession was this:

"When there is conscious control, the intent to exclude and the exclusion of others, with access to the place of custody as of right, these are all the elements of possession in the fullest sense."

In any case of disputed warehousing like the one in hand, therefore, the one thing that is essential to work a change of possession of the goods desired to be warehoused is for the warehouseman to acquire exclusive control thereof. How absolutely the acquisition of exclusive control was regarded as working such a change and effectually warehousing the goods desired to be warehoused is to be gathered from this further remark of Mr. Justice Holmes:

"If the goods had been in a place under the exclusive control of the company, even without the company's knowledge, they would have been in the company's possession."

In the Wilson Case it was because the warehouse company had acquired exclusive control of the leather goods that it was held that they had been warehoused. And what settled that it had acquired such control is thus stated by Mr. Justice Holmes: "It had them under lock and key in a place to which it had a legal title and right of access by lease."

The correctness of appellant's contention here, therefore, depends upon the question whether the appellee storage company acquired exclusive control of the lumber by the warehousing proceedings heretofore set forth. By the lease from the hardwood company to it, assuming that the lease was its act and binding upon it, the appellee storage company acquired and had the legal title to the lumber yard and right of access thereto for the term of one year. It did not, however, put, or at any time have, the lumber yard under lock and key. In the nature of things, that was impossible, for the side next to the railroad was unfenced and exposed. It, therefore, did not acquire exclusive control over the lumber in the way in which such control was acquired in the Wilson Case. But that is not the only way in which one can acquire the exclusive control of goods. He can place them in the custody of another and station him where the goods are to assert control over them and prevent others from interfering with them. Such a way of acquiring control is as effectual as placing the goods under lock and key. That is what the appellee storage company did here. It placed them in the custody of Lewis, and stationed him at the lumber yard to assert control and prevent others from interfering with the lumber, taking from him a $5,000 bond with good surety for the faithful performance of his duties as custodian from July 13, 1901 to May 3, 1902. He was faithful to his trust. He was at the lumber yard every day during that time, Sundays as well as week days, in such capacity. The possession and control of the storage company through its custodian was recognized by the state receivers when they paid the appellee bank the invoiced value of certain of the piles of lumber and secured their release from the appellee storage company, through Lewis, the custodian. It had no occasion otherwise to assert its control during the custodianship. The control of the appellee storage company was also manifested by the signs placed at the four corners of the yard and the double tags fastened to each of the 369 piles of lumber. It is unimportant that at the time of his appointment as custodian he was the servant of the hardwood company and continued such after his appointment and received no other

pay than the wages paid him by the hardwood company until the appointment of the receivers in bankruptcy. It is well settled in cases of this sort that the warehouseman may acquire and hold exclusive control and possession of the goods in such a way and under such circumstances. Sumner v. Hamlet (Mass.) 12 Pick. 76; American Pig Iron & S. Co. v. German (Ala.) 28 South. 603, 85 Am. St. Rep. 21; First National Bank of Parkersburg v. Harknes, 42 W. Va. 156, 24 S. E. 548, 32 L. R. A. 408; Fidelity Ins. T. & S. D. Co. v. Roanoke (C. C.) 81 Fed. 439; Dunn v. Train, 125 Fed. 221, 60 C. C. A. 113. Nor did the fact that the sign of the American Hardwood Company was permitted to remain as it had been, nor the further fact that Miss Albright was permitted to remain in the office, in charge of it and over Lewis in hardwood company matters, to any extent affect the exclusive control which the appellee storage company had of the lumber through its custodian, Lewis. She had no charge or control over the lumber or over Lewis with reference thereto. It is immaterial whether in fact she knew that to this extent she had been superceded, though it is not probable that she did not know it. The hardwood company had power to take from her whatever control she had over the lumber or Lewis with reference thereto, and, if it authorized appellee storage company to take exclusive control, through Lewis, her control was taken from her, whether she knew of it or not. Whatever authority or control over the office or over Lewis was left to her did not affect the control of the storage company over the lumber.

Undoubtedly, adopting in part Mr. Justice Holmes' language in the Wilson Case, if there was an understanding between the parties different from what the forms gone through by them signified and they were intended to disguise that understanding, the transaction was invalid. But there is nothing in the evidence tending to show any such understanding. The forms gone through with represented the real intent, purpose, and understanding of the parties. Still further, it is true here, as in the Wilson Case, that the motive for warehousing, so far as the hardwood company was concerned, was to get the lumber represented by documents for convenience of pledging, rather than to get it stored. But, as Mr. Justice Holmes there said, "that was a lawful motive and did not invalidate his [its] acts if otherwise sufficient." Nor is it open to contention that after the warehouse proceedings were had conditions were such in and about the yard that the lumber gave credit to the hardwood company. There is no evidence that any creditor was misled thereby, and the testimony of Lewis is that the tagging on the pile or piles next to the office and those next to Thirteenth street were observable from the outside and attracted a great deal of attention. The evidence does not justify the inference that there was any effort at concealment. The only fact that smacks thereof is the tacking of the yellow cards at the four corners of the yard on the inside, instead of the outside, of the fence. But the testimony is that this was done to prevent their removal by mischievous persons. Mr. Justice Holmes in his opinion refers to cases in which the "exclusive power of the so-called bailee gradually tapers away," and also to other cases "in which the courts have held

as matter of law that there was no adequate bailment." He cites the cases of Tradesmen's National Bank v. Thomas Kent Mfg. Co., 186 Pa. 556, 40 Atl. 1018, 65 Am. St. Rep. 876; Drury v. Moors, 171 Mass. 252, 50 N. E. 618.

It may be well to refer briefly to the facts of these two cases. In the latter case the goods attempted to be warehoused were iron kept by the owner in a yard under lock and key some distance from the owner's place of business. The warehouseman had made the owner's bookkeeper his agent to keep possession of the property. The key to the yard was kept in the owner's office over the desk of the bookkeeper, but it was not suggested that "he held the key adversely to the owner" or that "he had any such relation to it that he could have sued for it if it had been carried off." In the former case the goods attempted to be warehoused were wool, and that in the owner's actual warehouse. The alleged warehouseman was a clerk of the owner. No lease was made to him of the premises or any part thereof. No storage charges were made by him. He had no sign of any kind anywhere to indicate his proprietorship of the wool, kept no office or desk in the warehouse or key of the premises, and he was rarely there, and left the whole charge, including the depositing and removal of the goods, to the servants of the owner. All he had was a book of blank warehouse receipts and the warehousing consisted simply of issuing warehouse receipts for the wool. This case presents no such state of facts as either of these two presents. And the conclusion we have reached in regard to it is strengthened by contrasting them with it.

Counsel for appellant cite quite a number of authorities in support of their proposition that the lumber was not effectually warehoused. They have all been considered, but it is not necessary to refer to any of them except the case of In re Rodgers, 125 Fed. 169, 60 C. C. A. 567, a decision of the Seventh Circuit Court of Appeals, which is specially relied on. In that case an attempted warehousing of seed on the owner's premises was held invalid; the court stating: "We find the actual possession and control of the property in dispute to have been in the bankrupt." There, there was an actual warehouse. The warehouse proceedings consisted of these things, to wit, a lease to the warehouseman, a tagging of the bags of seed, discoverable upon careful search, and a placing of small and obscure signs not likely to attract attention and most of them hidden behind the piles of bags of seed upon the different floors, indicating that the warehouseman controlled the premises, without any exterior sign. On the other hand, the owner occupied the premises as a place of business, maintaining an office with clerks to assist in the management of the business and porters to handle the seed, continuing to transact business there as he had formerly done. The warehouseman had no key to the premises. No representative of the warehouseman was kept on the premises, though one occasionally visited the premises and inspected the property in a sort of way, exercising no supervision or control that would prevent the bankrupt from doing with it as he would, and, as a matter of fact, he did do with it as he would,

not, however, with the knowledge of the warehouseman. The facts of the case are so strikingly different in certain important particulars from those of the one in hand as to make it not an authority against the conclusion reached here. It is true that Judge Jenkins, as affecting the validity of the warehousing relied on, referred to such facts as these, to wit, that the warehouseman had no premises upon which to store property, and the seed in question were stored on the owner's own premises, and that the warehouseman paid no rental for the premises and assumed no liability to the owner or any other responsibility except what the law imposed on it with respect to those advancing money on the faith of the warehouse receipts. It is hardly probable that he would have attached any value to these circumstances in the absence of the other facts of the case which show that the warehouseman did not have the exclusive control of the seed, but, in so far as the case may be treated as an authority attributing an invalidating effect to them, it must be considered as overthrown by the decision in the Wilson Case. It was cited by counsel in that case, but it is not referred to in the opinion. It had theretofore been reversed by the Supreme Court on the ground that the lower court was without jurisdiction in the case of First National Bank v. Chicago T. & T. Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051. There is nothing in the Tennessee statutes in relation to warehousemen affecting the validity of the warehouse transaction in question. They simply define warehousemen to be persons, etc., who shall receive cotton, etc., in store for hire, or who shall undertake to receive and take care of or sell the same for other persons, provide that no warehouse receipt shall be issued unless the property is in the custody of the warehouseman and in store, or upon the premises and under his control at the time of issuing the receipt, and provide as to their negotiability. Shannon's Code, §§ 2792, 2793, and 2796. In the case of Bank of Rome v. Haselton (Tenn.) 15 Lea, 216, the warehousing of goods upon the owner's premises by one engaged in the warehouse business was upheld.

Another ground upon which the position of appellant heretofore stated is urged is that the lease from the hardwood company to the appellee storage company, and the other steps taken on its behalf to warehouse the lumber and the pledging of the warehouse receipts with the appellee bank, were none of them the acts of the hardwood company. It is contended that said acts were the acts of Charles E. Corkran, the president and treasurer of the company, on its behalf, that he had no authority from the company so to act, and therefore they were not its acts. In support of this contention, the by-law hereinbefore quoted by which it was made the duty of the president to sign and execute all contracts in the name of the company and affix the seal of the company thereto when instructed so to do by the board is relied on, and it is said that the board of directors of the hardwood company never authorized any of said acts. It is further stated by appellant's counsel that the appellee knew of this particular by-law at the time it made the loan—that it was amongst the by-laws then exhibited to it as showing said Corkran's power to act on its be-

half. This is a mistake, as the only by-laws then exhibited to it or that it ever saw were the other by-laws hereinbefore quoted in relation to making and indorsing notes and drawing checks. Said Corkran at the time was both president and treasurer. It is not contended that he did not have power to borrow the money, execute the company's note therefor, and check against the proceeds placed to the company's credit in its name. Such power was clearly conferred on him by the by-laws. The contention is that he had no power to make the warehouse arrangement with the appellee storage company and execute the lease to it or to pledge the warehouse receipts to the appellee bank as security for the loan without being authorized so to do by the board of directors. The evidence introduced on behalf of the trustees did not come far short of showing that, according to the course of dealing of the hardwood company, said Corkran was empowered to do on behalf of the company anything he deemed proper. The directorship was subject to a called meeting on one day's notice by telegraph, and as a matter of fact a quorum of the directors was in Cincinnati July 15, 1901, the time when the warehouse transaction was completed and the loan and pledge of the warehouse receipts were made. It is true that the minutes of the meetings of the board of directors contains no reference to these transactions, but those minutes seem not to have recorded much else besides the resignations of officers and appointment of their successors, which were quite frequent. However, it is not necessary to determine definitely the extent of Corkran's authority in the particulars in question. Though his authority may have been defective in one or all of these particulars, it is not open to the hardwood company, or any one claiming through it, to take advantage of such defect. This is because the company received the fruits of the transaction. The proceeds of the $21,000 note and of the 11 indorsed notes were placed to the credit of the company with the appellee bank and checked therefrom in its name. The by-laws provided that the treasurer should deposit the funds in such bank as the president might select, and that either the president or treasurer might issue checks in the name of the company. When, therefore, the proceeds of the notes were placed to the credit of the company with the appellee bank by Corkran, who was both president and treasurer, and were paid out upon the company's checks drawn by him, it was by act of the company they were so deposited and withdrawn. It thereby received those proceeds. The fact that thereafter Corkran may have diverted the proceeds from the company to his own private use in no way affected the prior fact that the company received those proceeds from the appellee bank.

Still another ground upon which said position of appellant is urged is that the failure of the appellee storage company to pay the tax prescribed for the privilege of carrying on the business of a warehouseman in Tennessee invalidated the warehouse proceedings in question, so that no rights can be asserted by the appellee bank growing out of them. The fact that the tax was not paid in no way militates against the conclusion heretofore reached that the exclusive control and possession of the lumber was changed from that of the hardwood

company to that of the appellee storage company. It was so changed at the instance of the hardwood company in order that it might obtain warehouse receipts to pledge to raise money. To deny the validity of the warehouse receipts which it thus obtained and thereafter pledged to the appellee bank is to make the latter suffer for the wrongdoing of the appellee storage company to the benefit of those claiming under the hardwood company, at whose instance the warehousing was done. The point is not well taken. The only one affected by the failure to pay the tax was the appellee storage company. It thereby became liable to be punished by fine, and could not itself assert any rights growing out of the transaction. Counsel for appellant cite the following decisions of Tennessee as upholding their contention, to wit: Stevenson v. Ewing, 87 Tenn. 46, 9 S. W. 230; Cary Lombard Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743; Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S. W. 879; Harris v. Parker, 108 Tenn. 29, 64 S. W. 1087. But none of them bear counsel out. In each case the wrongdoer was asserting a right growing out of his alleged transaction. It was he alone that was denied relief. In the case of Chattanooga R. & C. R. Co. v. Evans, 66 Fed. 809, 14 C. C. A. 116, this court held that a statute of Tennessee declaring it wrongful for any foreign corporation to acquire property in the state without first complying with certain prescribed conditions, and declaring a penalty against any one violating the provisions, did not invalidate a purchase by a foreign corporation that had not complied with those conditions, but merely subjected the offender to the punishment prescribed.

2. It is urged, further, on behalf of appellant that the appellee bank was entitled to no greater share of the proceeds of the lumber in the hands of the stakeholders and held by them subject to this litigation than what was sufficient to pay the balance due upon the $21,000 note, after crediting thereon the sums received from the state receivers, and that all over and above that amount should have been adjudged to appellant. This position is also urged upon several grounds. One is that the pledge of the warehouse receipts is invalidated by section 67e of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, p. 3449]), wherein it provides that conveyances, etc., made within four months prior to the filing of the petition in bankruptcy, with intent to defraud creditors, shall be void. The pledge of the warehouse receipts was on July 15th and the petition was filed November 12th, so that the former was made within four months prior to the latter. Further, as heretofore indicated, the evidence probably justifies the inference that the pledge was made with intent to defraud creditors. It is contended that the pledge to the extent of the liability of the hardwood company upon its indorsement of the 11 notes discounted by it between July 17th and 24th is not within the exception of the provision in favor of purchasers in good faith and for a present fair consideration. Indeed, it is intimated that there was no pledge at all to that extent, because nothing was said at the time of discounting the 11 notes as to the warehouse receipts being treated as collateral security for the liability

which the hardwood company thereby came under to the appellee bank. But it was not essential that anything should have been said at that time upon the subject. The provision in the contract of pledge entered into when the $21,000 note was executed, that it should cover any liability thereafter contracted, was sufficient without more to create a pledge to secure this liability subsequently created. It is also intimated that the pledge was not in good faith. But the evidence clearly establishes good faith on the part of the bank. There is no evidence whatever to the contrary. The real contention as to the pledge to the extent of said liability as indorser not being within said exception, and hence invalidated by said provisions, is that to that extent it was not for a present fair consideration. This, however, cannot be maintained. The pledge to that extent was for a present fair consideration. The appellee bank parted with the money simultaneously with the contraction of the liability and the creation of the pledge to that extent.

Another ground is that there is no proof that any of said 11 notes was presented for payment at maturity and duly protested, so as to hold the hardwood company as indorser. It is alleged in the bill of the appellee bank that demand of payment was duly made at maturity in each instance and notice of nonpayment promptly given to the hardwood company, and each of the notes was duly protested for nonpayment. It is contended, however, that this allegation is not admitted in the answer, and, not being so, should have been proven. This, as well as the absence of strict proof of the allegation, may be conceded to be true. But the hardwood company was a party to the trust agreement with the North American Trust Company hereinbefore referred to, and introduced in evidence, and at the time the appellee bank executed it, December 18, 1901, all of said notes had matured. By said agreement said 11 notes were treated as part of the liability of said hardwood company and the amounts of the protest fees in each instance were given as a part of that liability. Besides, the officers of the appellee bank proved in a general way that the said notes were a part of the liability of the hardwood company to it. No objection was made to this general form of proof. Indeed, this point does not seem to have been made at all in the lower court, so that if the proof of the demand, notice of nonpayment, and protest were not sufficient, it is now too late to make it.

Still another ground is that the appellee bank, by executing said trust agreement and assigning the 11 notes indorsed by the hardwood company to the North American Trust Company, parted with all claims upon the lumber or its proceeds to the extent of said notes. The case of Johnson v. Smith, 11 Humph. (Tenn.) 396, is cited as supporting this contention. It was held in that case that the assignment by the pawnee of a debt secured by a pawn, unaccompanied by a delivery of the pawn or pledge, either actual or constructive, will not carry with it and vest in the assignee the lien upon the property. Of course, in such a case, the pawnee or pledgee has no longer any claim to the pledge. It is true that the creditors generally who executed that agreement assigned their claims to the North American Trust Company upon

the stipulation that they were to take the notes, preferred stock, and common stock of the new corporation to be formed by the creditors' committee to the extent of their claims in payment for them, and that said agreement was thereafter binding upon them, so that they had no further claim than to said notes, preferred stock, and common stock. But the execution of said agreement was qualified so far as the appellee bank was concerned. It was expressly provided that it was to retain its right to the proceeds of the lumber over and above what was necessary to pay the $21,000 note on account of the hardwood company's liability as indorser on the 11 notes, and that to the amount it so received it was not to be entitled to common stock of the new corporation. This must be held to qualify the assignment provided in said agreement so far as the appellee bank was concerned. To the extent of what it might receive from the proceeds of said lumber on account of said liability it did not assign its claims to said trust company. It retained in itself that much of the liability.

3. Finally, it is urged on behalf of the appellant that it was entitled to have certain amounts paid to it out of the proceeds of the lumber, and that the lower court should have adjudged them to it. One amount is the sum of $874.10, the loss which the state receivers sustained by securing the release of certain piles of lumber upon paying to the appellee bank their invoiced value and selling same. It is contended that the appellee bank's president testified that it agreed to make good any such deficiency. Such an agreement is not alleged in the amended bill and made the basis of the right to recover said sum. Nor have the trustees in bankruptcy any right to sue upon an agreement made with the state receivers, who should settle with the court that appointed them. Otherwise no right to this sum has been shown.

Another amount is the sum of $820.36, expenses incurred by the state receivers in connection with the lumber yard and the lumber. They were not paid by said receivers at the instance of the appellee bank or upon any agreement with it, and nothing is shown upon which the right to recover this sum can be maintained.

And still another amount is the sum of $992.20, the invoiced value of the piles of lumber released to the state receivers, which it is contended were sold by the stockholders under the agreement of May 3, 1902, and whose proceeds are in their hands. It is denied on behalf of appellee bank that such is the case. The burden of proof was upon the appellant to make this out. The matter was referred to a special master. He found that this burden was not sustained and the lower court confirmed his finding. There is no such clear showing that this finding was erroneous to warrant us in disturbing it.

The decree appealed from is affirmed.

HAGGART et al. v. WILCZINSKI et al.

(Circuit Court of Appeals, Fifth Circuit. February 6, 1906.)

No. 1,490.

1. MORTGAGES—VOID FORECLOSURE—EFFECT.
Where a mortgage foreclosure sale was subsequently declared void, those holding under the purchaser at the sale are to be regarded as mortgagees in possession.
[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1110.]

2. COURTS—FEDERAL COURTS—DECISIONS OF STATE COURTS.
The statutes and decisions of the courts of last resort in a state where property mortgaged is situated, and where the controversy arose, are binding on the federal courts as a rule of property.
[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 958, 959.
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. MORTGAGES—BREACH OF CONDITION—POSSESSION—EJECTMENT.
A mortgagee of property located in Mississippi, on breach of condition, may maintain ejectment to recover the mortgaged land as a means of enforcing the security.

4. SAME.
Where a mortgagee of land located in Mississippi obtained possession under a void foreclosure after breach of condition, he and his grantees are entitled to hold possession until the mortgage debt is paid.

5. SAME—INVALID SALE.
Where a mortgage was foreclosed by a substituted trustee, whose appointment was invalid, the sale for that reason was voidable only, and not void.

6. SAME—DISAFFIRMANCE OF SALE—ELECTION.
Where a mortgage foreclosure sale was voidable at the election of the mortgagor or his heirs, the purchaser's grantee was entitled to relieve himself of the position of a mortgagee in possession by suit in equity to compel the mortgagor or his heirs to affirm or disaffirm the sale, and, in the event of a disaffirmance, to obtain a judicial foreclosure.

7. EQUITY—BILL—PRAYER FOR RELIEF.
Under a general prayer in a bill in equity, the court may grant any relief consistent with, and included in, the allegations of the bill.

8. MORTGAGES—INVALID SALE—FORECLOSURE BY ACTION—LIMITATIONS.
Code Miss. 1892, § 2732, provides that, when a mortgagee, after condition broken, shall obtain actual possession or receipt of the rents and profits of the land mortgaged, the mortgagor, or person claiming under him, may not sue to redeem, except within 10 years after the time the mortgagee obtained possession. Section 2755 provides that the completion of the period of limitation shall extinguish the right as well as the remedy. Section 2733 declares that, when an action at law on notes secured by a mortgage is barred, the remedy in equity on the mortgage is also barred. *Held*, that section 2733 should be construed as applicable alone to a mortgagee out of possession seeking to collect the debt or enforce the mortgage, and hence the fact that the debt secured by a mortgage was barred did not preclude the mortgagee in possession under a void sale from maintaining a suit to compel the mortgagor's heirs from either electing to affirm the sale, or to disaffirm the same, and for judicial foreclosure.

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

Edward Mayes and Caruthers Ewing, for appellants.

Le Roy Percy and R. B. Campbell, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit was brought in the court below by the appellants against the appellees, and the jurisdiction of the court is shown by proper averments of the diverse citizenship of the parties. The Circuit Court sustained a demurrer to the bill and dismissed it. To show the questions raised by the appeal, it is necessary to make a condensed statement of the material averments of the bill.

On and before February 1, 1891, Joseph Wilczinski owned in fee simple the Matilda plantation, lying in Washington county, Miss., and containing 1,534 acres. On that day, he and Julia Wilczinski, his wife, executed a deed of trust to Charles C. Currier, as trustee, to secure several promissory notes, amounting in the aggregate to $35,000, payable to the Alliance Trust Company, Limited, a corporation under the laws of Great Britain. The last one of the notes was due January 1, 1896. The deed of trust conferred the usual power on the trustee to sell the mortgaged property in case of default in paying the notes. In case of the refusal of the trustee to act, it was provided that the Alliance Trust Company and their legal representatives might appoint a trustee to act in place of Currier. Currier resigned his office of trustee January 3, 1898. H. C. Williamson was thereupon appointed trustee by A. S. Caldwell, as attorney in fact for the Alliance Trust Company; the appointment being made after the death of Joseph Wilczinski, the mortgagor. Williamson, the substituted trustee, advertised and sold the lands under the deed of trust, and James Haggart and William McMaster bid $35,000 for the same, buying it, in fact, for the Alliance Trust Company. At that time there was due on the mortgage, including interest, $44,027. The $35,000 so bid was treated and held by the Alliance Trust Company as a credit on the mortgage. In 1902, Haggart and McMaster conveyed the land to James A. Crawford, who, during the same year, conveyed it to the Citizen's Bank, a corporation under the laws of Mississippi, and the bank conveyed it to B. R. Allen. These several deeds, made subsequent to the foreclosure sale, contained warranties of title. Each of the subsequent vendees paid in money or in notes $35,000 for the land. After James Haggart bid for the land, he died, and his heirs at law are made parties complainant. When Williamson, as trustee, made the sale, Wilczinski's several children, who succeeded to his interest in the land at his death, were infants, and two of them are infants yet.

In 1903 B. R. Allen brought suit in the chancery court of Washington county, Miss., against Joseph Wilczinski's heirs, the Alliance Trust Company, James Haggart, William McMasters, and others, seeking to have his title confirmed and the title of the Wilczinski heirs canceled as a cloud on his title. The defendants demurred to

the bill, raising the question of the validity of the sale made by Williamson as substituted trustee. Thereupon Allen amended his bill, adding a prayer to be subrogated to the rights of the Alliance Trust Company under the deed of trust, and for a foreclosure. The Wilczinski heirs demurred to that part of the bill only which asserted title in Allen. The demurrer was sustained by the chancery court, and the decree was affirmed by the Supreme Court of Mississippi. These decisions were to the effect that A. S. Caldwell had no authority to appoint a trustee in the place of Currier, who resigned his trust, and that therefore the sale made by H. C. Williamson, substituted trustee, was void. In brief, the holding was that Allen had no title, for he deraigned title from Williamson's sale. The court, after disposing of the main question as to the legality of Allen's title, used this language:

"Of course, the appellant (meaning the Wilczinski heirs) must do equity if he seeks equity, and, just as certainly, he would be estopped to set up any statute of limitation against the enforcement of the claim, and the appellee (meaning the Alliance Trust Company) has nothing still to do except to enforce its security in the proper way." Allen v. Alliance Trust Co. et al., 84 Miss. 319, 331, 36 South. 285, 287.

Upon the rendition of the decision by the Mississippi Supreme Court that he had no title, Allen "announced his intention to abandon the said plantation and insist upon the covenants of warranty against the bank, and dismissed his bill brought in the chancery court." The amount now due on the mortgage, disregarding the credit of $35,000, the amount of the bid for the land at the foreclosure sale, is over $70,000. The bill in the case at bar, after stating the foregoing facts, concludes with a prayer for an accounting, for a judicial foreclosure of the mortgage, and for general relief. To this bill, the heirs at law of Joseph Wilczinski, deceased, demurred, assigning as causes of demurrer:

"(1) That, treating said amended bill as seeking to foreclose the mortgage therein mentioned, it appears by said amended bill that the cause of action, and the right to foreclose said mortgage, did not accrue within six years before the commencement of this suit, and that said plaintiffs are barred from any relief by the statute of limitations of the state of Mississippi, in such cases made and provided, notwithstanding the alleged declaration of the Supreme Court of the state of Mississippi that the Alliance Trust Company could still proceed to enforce its mortgage in the proper way, as alleged in said amended bill, since it appears from the exhibit to said amended bill that said declaration of the Supreme Court was obiter dictum, and not an adjudication of any issue before the court.

"(2) That, treating said amended bill as seeking to cancel the title of these defendants to the lands described as a cloud on plaintiff's title, it appears by said bill that the plaintiffs have no such title or interest in said land as to enable them to maintain this suit; but, on the contrary, it appears by said amended bill and exhibits thereto that the title to said land has already been adjudicated between the parties to this suit by the Supreme Court of the state of Mississippi as being the demurrants. Therefore plaintiffs are not entitled to the relief sought, or to any relief."

The Circuit Court sustained this demurrer and dismissed the bill. The complainants appeal to this court, and assign the decree of the Circuit Court as error.

We are advised by counsel for appellants, in their printed statement and argument filed in this court, that, "on the decision of the Supreme Court of Mississippi that the sale was void, the property was reconveyed to appellants and the successive warranties made good." We do not find in the record any deed from Allen to appellants, but, as Allen is made a party defendant as interested in the accounting, the facts as to the character of his further interest in the case, if any, may be shown in the progress of the suit. Allen is a citizen of Mississippi, and several other defendants being citizens of that state, if it appeared that he was a necessary party complainant, it would defeat the jurisdiction of the Circuit Court. It is sufficient to say that, even without the conveyance referred to by counsel, it does not appear on the record before us that Allen is a necessary party complainant.

Notwithstanding the sale made by the substituted trustee was held void, the Supreme Court of Mississippi declared that the mortgage could be foreclosed "in the proper way," and that the mortgagor's heirs "would be estopped to set up the statute of limitations against the enforcement of the claim." The appellees insist that this part of the court's opinion is a mere dictum, and an able argument is presented to show that the doctrine of estoppel is not applicable to the case; the estoppel deniers being infants and not having in any way ratified the appointment of the substituted trustee or the sale made by him. It is claimed by the appellants that this part of the opinion is not a dictum, and that there are analogous decisions of the same court that tend to support the view that the doctrine of estoppel is applicable. The cases cited are Sugg v. Thrasher, 30 Miss. 135; Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549; Davis v. Hoopes, 33 Miss. 173; Wilkinson v. Flowers, 37 Miss. 579, 75 Am. Dec. 78; Marshall v. Minter, 43 Miss. 666; Staton v. Bryant, 55 Miss. 261; Barnett v. Nichols, 56 Miss. 622; Kelly v. Wagner, 61 Miss. 299; Matthews v. Matthews, 66 Miss. 239, 1 South. 741; Lucas v. American, etc., Mortgage Co., 72 Miss. 366, 16 South. 358; and Easter v. Riley, 79 Miss. 625, 31 South. 210.

Under section 4381 of the Mississippi Code of 1892, a copy of this opinion was certified to the Washington county chancery court, and it cannot be doubted that, if Allen had not dismissed his bill, and the Alliance Trust Company by cross-bill in that case had sought to foreclose the mortgage, the chancery court would have been governed by the opinion to the extent that the statute of limitations would not have been regarded as preventing the foreclosure of the mortgage in the proper way. The Supreme Court had held, on the appeal from the interlocutory decree sustaining a demurrer to part of the bill, that the attempted foreclosure by the substituted trustee under the power of sale was wholly ineffectual. The case remained in the chancery court for further proceedings pursuant to the opinion, and such proceedings were to be had on a bill containing a prayer for foreclosure. In a case in which the right to foreclose the mortgage was asserted, the Supreme Court made the decision in question. The substance of the thing adjudged on this point was that the statute of limitations could not be used to prevent the foreclosure. We should not turn from the substance of what was said to look too closely at one reason given

for saying it. If the statute of limitations is not a defense under the circumstances of the case, that fact is conclusive of the question presented by this appeal, no matter by what process of reasoning that conclusion is reached. The ultimate question, therefore, we are called on to decide in this case is whether or not the statute of limitations bars the rights of the complainants asserted in the bill.

Before we examine the statute of limitations in question, it will be well to consider the legal and equitable relations of the parties, for a knowledge of these relations will shed light on the question when we come to examine the statutes. The sale under the mortgage by the substituted trustee having been ineffectual and having been declared void, it is not denied that the position of the complainants is, in substance, that of mortgagees in possession. Cooke v. Cooper, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709. The settled law of a state on the subject of mortgages is regarded as a rule of property, and the federal courts are governed by the statutes and decisions of the courts of last resort in the state where the property mortgaged is situated, and where the controversy arose. Parker v. Dacres, 130 U. S. 43, 9 Sup. Ct. 433, 32 L. Ed. 848; Bacon v. N. W. M. L. I. Co., 131 U. S. 258, 9 Sup. Ct. 787, 33 L. Ed. 128; Dugan v. Beckett, 129 Fed. 56, 63 C. C. A. 498.

In Mississippi, the mortgagor is the owner of the legal title to the land until a valid foreclosure of the mortgage. This is true against everybody, but subject to this exception: After breach of the condition of the mortgage, the mortgagee may maintain ejectment against the mortgagor to recover the mortgaged land as a means of enforcing the security. Buckley v Daley, 45 Miss. 338; Freeman v. Cunningham, 57 Miss. 67. It follows, we think, that where a mortgagee obtains possession by suit, or under an irregular, or voidable, or void, foreclosure, after breach of the condition of the mortgage, he has the right to hold possession until his mortgage is paid. The mortgagor cannot deprive him of possession without first paying the debt. Bryan v. Brasius, 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022; Helm v. Yerger, 61 Miss. 44, 51; Buckley v. Daley, supra. We have no reason to doubt that this doctrine prevails in Mississippi although it may be that the mortgagee under such circumstances, if sued in ejectment by the mortgagor, would have to resort to a court of equity to preserve his possession till his mortgage was paid. Bonner v. Lessley, 61 Miss. 392. This rule, that the mortgagee cannot be deprived of possession by the mortgagor till the debt is paid, is applied in cases where the debt secured by the mortgage is barred by the statute of limitations. Bryan v. Brasius (Ariz.) 31 Pac. 519; Id., 162 U. S. 415, 16 Sup. Ct. 803, 40 L. Ed. 1022. This may be true generally on the theory that the statute operates alone on the remedy, not extinguishing the debt nor the lien (Angell on Limitations [6th Ed.] § 73), but we must keep in mind that in Mississippi the completion of the period of limitation defeats and extinguishes "the right as well as the remedy." Code Miss. 1892, § 2755.

The bill shows that the land was bought at the foreclosure sale by Haggart and McMaster for the Alliance Trust Company; their bid

being $35,000 and more than $44,000 being then due on the mortgage under which the sale was made. This bid has ever since been treated by the Alliance Trust Company (at least, till the sale was held void by the Mississippi Supreme Court) as a credit on the mortgage debt. Possession of the land has been held continuously under this sale. The validity of the sale was never ratified by the Wilczinski heirs, nor was it ever openly repudiated until after the expiration of the period of limitation, when Allen filed his bill in the state chancery court. That court held, and the Supreme Court approved the decision, that the foreclosure sale was void, and that Allen could acquire no title from those who purchased at that sale. The Mississippi Supreme Court used the expression that the sale was "absolutely void," but the point passed on was raised by a demurrer to the part of the bill that alleged title in Allen, so the decision was to the effect that the sale and conveyance by the substituted trustee was "absolutely void" as an attempted transfer of the title to the land.

The word "void" is so often used in the sense of "voidable" as to have almost lost its primary meaning, and, when it is found in a statute or judicial opinion, it is ordinarily necessary to resort to the context in order to determine precisely what meaning is to be given to it. The word, when confined to the effect of the sale and conveyance as a transfer of title, the matter under consideration, was used by the learned Supreme Court with accuracy and technical precision. A purchase by a trustee at his own sale is certainly void as to the beneficiary in the trust. It is void because the seller is not permitted to buy at his own sale. Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076. The word "void," however, is frequently used even by legal writers and jurists where the purpose is nothing further than to indicate that a contract is invalid and not binding in law. Ewell v. Daggs, 108 U. S. 143, 148, 2 Sup. Ct. 408, 27 L. Ed. 682. The distinction between "void" and "voidable" in their application to contracts is sometimes one of practical importance. A transaction may be void as to one party, and not as to another. When entire technical accuracy is desired, the term "void" can only be properly applied to those contracts that are of no effect whatsoever, mere nullities, such, for example, as are against the law, illegal, or criminal, or in contravention of that which the law requires, and therefore incapable of confirmation or ratification. Allis v. Billings, 6 Metc. 415, 417; 39 Am. Dec. 744; Lawrence v. Hornick, 81 Iowa, 193, 46 N. W. 987, 988; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 95 Fed. 497, 525, 36 C. C. A. 155. The sale by the substituted trustee, while it had no effect on the title, was not a transaction entirely incapable of confirmation or ratification by the parties in interest. The Alliance Trust Company, the beneficiary in the trust, gave credit for the purchase money and held possession under the purchase. In its bill now before the court, in one of its alternative claims, it avers the legality of the sale, thereby expressing a willingness to let the sale stand. Can it be doubted that the sale could be confirmed and the credit of $35,000 on the mortgage be permitted to remain, if all parties in interest elected to let it stand? A decree ratifying the sale, rendered at the election of all parties in interest,

would be the equivalent of a decree of strict foreclosure under the former practice. 2 Jones on Mortgages, §§ 1538, 1539. As to those defendants who are minors, the chancery court can make an election for them according to their interest. 1 Beach, Mod. Eq. Jur. § 537; Robinson v. Robinson, 19 Beav. 494. If any one of the heirs of the deceased mortgagor desires a resale, or if the court held that it was to the interest of the minors that there should be a resale, another sale should be made. The voidable foreclosure should never be permitted to give the purchaser an unfair advantage, or to affect unjustly the rights of the mortgagor or his heirs. In cases where it is held that a mortgagee is not allowed to purchase at a sale made by him under a power in the mortgage, he has been permitted to relieve himself of the embarrassing position of a mortgagee in possession under a voidable sale by proceeding in chancery to require the mortgagor to elect to affirm or disaffirm the sale, and, in the event of a disaffirmance, for a judicial foreclosure. American F. L. Mort. Co. v. Sewell, 92 Ala. 163, 167, 9 South. 143, 13 L. R. A. 299; McHan v. Ordway, 76 Ala. 347; McLean v. Presley's Adm'r, 56 Ala. 211, 218. Under the circumstances of this case, we think the complainants would have this right, unless the right is barred by the statute of limitations.

It is true that there is no special prayer in the bill relating to this relief, but, under the general prayer, the court may grant any relief which is consistent with and included in the allegations of the bill. 1 Foster's Fed. Prac. (3d Ed.) § 83, p. 234. If the parties in interest do not elect to ratify the sale, there is no reason why the mortgage may not now be foreclosed by decree of the court, unless the complainant's right to foreclosure is barred by the statute of limitations. For convenience of reference, the several Mississippi statutes of limitation will be copied in a footnote.

Actions on promissory notes or other written obligations are barred unless suit be brought on them within six years from the time they are due. Washington v. Soria, 73 Miss. 665, 19 South. 485, 55 Am. St. Rep. 555; Wright v. Mordaunt, 77 Miss. 537, 27 South. 640, 73 Am. St. Rep. 536; Code Miss. 1892, § 2737. Under the common law, the bar of a note secured by a mortgage did not bar the remedy by foreclosure (Bank v. Guttschlick, 14 Pet. 19, 31, 10 L. Ed. 335); but in Mississippi, under the present statutes, when the action at law on notes secured by mortgage is barred, the remedy in equity on the mortgage is also barred. Code Miss. 1892, § 2733.

The last note secured by the mortgage became due January 1, 1896, and more than six years elapsed before the beginning of this suit on January 1, 1904. Section 2732 of the Mississippi Code provides that, when a mortgagee, after a condition broken, shall obtain the actual possession or receipt of the profits or rent of the land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage but within 10 years after the time at which the mortgagee obtained possession. Section 2755 provides that the completion of the period of limitation shall extinguish the right as well as the remedy. The statutes, taken literally and applied to all cases, bar the mortgagee of all remedy and all right in

six years, and bar the mortgagor's right of redemption in 10 years after possession by the mortgagee. Making all the statutes applicable to the case where the mortgagee is in possession, there would be a period of four years in which the mortgagee's remedy and right was extinguished, and yet in which the mortgagor would be permitted to redeem, but in which he would be required to pay the extinguished debt before he would be permitted to recover the possession. If the expiration of six years extinguishes the debt—and the statute says that it does—it is difficult to see why it is expressly provided that the mortgagor should have 10 years, four years after the debt is extinguished, in which to pay the debt by redemption. This seeming incongruity would be removed entirely by a construction of the statutes which makes the limitation provided for by section 2733 applicable alone to a mortgagee out of possession, and who seeks in an action or suit or other proceeding to collect the debt or to enforce the mortgage. It may be well to remember that prescription and statutes of limitation do not ordinarily run against those in possession.

Under section 2732, the mortgagee's possession for 10 years will ripen into absolute title against the mortgagor, cutting off the latter's right of redemption. Can it be that, during the first 6 of the same 10 years, sections 2733 and 2737 would cut off the mortgagee's right of foreclosure and extinguish the debt secured by the mortgage? It is not probable, we think, that the Legislature intended that the statute of 6 years should run against the mortgagee in possession, while the statute of 10 years was running in his favor; that time should be cutting off his rights with a 6 years' statute while it was securing him a title with a 10 years' statute. But in this case, not only do the complainants occupy the position of a mortgagee in possession, but they are in possession under an attempted foreclosure, by a sale void for the purpose of affecting the title, and voidable for all purposes at the option of the parties, but made under circumstances believed at the time to make it valid, and that created an apparent credit of $35,000 on the mortgage debt. The facts alleged show that the complainants relied on the sale and possession under it as crediting the mortgage by the amount of the bid and as conferring on them the right to hold the land as owners. Construing the statute of limitations before the adoption of the code in which it is re-enacted, the Supreme Court of Mississippi, in Barnett v. Nichols, 56 Miss. 622, made an observation that is exceedingly pertinent to this discussion:

"It is the settled doctrine that full relief will be administered in a court of chancery, where the bar has attached during the pendency of unfounded litigation instituted by the debtor; and no substantial difference in principle is seen between such a case and one where it has attached while the creditor was relying upon an invalid payment."

There is no doubt that the mortgagor's heirs could, within 10 years after the mortgagee took possession, maintain a bill to redeem and for an accounting. If they filed such bill, they could not redeem and recover the land, and at the same time get the benefit of the credit for the amount that the land sold for at the sale. The sale being avoided, the credit would also be avoided, and the mortgagor's heirs would be

charged with the entire debt. That being so, the status as to the amount of the debt being restored, it would seem inequitable to hold that the statute of limitation of six years was running against the creditor and mortgagee, notwithstanding his reliance on the credit as a part payment, and on his possession based on the voidable sale. It is conceded and unquestioned by authority that the mortgagor's heirs, in a proceeding to redeem, would have to pay the entire debt; that no statute of limitation, although by its terms its effect is to extinguish the debt, would enable the mortgagor's heirs to obtain possession of the land by suit without paying the debt in full. But this, it is claimed, comes from the rule that they would be required to do equity. Conceding that the rule requiring them to do equity is applicable to require the payment of the debt extinguished by the statute, is it necessary to resort to such rule? Is it not more reasonable to say that they must pay the debt, because under the circumstances the mortgagee's right is not affected by the statute of limitation? It is conceded that the mortgagee in possession, after the expiration of six years from the maturity of the debt, has equitable rights—the right to hold possession and collect the rents till the barred debt is paid by the rents. The rents, when collected, must be applied to the debt by a decree of the court to effect payment. Hubbell v. Moulson, 53 N. Y. 225, 13 Am. Rep. 519.

As a decree of the court is necessary to close the accounts and settle the equities, what good reason is there for not permitting the mortgagee, as well as the mortgagor, to invoke the action of the court? The mortgagee is to be credited by taxes and reasonable repairs and other payments, and is to be charged with rents. Lapse of time adds to the difficulty of stating the account. Only the adult heir is required to proceed to redeem and for an accounting within 10 years. Where there are minors, as in the instant case, another long period may be added to the time in which redemption is allowed. Code Miss. 1892, § 2746. The construction that the appellees would have us place on the statutes would make the complainants, although they were in possession under a void or voidable purchase, on account of which they had credited the mortgage, entirely without remedy to close the account and settle the contention as to the title to the property. Having equitable rights, they could get no relief in equity, unless the mortgagor brought suit to redeem. This ruling would arm the mortgagor with the power by mere inaction to indefinitely delay a settlement. We think it more reasonable to place a construction on the statutes that would prevent this result, and permit the mortgagee in possession, under the circumstances of this case, to proceed to have the accounts closed and the rights of the parties adjusted.

We concur fully in the opinion of the Supreme Court of Mississippi in Allen v. Alliance Trust Co., 84 Miss. 319, 331, 36 South. 285, that the statute of limitations does not, under the circumstances, bar the complainants of the right to relief.

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to overrule the demurrer, and to proceed further in accordance with the views herein expressed.

Note.

Sec. 2449. Mortgages and Trust Estates: Trust-Estates Subject to Execution.—Estates of any kind holden or possessed in trust for another, shall be subject to the like debts and charges of the person to whose use or for whose benefit they are holden or possessed as they would have been subject to if the person had owned the like interest in the thing holden or possessed as he may own in the uses or trusts thereof, whether the trusts be fully executed or not, and may be sold under execution at law, so as to pass whatever interest the cestui que trust may have, and, before a sale under a mortgage or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of trust, except as against the mortgagee and his assigns, or the trustee after breach of the condition of such mortgage or deed of trust.

Sec. 2732. Mortgages and Deeds of Trust.—When a mortgagee, after condition broken, shall obtain the actual possession or receipt of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee or the person claiming through him; and in such case a suit may not be brought but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; but such acknowledgment shall be effectual only as against, and to the extent of the interest of the party signing it.

Sec. 2733. Remedy on Mortgage Barred When Debt is.—When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law to secure the payment of a sum of money specified in any writing, an action or suit or other proceeding shall not be brought or had upon such lien, mortgage or deed of trust to recover the sum of money so secured but within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such mortgage or deed of trust may be specified; and in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

Sec. 2737. Actions to be Brought in Six Years.—All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

Sec. 2746. Saving in Favor of Those Under Disabilities.—If any person entitled to bring any of the personal actions before mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed; but the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one years.

Sec. 2755. Completion of Limitation Extinguishes Right.—The completion of the period of limitation herein prescribed to bar any action, shall defeat and extinguish the right as well as the remedy: but the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.

SECURITY WAREHOUSING CO. et al v. HAND et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,090.

1. BANKRUPTCY—MODE OF REVIEW—APPEALABLE ORDERS.

A petition filed in a court of bankruptcy in the nature of a bill in equity to establish the right of the petitioner to the possession of certain property also claimed by the trustees of a bankrupt, and to enjoin the trustees from interfering with such possession presents a "controversy arising in the course of bankruptcy proceedings" and does not constitute a proceeding in bankruptcy and the order or decree entered thereon is reviewable by appeal under Bankr. Act 1898, c. 541, § 24a, 30 Stat. 553 [U. S. Comp. St. 1901 p. 3431].

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

2. WAREHOUSEMEN—WAREHOUSE RECEIPTS—LAW GOVERNING.

Whether an instrument constitutes a valid and negotiable warehouse receipt such that its transfer operates as delivery is to be determined by the law of the state.

3. SAME.

Under the law of Wisconsin (with a statutory exception with respect to grain), the owner of property can obtain a negotiable warehouse receipt therefor only when it is stored in a public warehouse openly held out as such, and subject to use by all persons on equal terms.

4. WAREHOUSEMEN—WHO ARE WAREHOUSEMEN—WAREHOUSE RECEIPTS.

A bankrupt was a corporation of Wisconsin engaged in operating knitting mills in that state. A so-called warehouse company incorporated in New York and having its principal office there with a branch in Chicago nominally leased certain spaces in the bankrupt's storage rooms at its mills which were inclosed by open palings having gates locked with a padlock having the name of the warehouse company thereon, and such company issued receipts from its Chicago office to the bankrupt for goods of the latter stored therein which receipts were indorsed by the bankrupts and delivered to claimants as collateral security for loans. All expense of inclosing and maintaining such storage rooms was paid by the bankrupt and certain of its employés were appointed custodians by the warehouse company and had the keys to the inclosures. No goods other than those of the bankrupt were stored therein, and there were no signs on the buildings indicating their occupancy as public warehouses, the only signs of such character being on the inside of the inclosures and on the padlocks. It was also shown that employés of the bankrupt from time to time removed and shipped goods from such inclosures and replaced them with others. *Held*, that such storage did not constitute a warehousing of the goods within the law of Wisconsin, and that the receipts were not warehouse receipts whose transfer carried constructive possession of the goods as against the bankrupt's trustees or general creditors.

5. SAME—PLEDGE—DELIVERY OF POSSESSION—WAREHOUSE RECEIPTS.

The placing of goods by the bankrupt in such spaces, separated in some cases from the surrounding storage room only by the open slatwork and the taking of receipts therefor from the storage company, did not constitute such a change of possession or delivery to such company as to render the transaction valid as a pledge of the goods to the receipt holders.

6. SAME—EQUITABLE LIENS.

Bankr. Act 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which protects "liens given or accepted in good faith * * * and for a present consideration which have been recorded if record there-

of was necessary to impart notice" applies only to liens perfected according to law of which notice has been imparted by record or otherwise, and does not save an equitable claim, which, under section 67a, "for want of record, or for other reasons," is invalid as a lien against creditors.

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

On a creditors' petition in bankruptcy, filed October 5, 1903, against the Racine Knitting Company, a corporation engaged in manufacturing hose and other knit goods, with factories at Racine and Stevens Point, Wis., the knitting company on October 26, 1903, was adjudged a bankrupt, and appellees were appointed receivers and later were elected trustees.

Appellees asserted a right to certain merchandise covered by receipts issued by appellant security company. Thereupon that company filed in the bankruptcy court its intervening petition asserting its exclusive possession and control of the merchandise, the issuance of its receipts therefor, and the negotiation by the bankrupt, prior to bankruptcy, of the receipts to the other appellants in good faith and in due course of business as security for loans. The petition further alleged that appellees were claiming title to the merchandise and were obstructing the petitioner in its possession thereof. The prayer was for an order that appellees refrain from interfering with the petitioner in its custody and control of the property.

The other appellants intervened, set up the same facts, and prayed that appellees be restrained from interfering with the security company in delivering the merchandise to the petitioners, and from asserting any right or title to the property as against them.

Issues were joined, and the referee reported the evidence and his findings of fact. The findings are as follows:

"(1) That the Racine Knitting Company, the bankrupt, is and was during the periods involved in this reference a Wisconsin corporation, organized for the manufacture of knit goods, hosiery, and underwear, having its principal office at Racine, and factories at Beloit, Stevens Point, and Ripon.

"(2) That the Security Warehousing Company is and was during the same periods a corporation of the state of New York licensed to do business in Wisconsin under section 1770b of the Revised Statutes of 1898, and acts amendatory thereto, and was engaged in the business of 'field warehousing' so-called, owning no warehouses of its own and not occupying any public warehouse at any place; its general method of field warehousing being the leasing of portions of storehouses or buildings or lands occupied in whole or in part by the owners of the goods to be stored. The particular methods pursued in the present case being more fully set forth below. Its corporate purposes, as set forth upon its letter heads, being stated to be the 'warehousing of manufactured stocks and raw materials for purposes of collateral security, or as a medium of purchase and sale and guaranty of possession while remaining on premises of original owner.' The same letter head also contained the words 'Public Warehousemen.' This style of advertising itself was in use in October, 1901, and for some time thereafter, but was abandoned later on except as to the words 'Public Warehousemen,' although at what precise date does not appear. The only reason for the change being stated by the witness Banks, its district manager, that the supply of the older form was exhausted. The warehousing company has never complied with chapter 251, p. 415, Laws 1899 of this state.

"(3) In October, 1901, the Racine Knitting Company executed an agreement of lease to the Security Warehousing Company [Exhibit A] of certain premises at the city of Racine, which are described in such agreement as 'the entire first and second floors of brick building known as Chicago, Milwaukee & St. Paul Railway Company's premises, formerly occupied as a machine shop, situate lots 5 and 8, block 6, Harbor addition to city of Racine; said floors measuring 40 feet from north to south by 60 feet from east to west.' This lease was for the term of one year, and for so long thereafter as any property should remain upon the premises for which receipts of the

warehousing company were outstanding and in force 'and until duly released of record, for a yearly rental of one dollar and other good and valuable considerations, the receipt of which in advance is hereby acknowledged.' It was further stipulated therein that the leased premises should be used and occupied exclusively for the storage of personal property and for the transaction of business connected therewith on the part of the warehousing company. That the latter should have, for purpose of inspection or removal of property, convenient access through any part of the abutting premises occupied by the lessor. The premises so leased were not in fact wholly occupied by the lessees, but only the second floor and those portions of the first floor marked sections A and C on the plat Exhibit M. The remainder being occupied by the bankrupt and other parties for storage purposes. A further and similar lease as to its terms was executed between the same parties, dated January 24, 1903, [Exhibit C] of a part of the floor space 50 feet by 30 feet in the storage warehouse of the bankrupt situated upon its factory premises at Stevens Point and hereinafter more fully described.

"(4) Cotemporaneously with the execution of these leases the parties thereto entered into agreements in form as shown by Exhibit D setting forth among other things that the knitting company desired the security company to receive and issue storage receipts for certain of its goods and warranting the premises suitable for the purpose, agreeing to keep the same in repair and indemnify the warehousing company against loss, damage, or destruction of the property, and to pay beside the specific storage charges and expenses, the amount of custodian's salary up to $5.00 per month, the charges for storage being based upon the value and not upon the bulk or physical character of the goods to be stored.

"(5) Pursuant to such arrangements the parties thereto caused to be stored in the premises described in these leases certain of bankrupt's goods, both at Racine and at Stevens Point, for which the warehousing company issued and delivered to the bankrupt 12 warrants or storage receipts upon the goods at Racine, and other 12 similar instruments on the goods stored at Stevens Point, in tenor and effect and general form as shown by Exhibit B, of which storage warrants six were delivered to the Hyde & Brittan Bank as security for notes to the amount of $5,300, of which notes or renewals thereof copies are shown in Exhibit E, and delivered the remaining 18 receipts to the petitioner McKeand, five of which were subsequently transferred to the Citizens Bank of Mukwonago as security for a note of $2,000 held by said bank, of which note or renewal thereof a copy is shown at Exhibit F, and the petitioner McKeand holds the remainder as security for notes to the amount of $6,800, copies of which notes or renewals thereof are shown at Exhibit G. Upon the issue of such storage receipts, manifests of the goods therein mentioned were made and certified to by the bankrupt, and by the person named as custodian by the warehousing company; at the foot of each manifest was appended the certificate of the warehousing company, signed by its district manager that storage receipts had been issued upon the property, and giving the numbers used for identification [see Exhibit H]. The storage receipts or warrants recited the receipt of the therein designated goods to be stored, subject to the order of the Racine Knitting Company, which latter company caused them to be severally indorsed in blank by a proper officer, and these warrants are the same warrants held by the several petitioners and claimed by them to confer title and the right of possession to the property therein referred to as security upon the several promissory notes held by the respective claimants and above referred to. It is admitted for the purpose of this reference that the petitioners received the several notes and warrants purporting to secure the same, as stated and claimed by them, and are the holders thereof, or of notes taken in renewal and extension of the original notes upon the same alleged security, except that as to the petitioner McKeand his claim is disputed by the receivers and trustees, who claim that upon the adjustment of unsettled balances between himself and the bankrupt he would be found to owe the bankrupt-estate. As such claims must be determined, in the opinion of the referee, upon objections filed to McKeand's proof of debt, in the ordinary course of procedure and not upon this reference, neither party

is to be concluded or prejudiced by anything on this reference as to the amount of McKeand's claim, or any offsets, counterclaims or objections that the trustees may have interposed or be advised to interpose hereafter.

"(6) That the several petitioners and receipt holders, the Hyde & Brittan Bank, Citizens Bank of Mukwonago, and W. B. McKeand, at all times prior to the institution of the bankruptcy proceedings were unacquainted, either from inspection or inquiry, with the physical nature of the storage of the manifested goods, or the warehousing methods of the Security Warehousing Company, and did not inquire with respect thereto either of the warehousing company or the knitting company, but did make inquiry as to the standing and reputation of the warehousing company and were satisfied therefrom that such standing and reputation were good and relied thereon and upon the contents of the storage receipts themselves. But, that the Citizens Bank of Mukwonago understood that its manifest goods were stored in buildings belonging to or occupied by the bankrupt, and the petitioner McKeand was at all times a director of the bankrupt, and part of the time an officer thereof, and was informed after the acceptance of the storage receipts and notes purporting to be secured thereby that the goods referred to in such storage receipts were stored in the warehouse building of the railway company at Racine, in part used by the knitting company, but had not seen and was not specially acquainted with the storage premises leased to the warehousing company.

"(7) The custodians in local charge of the warehoused goods, both at Racine and Stevens Point, and their respective deputies, were employés of the bankrupt at all times prior to the institution of the bankruptcy proceedings, were selected and nominated by the bankrupt, but received their appointments from the warehousing company, which appointments, and instructions and agreements for their compensation and the designation of their prescribed duties were set forth in written contracts in form and substance in all respects as shown by Exhibit J, and all expense incident to the storing arrangements, such as fees and cost of indemnity bonds of custodians, storage charges and traveling expenses of the warehousing company and its servants for purposes of inspection, delivery, and the like, were charged to and collected from the knitting company.

"(8) The premises so, as aforesaid, leased by the bankrupt to the warehousing company at Stevens Point consisted of a floor space 30 feet by 11 feet, on the inside of the bankrupt's storeroom, separated from the remainder of such storeroom by a substantial slatted enclosure or fence-like paling of boards from floor to ceiling built by the engineer of the knitting company and at its instance, and provided with a sliding door at the north end at the point marked 'X' on Exhibit I, which door was constructed in like manner and locked by a suitable padlock of the 'Jail-lock' type about two inches square, made of bronze and marked 'Premises of Security W'h's'g. Co. of N. Y. Chicago, Ill.' The first two and the last two words of this legend being in raised letters and the balance in stamped or depressed letters on each of the two faces of the padlock; said letters being about one-sixth of an inch in height, the raised letters showing clearly in ordinary light, the stamped letters indistinct but legible in a good light. The lock was affixed by the warehousing company and the key delivered to its appointed custodian by the warehousing company, whose manager had also a pass-key to all the locks of his company. The custodian at Stevens Point was during all the time cashier of the bankrupt, having also principal charge of its stock of goods and materials at Stevens Point and who kept the key upon a ring, with other keys, both personal and those of the bankrupt in or upon the cashier's desk during office hours where the same was accessible and occasionally used by the manager of the knitting company, and at other times the key was kept upon her person. The door was kept locked except when necessary to enter the inclosure. Upon the inside of the inclosure over the door and at the further end of the inclosure were fastened up cardboard signs 'at points X and Z Exhibit I,' which signs were upon substantial manila board, printed in black letters of good size and of which Exhibit K is a specimen. In September, 1903, just before the institution of bankruptcy proceedings, the sign over the

door was removed by the warehousing company, and replaced upon the door itself outside the inclosure. Upon the cases of goods were put small cards of identification like Exhibit L stating the property to be in the possession of the Security Warehousing Company. The boxes and cases were piled six to seven feet high, and there were also boxes and cases piled in the warehouse outside the paling, and this outer space appears to have been crowded much of the time to such an extent as to preclude observation of the large signs without climbing upon the boxes. As to light the testimony is conflicting. There were two windows hung with close shutters, and unless the shutters were open there could have been very little light, and when opened some of the light would be cut off by the piles of goods in store. Access to the inclosure itself was possible only by way of the door, y, leading out of the warehouse building and through the storeroom to the door, x; this door, y, being secured only by the lock of the knitting company to which there were two keys kept on its premises and accessible to its servants, but to which the warehousing company had no key, and could gain access to the building only by using one of the keys of the knitting company. The storehouse was mostly invisible from the street on which the factory premises of the bankrupt fronted and of which premises such storehouse was an integral part, and the property was inclosed by a fence with three gates on the west or side farthest from the storeroom, one of which must be passed to gain access to the storehouse building. There were no signs or marks on the outside of said building or any part of the factory premises indicating any occupation or use by the warehousing company, or that it had thereon any goods in store.

"(9) The premises so as aforesaid leased by the bankrupt to the warehousing company at Racine and used by the warehousing company consisted of the floor space of the second floor, and part of the first floor of a two-story brick building owned by the C., M. & St. P. Railway Company, part of which building was leased by it to the knitting company [see plats Exhibit M and Exhibit N, which are admitted as to the plats only, and not as to any printed recitals thereon tending to support the petitioners' contention]. These premises are no part of the Racine plant or office property of the bankrupt, but are situated several blocks distant therefrom. The floor spaces used by the warehousing company were enclosed by palings or fence-like partitions similar to those constructed at Stevens Point, but not extending more than 10 or 12 feet above the floor, each having a hinged door secured by lock of the same description as that heretofore mentioned, and within these inclosures so constructed the manifest goods were placed. Access to the building is through an outside door forming a general entrance [shown at V on plat Exhibit M] used in common by the occupiers of the building, and not secured; there were numerous windows and sufficient light. In each of the two inclosures sections A and C [Exhibit M] were placed one of the large cardboard signs above referred to, and one on the second floor on a beam near the elevator and smaller signs like Exhibit O were placed on the doors leading to the inclosures A and C, and also one on the stairway door. Signs were also placed on the inside of the elevator inclosure on the second floor, which inclosure was a paling similar to the inclosure A and C on the first floor, and small identification cards [Exhibit L] on each lot of goods stored or on each case. Where the cards were not placed upon each box the lots were separated by a narrow aisle or opening a few inches in width, and this method of storing and marking applied to the goods in all of the above mentioned inclosures. The inclosure about the elevator opened to the second floor by two doors [xx and yy Exhibit N] fastened from the inside. Goods were sometimes left in the inclosures by the bankrupt after being released to prevent pilfering. Other goods not manifested belonging to the bankrupt, principally 'premium goods' so-called such as small tables and cabinets, were stored in the same building, and on three or four occasions manifested goods were taken out of the inclosures by the custodian who was in the bankrupt's employ and who took them out at the bankrupt's direction and other goods were substituted therefor. There were no signs or marks on the outside of the building indicating any occupation or use by the warehousing company or that any manifested goods were stored therein.

"(10) The receivers and trustees are in possession of the several buildings containing the manifested goods, but the locks of the warehousing company still remain upon the inclosures, and upon the inclosures at Racine the trustees have added locks of their own, while at Stevens Point the trustees control exclusively all access to the building containing the inclosure within which are the manifested goods at that place, but the lock of the warehousing company is still upon the door leading to such inclosure, which door was temporarily removed by the trustees or receivers by taking off the hinges for the purpose of entering the inclosure.

"(11) Demand was duly made upon the warehouse company by each of the receipt holders of the goods called for by their respective receipts."

The receipts mentioned in the findings were of the form as shown in the following:

"R-N 8117. Guaranteed Storage Receipt of No. 3,244.

Security Warehousing Company.

General Offices: 346 Broadway, New York.

District Offices: 540 The Rookery, 217 LaSalle St., Chicago.

Date December 1, 1902, Issued at Chicago, Illinois.

"The Security Warehousing Company certifies that it has received on storage in Premises, No. 134, located at Racine, Wis., 1st Floor C. M. & St. P. Ry. Co.'s Whse. subject to the order of Racine Knitting Company, Racine, Wisconsin, the following described Commodity, viz.: Four (4) cases, Nos. 4070, 4073, 4080 and 4090, said to contain not less than Two Hundred Sixty (260) Dozen Pairs Assorted Hosiery and be as per Manifest herewith designated as Exhibit 'A-235'. To be known as Lot No. 286.

"Said Commodity to be retained on Storage and delivered only upon surrender of this receipt properly endorsed and payment of all charges thereon, Provided, however, if such Commodity or any part of it remaining undelivered be not called for within one year from the date hereof, the Security Warehousing Company may, at its option, upon giving three days' notice of its election so to do, store the whole or the undelivered part of such Commodity elsewhere at the expense of whomsoever may then be entitled to the same. The Security Warehousing Company in no event shall be under any liability for errors or mistakes committed in the inspection of such Commodity unless claim in writing therefor be made upon it within one year from the date hereof, and the said Company shall not be liable for the destruction of, or damages to, such Commodity by fire, water or from inherent qualities of the property.

"This Receipt void unless signed by an Agent and Countersigned by W. H. Banks, District Manager.

"Security Warehousing Company,
"By Alex Greig. President.

"Charges as per Contract.
"E. C. Curtis, Agent.
"Countersigned:
"W. H. Banks, District Manager."

Certain exceptions by both sides were overruled by the court, and the petitions were dismissed for want of equity. Appellees have interposed a motion to dismiss the appeal.

Henry S. Robbins, for appellants.

John B. Simmons, for appellees.

Before GROSSCUP and BAKER, Circuit Judges, and HUMPHREY, District Judge.

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

1. The motion to dismiss the appeal is based on the contention that

the record presents a "proceeding in bankruptcy" and not a "controversy arising in the course of bankruptcy proceedings." The distinction was recently considered by this court in the case of In re Friend, 134 Fed. 778, 67 C. C. A. 500. The pleadings filed by the appellants in the District Court were in substance bills in equity to establish and enforce their liens and right of possession, and to enjoin the appellees from beclouding their rights and disturbing their possession. The District Court, on the initiative of the appellants, had complete jurisdiction to determine these questions in a plenary suit, which was an independent controversy between adverse claimants and the trustees, and was not a part of the proceedings in the administration of the estate. Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425; Liddon v. Smith, 135 Fed. 43, 67 C. C. A. 517; Marshall v. Knox, 16 Wall. 551, 21 L. Ed. 481; Stickney v. Wilt, 23 Wall. 150, 23 L. Ed. 50; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. The claim of appellees that the authority of the cases above cited is impaired by the decision in First Nat. Bank v. Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, is entirely unwarranted. In that case the receiver filed a petition asking the court's directions in respect to a sale of certain property. In the petition the receiver recited that he had taken possession of the property. The adverse claimants appeared specially and objected to the jurisdiction of the District Court to decide the controversy respecting their right of possession. Inasmuch as the adverse claimants were entitled to have their rights determined in a plenary suit, the District Court was without authority to proceed against them summarily, and the District Court could not entertain a plenary suit brought by the trustee, "unless by consent of the proposed defendant." Section 23b Bankr. Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. The fact that the adverse claimants were entitled to a plenary hearing in a proper tribunal did not touch the other fact that the receiver's petition to the court for instructions respecting a sale of the property was a proceeding in bankruptcy. As the present record discloses a "controversy arising in the course of bankruptcy proceedings", the appeal was properly taken under section 24a (30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]); and the motion to dismiss is accordingly overruled.

2. Error is predicated on the overruling of appellants' fourth and sixth exceptions to the referee's report. The fourth asserts that the referee erroneously failed to find "that all the doors to the Security Warehousing Company's inclosures at Racine were kept locked, and the keys thereof were always in the custody of the custodian Amend or of the subcustodian Netzinger;" and the sixth "that the two doors at the elevator opening on the second floor [at Racine] were always kept locked, and the keys thereof were continuously in the custody of the custodian [Amend] or subcustodian [Netzinger]." These exceptions assume that the evidence required a finding that the inclosures at Racine were the security company's; that is, that, regardless of the paper forms employed by the knitting company and the security company, the possession and use of the inclosures were in fact un-

equivocally and exclusively in the security company; and that the doors thereto were not opened by Amend or Netzinger except as agents of, and for the purposes of, the security company. The evidence shows that the inclosures in the railroad roundhouse were built by the knitting company; that the lease from the knitting company to the security company included the entire first and second floors, though the inclosures did not; that the knitting company, after the lease, continued to use, for its own storage purposes, the space outside of the inclosures, as it had before; that the goods (hosiery and underwear) were easily movable from place to place; that goods not "manifested" were put in and taken out of the inclosures by employés of the knitting company; that Amend was assistant general manager of the knitting company, and Netzinger was shipping clerk at Racine; that Amend was absent from Racine a large part of the time, and left the keys with Netzinger; that the security company did not appoint, and Amend had no authority to appoint, Netzinger subcustodian; and that Netzinger as shipping clerk filled orders from cases without or within the inclosures as need required. These, and other facts regarding visible tokens of a change of possession, which will be considered later, satisfy us that the referee's finding was as favorable to appellants as the evidence justified.

3. Were the receipts of the security company entitled to the status of negotiable instruments the transfer of which operates as delivery?

Their validity as proper warehouse receipts is to be determined by the laws of Wisconsin. Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; In re St. Paul & Kansas City Grain Co. (Minn.) 94 N. W. 218.

Chapter 340, p. 346, Laws 1860 (amended by chapter 73, p. 96, Laws 1863), conferred negotiability upon "warehouse receipts, * * * given for goods * * * deposited with any warehouseman, wharfinger, vessel, boat or railroad company, or other person." That the "other person" must be ejusdem generis and must assume an obligation to the public like an innkeeper, or a common carrier, and that the place of business of every one within the class must be openly held forth as such, is shown in Shepardson v. Cary, 29 Wis. 34:

"To uphold the receipt as a proper warehouse document, transferring the title to the property and operating as a good constructive delivery of it to the vendee, it must in all cases distinctly appear that it was executed by a warehouseman, one openly engaged in that business, and in the usual course of trade."

In Geilfuss v. Corrigan, 95 Wis. 651, 70 N. W. 306, 37 L. R. A. 166, 60 Am. St. Rep. 143, decided in 1897, a furnace company issued formal warehouse receipts upon its own iron, stored in its own yards, to a mining company which used them as collateral. The court said:

"The so-called storage warrants were not warehouse receipts. * * * In order to be such they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation. * * * Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not con-

stitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bills constitutes the counterfeiter a bank."

That was a case of a manufacturer's issuance of documents in the form of warehouse receipts for his own goods, stored on his own premises. Should owners of public warehouses in Wisconsin be permitted to issue negotiable receipts for their own goods, stored in their own warehouses? Should any other persons, not owners of public warehouses, issue negotiable warrants for their own property, in their own possession? These questions were answered by the Legislature in 1899. The act concerning warehouse receipts was amended by adding:

"And any warehouse receipt issued by any person or persons keeping, running and managing a public warehouse, on goods, wares, or merchandise owned by him or them, and which he or they have at the time of issuing such warehouse receipt actually stored in the said warehouse, shall have the same force and effect to protect the owner and holder thereof on any loan or advance of money he may have made on the same, as a warehouse receipt issued by the keeper and manager of a public warehouse to any other person who brings goods, wares, or merchandise to be stored in such public warehouse."

It was also enacted that any person owning grain, or certain other named commodities, who owned or controlled the structure in which his grain was stored, might issue negotiable receipts, provided he first should file in the office of the register of deeds of the county a written statement of his intention and an accurate description of the structure and its location, and should keep an open registration of all receipts issued, and should certify on his receipts that the act had been fully complied with.

These statutes and decisions prove to us that in Wisconsin one who is not an owner of a "public warehouse" or a grainowner that has complied with the last recited statute, can obtain a negotiable warehouse receipt for his own goods in no other way than by taking them to a "public warehouse;" that is, a place that is held out to the public as being one where any member of the public, who is willing to pay the regular charges, may store his goods and then sell or pledge them by transferring the receipt given him by the keeper or manager.

In the present case the main office of the security company was in New York; the nearest district office was in Chicago; from there the receipts were issued; and in Wisconsin the security company had no office and no warehouses, unless the inclosures within the buildings of the knitting company at Racine and Stevens Point be counted such. The receipts themselves would put the holders thereof on notice of these facts. And at Racine and Stevens Point the security company gave no evidences to the public of its presence. No signs were displayed to the passerby. No business was sought from the public. The only property within the inclosures was the knitting company's. The knitting company did not want storage room, but collaterals, which the security company agreed to furnish for a commission upon the amount thereof plus all expenses. The security company's only agents on the scene were the agents of the knitting company who cared for and shipped out its goods. That this was the only busi-

ness contemplated is disclosed by the agreement that the knitting company should be restored to full possession of the premises at any time it returned the outstanding receipts. This, in our judgment, was not warehousing within the law of Wisconsin.

In Union Trust Co. v. Wilson, 198 U. S. 530, 25 Sup. Ct. 766, 49 L. Ed. 1154, it is said:

"Although the first question does not refer in terms to the statutes of Illinois, it is proper to add that we see no sufficient reason for denying to the place of storage the character of a public warehouse. 'Public warehouses of Class C shall embrace all other warehouses or places where property of any kind is stored for a consideration.' Hurd's Rev. St. 1903, § 135, c. 114 (§ 2). These sweeping words embrace any place so used, whether owned or hired by the warehousemen, and, if so, they embrace as well a place hired of the owner of the goods as one hired of anybody else."

We find no provision in Wisconsin that warrants the disregard of the elements of the publicity that attaches to an openly conducted business, and the obligation to serve the public at large.

4. Though the receipts be ineffective as proper warehouse receipts, the security company may have had such a possession that the transactions may be upheld as pledges by the knitting company to the appellant lenders, the security company standing as the agent of the lenders for the purposes of possession.

Wisconsin, in addition to the usual requirements of an actual and continued change of possession of chattels sold or covered by an unrecorded mortgage, has enacted that conditional sales shall be recorded. This unmistakable policy in regard to secret liens on personalty should forbid any laxity in the construction or application of the law of pledges. Seymour v. Colburn, 43 Wis. 67.

Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession. The pledgor must dispossess himself openly, completely, unequivocally, and "without deceptive combinations which lead third persons into error as to the real possessor of the thing." And the pledgee must take and maintain an open, exclusive and unequivocal possession. Dirigo Tool Co. v. Woodruff, 41 N. J. Eq. 336, 7 Atl. 125; Drury v. Moors, 171 Mass. 252, 50 N. E. 618; Bank v. Jagode, 186 Pa. 556, 40 Atl. 1018, 65 Am. St. Rep. 876; Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779.

At Stevens Point the inclosure was in the knitting company's own warehouse, which was openly occupied and used by it after the lease as well as before. No signs on the building or on the door leading into it announced the presence of the security company. The inclosure in one corner of the building was of slats, between which the packages of goods inside could be seen. No signs regarding the security company's possession were placed on the outside of the inclosure in 1901 nor at any time until in September, 1903, very shortly before the bankruptcy proceedings were begun, when the district manager of the security company came from Chicago, and changed a sign from inside, over the door, to outside, on the door. The signs inside were ambiguous, in that they referred to bins and chutes, and much of the time were not to be seen on account of

the piled-up goods. The security company's agent, on the ground to maintain an open, unequivocal and exclusive possession, was the cashier of the knitting company, who had charge of the stock and of shipping. The key to the inclosure was kept on a ring with other keys used in the business of the knitting company; and this bunch of keys was accessible to the manager of the knitting company, and was left at the office during the cashier's absences. Substantially the same conditions obtained at Racine.

If a creditor desired to look over the property of the knitting company, what would be the probable result? The cashier or shipping clerk or manager could take the bunch of keys, unlock the warehouse, show the raw materials, and broken stock outside of the slatted inclosure, point out the quantity of goods within the inclosure, explain the necessity of the inclosure to prevent pilfering of the hosiery, etc., when the warehouse was open; and nothing would warn the creditor of the deception. And the evidence satisfies us that at least one creditor was so deceived.

So far from the security company's maintaining an open, exclusive, unequivocal possession during the two years this arrangement was carried on, it seems to us that the security company might as well have been eliminated, and the knitting company have employed its own stockkeepers and shipping clerks as custodians for intending lenders, directly, instead of indirectly through the security company. In that view this becomes one of the cases "in which the exclusive power of the so-called bailee" (Union Trust Co. v. Wilson, 198 U. S. 530, 537, 25 Sup. Ct. 766, 768, 49 L. Ed. 1154) tapers away to nothingness. Drury v. Moors, 171 Mass. 252, 50 N. E. 618; Bank v. Jagode, 186 Pa. 556, 40 Atl. 1018, 65 Am. St. Rep. 876.

5. The appellant lenders finally assert that, if they have neither the negotiable receipts of a public warehouseman nor a pledge through an unequivocal possession by their agent, the security company, nevertheless they have "equitable liens" which entitle them to the possession of the property as against the trustees.

The trustee succeeds, as of the date of the adjudication, not only to the bankrupt's title and possessory right to the property, but also to the right of the bankrupt's creditors to assert that the title and possessory right, as to them, is in the bankrupt. Section 70a (4) and (5); section 70e (30 Stat. 565, 566 [U. S. Comp. St. 1901, pp. 3451, 3452]). Liens that remain undisturbed are those that were good against both the bankrupt and his creditors immediately preceeding the adjudication. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261. The conclusion results not merely from a consideration of the nature of the trustee's succession, but as well from the inhibitions of the act. Section 67a (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449] vitiates as liens all "claims which for want of record or for other reasons" the bankrupt's creditors might have avoided as liens; that is, no secret liens or equities shall prevail against the trustee that were not good against the general unsecured

creditors represented by the trustee. Section 67d protects "liens given or accepted in good faith * * * and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice." The liens thus saved are liens, not promises to give liens, not equitable claims that what ought to have been done shall be considered done, but liens perfected according to law. "Notice" as well as "a present consideration" is necessary. If a chattel mortgage be given in good faith and for a present consideration, recording is not obligatory, but the imparting of notice is. Recording is one way, another is actual and continued change of possession. If a pledge be similarly given, recording is not "necessary in order to impart notice," because no provision has been made that a record of the fact shall be notice of the fact; but what is "necessary in order to impart notice" is the delivery of exclusive and unequivocal possession. We think that Section 67d does not change Section 67a into the meaning that "claims which for want of record or for other reasons" are not good liens as against creditors are good liens as against the estate if the lender advanced his money without any actual intent to defraud unsecured creditors. He is chargeable with the constructive intent which is attributed to secrecy.

The decree is affirmed.

CENTRAL INDIANA RY. CO. v. GRANTHAM.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,171.

1. RAILROADS—FORECLOSURE OF MORTGAGES—LIABILITY OF PURCHASER FOR PRIOR LIENS UNDER DECREE.

   Under a decree foreclosing two mortgages on railroad property, which required the purchaser at the sale to pay all claims filed within six months which should be adjudged "prior in lien to the mortgages foreclosed," where the proceeds of the sale paid the first mortgage debt in full, the purchaser is liable for the payment of a claim filed within the specified time which is adjudged prior in lien to the second mortgage; any equities existing in favor of the first mortgagee, which might be superior to such claim, being only by way of security for its debt and extinguished on its payment.

2. JUDGMENT—CONCLUSIVENESS OF PRIOR ADJUDICATIONS.

   Where the ownership of the right of way, occupied by a railroad through a farm, had been repeatedly litigated in different suits between the successive owners of the farm and of the railroad, involving substantially the same issues, and each time finally determined in favor of the owner of the farm, the last being a proceeding by him to obtain the assessment of damages, to which the mortgagees of the railroad company were made parties, such determinations establish conclusively the right of the land owner to the compensation awarded him, and that the same is prior in lien to the mortgages, and such issues cannot be relitigated on the filing of his claim for allowance in a suit in a federal court for the foreclosure of the mortgages.

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

The appellant, the Central Indiana Railway Company, is the purchaser under a decree of mortgage foreclosure against the Chicago & Southeastern

Railway Company, which requires the purchaser, among other conditions, to pay all claims filed within six months thereafter "which shall be adjudged prior in lien to the mortgages foreclosed"; and the appeal is from a decree in favor of the appellee, as intervening petitioner at the foot of such foreclosure decree, which confirms the master's report and orders that the appellee be paid, out of the funds in the registry of the court, the sum of $1,283.83, with interest and costs. Upon the intervening petition, as amended, and issues joined, the evidence was heard before a master and is reported by him, with findings of fact and conclusions thereupon. The record is voluminous, and the facts are complicated, but undisputed in all matters deemed material. The appellant's exceptions to the report were stricken from the files, for want of conformity with the rules, and the only exceptions, either preserved or pressed for consideration, relate to the conclusions of law.

The facts so reported are substantially these:

(1) Continuously from January 1, 1872, to April 24, 1877, Thomas H. Messick was owner in fee of S. W. ¼, section 4, and up to February 13, 1875, was like owner of N. W. ¼, section 9, all in town 17 N., range 3 W., Montgomery county, Ind. On February 13, 1875, Messick and wife conveyed to George G. Meyers the N. W. ¼ of section 9, excepting an enclosed lot occupied as a graveyard, and further excepting all the parcel of land lying on the north side of the line and including the right of way of the Anderson, Lebanon & St. Louis Railroad; the center of said road being the dividing line. Approximately nine-tenths of the strip of land described in the intervener's petition is included within said S. W. ¼ of section 4; and the title to the portion of the N. W. ¼ of section 9, contiguous to the part thereof conveyed to Meyers, was held by Messick until February 1, 1893, when it was conveyed to one Wesley Grantham. On April 24, 1877, the S. W. ¼ of section 4 was sold at marshal's sale to the Madison County National Bank, under an execution against Messick, and the marshal's deed thereupon was duly executed a year later, which conveyed to the bank said S. W. ¼ of section 4 with other real estate, and the deed was duly executed. On March 13, 1882, the bank conveyed to Elizabeth A. Messick the S. W. ¼ of section 4, and the grantee entered into possession thereunder.

(2) In 1873, while Messick owned such land, the Anderson, Lebanon & St. Louis Railway Company surveyed and located a railroad line diagonally across the same, including the strip described in the intervener's petition, and constructed the earthwork of a railroad grade, but did not at any time complete a roadway thereon. The grade work, however, clearly indicated the intended use and similar work extended in either direction beyond such land upon the line of the projected railroad, extending from Anderson to Waveland, Ind. No further work was done upon the line until January 1, 1887, a period of 14 years, and in the interval the several owners of the land along the line inclosed such grade and used the same for farming purposes, but enough of the grade work remained to indicate its purpose.

(3) In 1874 Thomas H. Messick inclosed the portion of grade on his land with fences, and the greater portion thereof was actually cultivated, and all was treated by said Messick and his successors in title as their own; such use continuing up to October 1, 1887.

(4) Thomas H. Messick was one of the officers of the railway company mentioned, either as director or vice president, during the time the grade was constructed over his land, and made no objections to such use, except that he stated that if ever completed he expected to receive compensation for the damages.

(5) On November 1, 1875, the railroad company referred to executed a mortgage upon all its railway property to Koontz and Crosby, trustees, to secure an issue of bonds, describing the property only in general terms as the right of way then owned or thereafter to be acquired by it and extending between the places named. When the mortgage was given, Messick held the title to his above-mentioned land and was in possession of the strip mentioned.

(6) In 1876 a creditor's bill was filed in the trial court against said railroad company, and a receiver was appointed December 28, 1877, of all the rail-

road property, which then extended from Anderson to Lebanon, and the receiver went into possession and operated the same until turned over to the Midland Railway Company. On December 12, 1878, the trustees of the mortgage filed a bill for its foreclosure in the same court, wherein Messick was made a party defendant with others as claiming interests subordinate to the mortgage lien. A receiver was appointed, and the prior pending suit was dismissed. Messick did not appear in such suit, but was defaulted, and a decree of foreclosure was subsequently entered under which a sale was made to one Platt. The sale was confirmed May 21, 1885, and Platt conveyed the railroad property to the Midland Railway Company. Elizabeth A. Messick, the wife of Thomas H., was not made a party, nor was the Madison County National Bank, although it then had title to the property described in the intervening petition.

(7) On January 1, 1887, the Midland Railway Company made a mortgage to the Metropolitan Trust Company and one Davis, as trustees, to secure an issue of bonds; its property being described only in general terms as the right of way then owned and thereafter to be acquired by it. Such mortgage was recorded February 6, 1887. At the date of the mortgage Elizabeth A. Messick held the record title to the strip of land in question under conveyance to her from the bank, dated March 13, 1882, and was in the exclusive physical possession thereof as a part of the farm conveyed to her.

(8) In October, 1887, the Midland Railway Company entered upon the strip and commenced the construction of a railroad by grading, putting in culverts, and laying ties and rails; such work being done over the objection and protest of Mrs. Messick. Subsequently, the operation of the railroad over such strip was commenced and continued. On November 21, 1887, Elizabeth A. Messick commenced an action in the circuit court of Montgomery county to quiet the title to her land, under the following description: Commencing at a point on the west boundary line of section 9, town 17 N., range 3 W., 40 feet distant from the center of what is known and designated as the Midland Railway track, on a line crossing said center line at an angle of 90 degrees; thence in a northeasterly direction on a line parallel with such center line to the point where such line crosses the eastern boundary line of the S. W. ¼ of section 4; thence south on said eastern boundary of the quarter section to a point 40 feet distant from the center line of the railroad track, on a line crossing the center line at an angle of 90 degrees; thence in a southwesterly direction, parallel with the center line of said railroad track to the west boundary of section 9; thence north on said west boundary to the place of beginning. The strip so described includes the strip described in the intervening petition herein. The complaint in such action averred her ownership in fee of the strip, and that the Midland Railway Company claimed some title or interest therein adverse to her, averred that such claim was groundless and cast a cloud upon her title, and judgment quieting title was prayed thereupon. The Midland Railway Company appeared and answered, setting up claim of title through the prior company and the mortgage foreclosure. The venue of the action was changed to Putnam county, and it was tried May 16, 1892, resulting in a judgment against the Midland Railway Company that the claim of such company was groundless, and that Mrs. Messick was the owner in fee of the strip in controversy, and that her title thereto be forever quieted. Such judgment stands undisturbed, but the Metropolitan Trust Company was not made a party to the suit.

(9) On October 30, 1891, pending the action to quiet title, the Midland Railway Company conveyed all its railroad property to the Chicago & Southeastern Railway Company, an Indiana corporation, and the grantee immediately mortgaged the same to the Central Trust Company and one Collett, as trustees. This mortgage is the same on which the bill for foreclosure was filed and involved in the present decree.

(10) February 1, 1893, after the judgment quieting title in her, Mrs. Messick conveyed to Wesley Grantham, by a warranty deed in which her husband joined, the strip of land in question, together, with the two quarter sections of land across which the strip extended. On March 24, 1893, she further assigned to Wesley Grantham all her rights and claims against the suc-

cessive railway companies aforementioned, on account of the construction and operation of a railway through the real estate conveyed. On March 25, 1893, Wesley Grantham filed his complaint in the circuit court of Montgomery county against the Midland Railway Company and the Chicago & Southeastern Railway Company to recover possession of the strip of land in question, averring his ownership and right to the immediate possession, and that the railway companies wrongfully kept him out of possession, and praying judgment for recovery. The Chicago & Southeastern Railroad Company answered with substantially the same averments set up by the Midland Railway Company in the suit for quieting title. The venue of this suit was changed to the circuit court of Putnam county, and on December 10, 1894, judgment was entered therein in favor of Wesley Grantham that he was the owner in fee and entitled to recover possession of the strip mentioned, and such judgment stands undisturbed. Neither the Metropolitan Trust Company nor the Central Trust Company was made party to this suit, nor was either of these trustee companies in possession or claiming possession of the strip, nor entitled to such possession under the terms of the mortgages respectively.

(11) On December 10, 1894, a writ of possession issued upon the last-mentioned judgment, and on January 24, 1896, the Central Trust Company filed in the trial court its bill for an injunction against the execution of the writ of possession, averring various facts on which the railway companies had theretofore relied by way of defense to the actions referred to. On this bill a temporary restraining order was granted, but the bill was subsequently dismissed for want of jurisdiction. Pending appeal the restraining order was continued in force, but the dismissal was finally affirmed.

(12) On March 12, 1898, the Central Trust Company filed another bill in the trial court, averring substantially the same facts stated in the former bill, together with additional facts to establish jurisdiction. A temporary injunction was granted pending the hearing, but the bill was dismissed upon final hearing. On January 18, 1901, the Central Trust Company filed a further bill, setting up the purpose of the defendants, Wesley Grantham and James F. Grantham, to sever the connection of the railroad track at the point where it enters upon the strip of ground in question, in violation of the complainant's title to the property and in violation of the railway company's right to exercise its franchise, and praying that the complainant's title be quieted and protected and for injunctional relief. A restraining order was granted against interference by the defendants, demurrers to the bill were filed, and such cause is still pending and the injunctional order in force.

(13) On January 1, 1901, a writ of possession was issued in the ejectment suit before mentioned, which was duly served by the sheriff, and Wesley Grantham was put into possession of the strip in controversy.

(14) After obtaining possession under said writ, Wesley Grantham placed his fences across the strip and inclosed it with his other land, and exclusive possession thereof was maintained up to January 19, 1901.

(15) On October 2, 1896, Wesley Grantham conveyed by warranty deed to James F. Grantham, the intervener, all that portion of the strip lying on the south side of a line extending east and west through the S. W. ¼ of section 4 and 72 rods north of the south line of said S. W. ¼, together with all that portion of the farm abutting on either side of the strip. Said Wesley Grantham, however, retained ownership of that portion of the strip and farm lying on the north side of the line so described. Immediately after the sheriff had made execution of said writ of possession, Wesley Grantham delivered to James F. Grantham possession of the portion of the strip described in such conveyance.

(16) On January 18, 1901, the Central Trust Company filed another bill in the trial court against Wesley and James F. Grantham and others for an injunction against interfering with the railway property, which was particularly directed against the execution of the writ of possession before mentioned, without, however, mentioning the fact of the judgment upon which such writ was founded. It averred, in effect, that the defendants with armed force had unlawfully seized the strip and severed the track and were preventing the running of trains and carrying of mails. A restraining order

was granted upon this bill, which remains in force. Prior to the filing of such bill and on January 9, 1901, the Metropolitan Trust Company filed its complaint in the circuit court of Montgomery county, Ind., to enjoin Wesley Grantham from using force to maintain his possession of the strip of land. On January 14, 1901, Wesley Grantham filed a cross-complaint seeking to quiet title, and the action is still pending.

(17) On January 19, 1901, while the intervener was in possession of the portion of the strip described in his petition, the Chicago & Southeastern Railway Company entered upon such strip, replaced the portions of its track which had been removed under the writ of possession, and resumed operation of its railroad and has continuously operated the railroad over such strip, claiming the same as right of way.

(18) The deed from Wesley to James F. Grantham conveyed 94 acres, and Wesley retained the ownership of 88 acres. The 94 acres so conveyed to the intervener were damaged by the occupation for railway purposes to the amount of $1,410, without considering the effect of the judgment of the circuit court of Clinton county hereinafter mentioned.

(19 and 20) On July 26, 1901, the intervener, James F. Grantham, was the owner in fee and in possession of the tract of land through which the railroad right of way extended, as hereinafter referred to, and on that day filed his application in the circuit court of Montgomery county for a writ for the assessment of damages against the Chicago & Southeastern Railway Company on account of its taking and appropriating a portion of said land for railroad right of way; such application being made in conformity with the statutes of Indiana in that behalf. The application averred that the Central Trust Company of New York and the Metropolitan Trust Company and Theodore P. Davis, trustees, claimed some interests in the premises adverse to the complainant, and that their respective claims were unfounded and without right, and that they were made parties to the proceeding to answer as to their claims and interests in the premises.

(21) Upon such application a writ was issued by the clerk of the court to the sheriff, pursuant to statute, for the assessment of damages by a sheriff's jury.

(22) The sheriff gave written notice to the applicant and the Chicago & Southeastern Railway Company that the damages would be assessed by a jury upon the premises on September 24, 1904. At the same time the applicant filed with the clerk and sheriff an affidavit, averring that the Central Trust Company and the Metropolitan Trust Company were nonresidents of the state and had no agent or attorney therein upon whom process could be served, and the sheriff and clerk caused notice of the pendency of the proceedings and of the time and place of assessment to be published pursuant to statute.

(23) The sheriff impaneled a jury in conformity with the statute, and such jury assessed damages in favor of the applicant, and the sheriff filed with the clerk of the court his return, setting forth the proceedings upon said writ.

(24) Upon such return, the Chicago & Southeastern Railway Company, the Central Trust Company, and the Metropolitan Trust Company filed with the clerk their several exceptions to the award by the sheriff's jury, and thereupon, on March 8, 1902, the venue was changed to the circuit court of Clinton county, on motion of the railway company.

(25) Upon such removal the railway company filed additional pleadings, setting up its claim to the land in controversy, and issues were formed upon the application, exceptions, and pleadings, and on July 2, 1902, the issues were tried before the court and a jury, resulting in a verdict against all of the defendants upon such issues and assessing damages against the railway company at $1,070 with costs. Judgment was entered, accordingly, for recovery of such amount against the railway company, and such judgment remains in force. The master finds the amount of such judgment $1,283.83, to be the amount of damages resulting to the intervener, instead of the amount stated in the eighteenth finding. The railway company appealed from such judgment, and the appeal was pending when the findings were filed.

(26) On November 28, 1902, the Central Trust Company filed a bill of com-

plaint in the trial court against the Chicago & Southeastern Railway Company for the foreclosure of the mortgage executed by that company October 30, 1891, and the Metropolitan Trust Company entered its appearance and filed a cross-bill, praying foreclosure of the mortgage executed to it and Davis, as trustees, January 1, 1887.

(27) The decree of foreclosure was entered under such bill and cross-bill, December 22, 1902, and sale of the railway property was thereby directed to satisfy the debt due upon the foot of the mortgage to the Central Trust Company and the mortgage to the Metropolitan Trust Company, so far as the same would go, and pay off such other claims and liens against the Chicago & Southeastern Railway Company as should be decreed by the court to be prior in equity to the lien of the mortgages, and six months' time was given for the filing of claims against the company.

(28) The railway property was sold pursuant to the decree, and the purchaser assigned his purchase to the Central Indiana Railway Company. Both sale and assignment were reported to and approved by the court, and proper instruments of conveyance and assignment were executed by an officer of the court to the Central Indiana Railway Company.

(29) The Central Indiana Railroad Company is a corporation, duly organized for the purpose, and entered into possession of the property described, including the strip mentioned in the intervening petition, deriving such possession from the receiver of the court, pursuant to the decree and sale. Such receiver entered into possession on his appointment, and his possession and use was continuous up to the time of such delivery to the purchaser.

(30) From the records in the foreclosure action, it appears that the full amount of the principal and interest secured by the mortgage to the Metropolitan Company and Davis, as trustees, has been paid out of the proceeds of the sale, and that the amount realized is insufficient to pay in full the principal and interest of the debt secured by the Central Trust Company mortgage.

(31) The intervener, prior to October 2, 1896, the date of the conveyance to him from Wesley Grantham, had knowledge that railroad tracks were located on the strip of land constituting a part of the 94 acres so conveyed to him, and had such knowledge when he accepted the deed. After the intervener commenced the proceedings for assessment of damages, and during the pendency thereof, the intervener entered into a verbal agreement with his grantor to accept an amount to reimburse him for the portion of land occupied by the railway company. On September 24, 1901, this amount was fixed between them at $300, and a note was accepted for that amount, but the intervener agreed to continue the proceedings for the assessment of damages, provided his grantor would pay the expenses, and have the benefits of any recovery. On October 10, 1901, Wesley Grantham appeared in the Montgomery circuit court and filed a disclaimer of all interests in such proceedings. Subsequently, and after the rendition of judgment therein, Wesley Grantham died intestate, leaving the intervener as one of his heirs at law. The judgment referred to was never assigned by the intervener to his grantor, nor to the administrator of the estate, but stands of record in the name of the intervener.

The master's conclusions of law are, in substance, that the claim of the intervener, amounting to $1,283.83, is held by him for the use of the estate of Wesley Grantham, deceased, and is prosecuted by him in the interest of such estate, subject to the right of the intervener to reimburse himself for all costs and expenses paid and incurred in such prosecution; that the claim is a valid claim; and that in law and in equity it is entitled to be paid in full out of the money in the registry of the court arising from the foreclosure sale. A decree, accordingly, is recommended.

Henry Crawford, for appellant.

F. E. Ballard, for appellee.

Before GROSSCUP, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The appellant, as the purchaser of the railroad property under the foreclosure decree, assumed liability for all claims and liens which were subsequently adjudged to be entitled to priority, under applications filed within six months after the entry. Two mortgages were involved in that decree—one made by a predecessor corporation to Metropolitan Trust Company and another, as trustees, January 1, 1887, securing bonds to the amount of $375,000, and the other made by the Chicago & Southeastern Railway Company to Central Trust Company and another, as trustees, October 30, 1891, securing bonds to the amount of $1,425,000. The bill for foreclosure was filed in the trial court by the Central Trust Company, representing the second mortgage, and a receiver was appointed over the property. Subsequently the trustees of the first mortgage intervened and filed a cross-bill to foreclose such mortgage. The decree provided accordingly for payment of the first mortgage out of the proceeds of sale and for application of the remaining purchase money upon the second mortgage, but subjected the proceeds to prior payment of all claims adjudicated at the foot of the decree to be entitled to priority. The proceeds largely exceeded the first mortgage, so that was paid in full, leaving the residue to be awarded as the decree directs. Thus no right or interest arises except such as exists in the second mortgagee—the appellant, under the final provisions of the decree referred to, standing merely as the representative of such interest in the disposition of proceeds—and any equities in favor of the prior mortgagee extend only by way of security for its bonds, and, upon their payment, do not accrue to the second mortgagee, as against intervening claims and equities. Therefore, the only question for review is whether the appellees's claim was rightly awarded priority over the second mortgage. Rights vested in the Chicago & Southeastern Railway Company, mortgagor, through its purchase of the property or otherwise, are of course involved in the inquiry, but not any independent equities which may have arisen to save the prior mortgage from impairment. The view thus stated, which we believe to be unquestionable, is studiously ignored in the argument for reversal, and, in so far as the various contentions rest on assertions of equity for the benefit of the first mortgagee, no further discussion is deemed necessary.

The complicated facts in evidence, relating to the chain of conveyances under which the appellee deraigns title, possessions of the right of way strip, and the relations and acts of predecessors in title, are the main reliance for defeating the claim. These facts, reported by the master, are well arrayed in the argument of counsel for the appellant and pressed for consideration, and are not without force to the end sought, unless the subsequent adjudications touching the subject-matter of this controversy are binding upon these parties and decisive. If the adjudications referred to are thus operative, the pre-existing facts are not reviewable, either as tending to create an estoppel against a claim for compensation, or indicating an accord and satisfaction, or defect in title to a portion of the strip in question. In passing to the consideration of the litigated matters, however.

these leading and undisputed circumstances may well be noted: The original entry upon the strip in question, for right of way purposes, was by a predecessor railway corporation (referred to in argument as the Anderson Company) in 1873, when one Messick, one of the officers of the company, owned the farm and acquiesced in the entry, without condemnation or payment. Such entry consisted of location and light grade work. In 1874, with no further use made of the entry, Messick re-entered upon and inclosed the right of way strip within his farm, and thereafter for about 13 years the strip was in his exclusive possession, under cultivation as a part of the farm. In 1875 the Anderson Company mortgaged its property under general terms, and the mortgage was subsequently foreclosed and the property sold to the Midland Railway Company in 1885; and this company made re-entry upon the strip in 1887, and proceeded with the construction of a railroad, which was, on completion, continuously operated as a line of railroad, by it and its various successors in interest or occupation. On October 30, 1891, the Midland Company transferred its property to the Chicago & Southeastern Railway Company, and the mortgage in question to the Central Trust Company and Collett, as trustees, was executed by the purchasing company on the same day. The several adjudications involved in this review arose out of litigation which ensued immediately upon the above-mentioned reoccupation of the right of way strip by the Midland Company, in 1887.

1. On November 21, 1887, Elizabeth A. Messick, as the alleged owner in possession of the farm, brought an action against that company, in the circuit court for Montgomery county, to quiet title to the strip, under the provisions of section 1070, Rev. St. 1881 of Indiana (1 Burns' Ann. St. 1894, § 1082). The Midland Company answered (1) in a general denial, and (2) averring ownership through the Anderson Company, under facts stated. On change of venue to Putnam county the issues were tried May 16, 1892, and resulted in a judgment in favor of the plaintiff, that the "claim of said Railway Co. was groundless," and the plaintiff "was the owner in fee of said strip of land," and "that her title thereto be forever quieted." The appellee's title is derived from the plaintiff in that judgment, and the transfer from the Midland Company to the Chicago & Southeastern Railway Company, and its mortgage to the Central Trust Company and Collett, as above mentioned, were made pending such suit, October 30, 1891. The conclusive effect of such judgment, as between the parties, is settled by the recent opinion of the Supreme Court of Indiana, in the case (referred to later on another point) involving the same claims of title, reported as Chicago & Southeastern Railway v. Charles W. Grantham, Administrator, etc., 75 N. E. 265. As there stated:

"The decree quieting the title to said land therefore adjudged that the whole interest was absolutely in Elizabeth A. Messick, and that the claim of the Midland Railway Company was groundless. Such a decree cuts off every claim, whatever its form or character, or any easement or other interest in the land."

And the Indiana cases supporting such view are cited. Without reference to the force of this ruling upon the present controversy, we adopt its interpretation of the issues thus set at rest, as both just and applicable to this adjudication.

2. After obtaining such judgment, Mrs. Messick conveyed to Wesley Grantham the land which includes the right of way strip referred to, and such grantee, in March, 1893, sued the Chicago & Southeastern Railway, in the circuit court for Montgomery county, to recover possession of the strip. The company answered, setting up substantially the same defenses interposed by the Midland company in the first mentioned action; and, upon change of venue to Putnam county, in December, 1894, the plaintiff obtained judgment of ownership and for recovery of possession of the right of way strip. A writ of possession was issued and executed by the sheriff, so that Wesley Grantham (appellee's grantor) obtained physical possession of the strip, for a period of several days. Thus the railway use was severed for the time, but soon resumed under injunction proceedings. All issues touching the title were plainly settled against the purchasing corporation by this adjudication, if not concluded by the earlier decree, and the judgment is not open to collateral attack (as sought in the present contest) under the authorities, state or general. Unreversed and unappealed from, it concludes the parties and privies—that the title was in the appellee's grantor and the railway company was a trespasser—and the question is not reviewable here whether either judgment or dispossession thereunder were rightful.

3. The remaining inquiry, therefore, is the nature and effect of the proceedings instituted by the appellee, July 26, 1901, for an assessment of damages against the Chicago & Southeastern Railway Company, for taking and appropriating the right of way strip in question; Wesley Grantham having conveyed to the appellee the portion of land which embraced such strip, with delivery of possession of the right of way strip during the interim of the grantor's exclusive possession under the ejectment writ. Formal compliance with the statutory provisions (1 Burns' Ann. St. Ind. 1894, Art. 30), in the application and proceedings, is unquestioned. The Central Trust Company was included as a party defendant, with the railway company and the prior mortgagee, to answer any interests or adverse claims, and issues were made up and tried in conformity with the statute (1 Burns' Ann. St. Ind. 1894, Art. 30, §§ 896, 908) upon pleadings on the part of the railway company setting up its claims to the right of way strip and various objections to the proceedings. The verdict was against all of the defendants upon the issues, with the damages assessed against the railway company. That any issue affecting the title to the strip—right to, as well as liability for, the damage—was properly adjudicated in that proceeding, not only impresses us to be the statutory purpose, but is established by the recent opinion of the Supreme Court infra, upon appeal from like proceedings and judgment.

With the occupancy of the right of way strip by the railway company thus adjudicated as wrongful, and the right to recover damages

established in the appellee at the amount assessed, we are of opinion that the answers to his intervening petition for its allowance out of the fund in court raised no issuable matter, and the decree justly awards such payment. The Central Trust Company is equally subjected to the adjudications, and neither it nor the appellant is entitled to reopen any of the issues so settled. An objection is raised against the appellee's right to recover, under the finding of an agreement with his grantor respecting these damages, which is assumed to create a beneficial ownership in the grantor and leave the petitioner no substantial interest. This objection, if tenable in this forum in any view of the facts, is within force under the last-mentioned adjudication.

The report of the master, in reference to the adjudication of the Clinton county circuit court on the assessment of damages (No. 25), states that an appeal therefrom was taken to the Appellate Court and is pending. Since the hearing below an opinion has been handed down in the Supreme Court of Indiana, on transfer from the Appellate Court, in the above-mentioned cognate case of Chicago Southeastern Railway Co. et al. v. Charles W. Grantham, Administrator, etc., 75 N. E. 265, which affirms the judgment of the Clinton circuit court on appeal in that case. While the decision is not in the case involved in this review, nor could it be treated as within the present record were it identical, nevertheless, the published opinion is well entitled to the highest consideration, here as elsewhere, as an expression of the law of that forum upon facts substantially identical. For interpretation of the statute in question and the proceedings thereunder, including applicability to the same state of facts, that opinion is both satisfactory and controlling. The rule which it upholds in reference to these prior adjudications confirms the view expressed in the foregoing opinion, while both conclusions are well fortified by the doctrine stated in Southern Pacific R. R. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355, and authorities cited and reviewed.

The decree of the Circuit Court accords with such conclusions, and it is affirmed.

CENTRAL INDIANA RY. CO. v. GRANTHAM.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,172.

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

Henry Crawford, for appellant.

F. E. Ballard, for appellee.

Before GROSSCUP, SEAMAN, and KOHLSAAT Circuit Judges.

PER CURIAM. This appeal involves substantially identical questions with Central Indiana Railway Co. v. James F. Grantham (de-

cided herewith) 143 Fed. 43, differing only in the location and present ownership of the right of way strip in controversy.

The motion to dismiss the appeal is overruled, and the decree of the Circuit Court is affirmed, in conformity with the opinion in the case referred to.

BANK OF AMERICA et al. v. WAGGONER et al.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1906.)

No. 1,455.

1. CHATTEL MORTGAGES—FORECLOSURE—PRIORITY OF LIEN—EVIDENCE.
In an action to foreclose the lien of a chattel mortgage, which had been wrongfully used by the debtor to secure notes discounted by plaintiff and defendant banks, evidence *held* to sustain a finding that the claim of plaintiff bank to a lien fixed by the mortgage was prior in time, and therefore superior in right to that of defendant bank.

2. SAME—DESCRIPTION—CATTLE.
A chattel mortgage on certain cattle described them as 50 head of registered Hereford cows and heifers, four head of registered Hereford bulls, all located on the mortgagor's farm, about 15 miles from V. in W. county, Tex. A sheriff's return on a writ of sequestration in the proceedings to foreclose the mortgage alleged that the sheriff had taken into his possession the property described, pointed out by the mortgagor as the property described in the mortgage, to wit, 35 head of Hereford cows and heifers, 1 two-year old bull, and 18 head of calves, and a bill of sale taken by defendants described the cattle as 65 head registered Hereford cattle, consisting of cows, calves, heifers, and bulls of all ages, located in the seller's pasture at his home at Doans and Vernon, in W. county, Tex. *Held*, that the mortgage was not void for want of a sufficient description of the cattle.

[Ed. Note.— For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 90.]

3. SAME—REGISTRATION—ACTS OF CLERK.
Where a chattel mortgage securing a negotiable note was duly filed in the office of the clerk as required by Sayles' Civ. St. 1888–89 Tex. art. 3190b, § 2, the rights of an assignee of the note and mortgage could not be affected either by any subsequent act of the mortgagor or mortgagee or by the clerk's failure to make the proper entries in his records or to keep the paper in its proper place.

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

J. H. Barwise, Jr., A. L. Matlock, Geo. E. Miller, and F. E. Dycus, for appellants.

W. O. Davis and Sam J. Hunter, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The National Bank of Commerce brought suit in the state court against J. W. Coffee on a promissory note dated the 5th day of April, 1900, and payable the 5th day of November, 1900, in the sum of $7,500, and on a chattel mortgage given on certain live stock, embracing cattle and horses, to secure

the same, sued out a writ of sequestration, and caused the property to be taken into the custody of the sheriff. The defendant did not replevy, and the court ordered the property sold. Before the sale was made the appellees made affidavit and bond as claimants of the cattle, which were surrendered to them. The proceeds of the sale of the property were deposited in the court. On application of the defendant, the Bank of America of New York was made a party, and on its petition the case was removed into the Circuit Court. Whereupon the pleadings were recast to meet the equity practice, and R. C. Neal, W. T. Waggoner, and Robert Houssels were made parties, and such proceedings were had that the suit came to final hearing, when the court passed its decree giving judgment in favor of the appellants, respectively, against R. C. Neal and J. W. Coffee, for the amounts of the notes held by them, and decreed in favor of the National Bank of Commerce a foreclosure of the chattel mortgage as to all the personal property described in the mortgage, except that which had been released to Waggoner and Houssels on their claimants' affidavit and bond. As to these claimants, the court found that they were innocent purchasers for value without notice of the lien of the chattel mortgage, and decreed in their favor accordingly, in terms not requiring further specification to understand the question which we pass upon on this appeal. The National Bank of Commerce and the Bank of America each separately appealed, and each have submitted assignments of error, the substance of which are that the court erred in adjudging that the appellees were innocent purchasers of the cattle for value without notice of the lien of the chattel mortgage. The Bank of America submits a further assignment, that the court erred in holding that the National Bank of Commerce had a prior and superior right to the proceeds of the property that had been sold.

The proof shows that for a number of years before April 5, 1900, R. C. Neal had been engaged in business at Vernon, in Wilbarger county, Tex., as president and active manager of the Merchants' & Cattlemen's Bank, and as a dealer in Hereford, or "white-faced," cattle. He had also a pasture on Red river, 10 or 15 miles north of Vernon, in Wilbarger county, in which he had cattle and other stock in charge of J. W. Coffee. Before April 5, 1900, the Merchants' & Cattlemen's Bank was reorganized and became the Waggoner National Bank, having a capital stock of $50,000, of which W. T. Waggoner held $10,000, Robert Houssels $3,000, and R. C. Neal over $30,000. Houssels resided in Vernon and was engaged in other business there during all the time of Neal's residence and operations there. Waggoner resided at Decatur, in Wise county, but the extent and nature of his business was such that he was from time to time at Vernon and well acquainted with Neal and with Neal's business activities. In 1900 Neal's pasture embraced a section and a half of land, 960 acres, and immediately adjoining it J. W. Coffee owned a farm on which he resided, having some stock of his own, and extended his care over Neal's pasture and the stock therein. While conditions were thus, Coffee, at the request of Neal, made and delivered to Neal the promis-

sory note and the chattel mortgage on which the Bank of Commerce herein sues. His execution of the mortgage was acknowledged by Coffee before the proper officer, and on April 11, 1900, it was placed in the hands of the clerk of the county court of Wilbarger county and an authenticated copy thereof was then placed on file and kept there by the clerk. On April 24th Neal applied in person to the National Bank of Commerce at Kansas City, Mo., for a loan of $10,000, and offered as collateral certain shares of stock in the Waggoner National Bank of the face value of $4,000, which he represented were worth more than par, and the note of J. W. Coffee (on which this suit was brought), "which he said was perfectly good, and was well secured by chattel mortgage on cattle." Relying on these representations, the bank accepted the collateral tendered and made the loan. In July, 1899, at the request of R. C. Neal, the Bank of America discounted for him a note of J. W. Coffee dated November 3, 1898, for $15,900, due May 3, 1900. It was dated Vernon, Tex., and made payable to the Merchants' & Cattlemen's Bank, and was indorsed by that bank and by R. C. Neal. As collateral security for the payment of this note, Neal gave the bank, at the time the transaction was completed, a mortgage made by the maker of the note, and bearing the same date, in favor of the same payee and covering certain cattle and horses therein described. The proceeds of the discount were sent to R. C. Neal. On April 16, 1900, the bank received from Neal the following letter:

"Vernon, Texas, April 11th, 1900.

"Wm. H. Perkins, Esq., Pt. Bank of America, N. Y.—Dear Sir: My discount of $15,900 will be due in the early part of May, and I want to pay $8,400 and have you carry $7,500 for another six months. The note and mortgage I inclose for your approval. I will also pay the interest on the $7,500.00 from the time the note matures until due. I will say that the cattle in the mortgage are easily worth $10,000.00, to say nothing of the horses. Please let me hear from you, and I trust you will be able to favor me. If this is satisfactory, say how much I shall send you to square the interest and the balance of the $15,000.00. I figure it will be $8,625.00, if note matures May 5th. Thanking you in advance for the favor, I am,

"Yours truly, R. C. Neal."

To which the bank replied:

New York, April 16th, 1900.

"R. C. Neal, Esq., Vernon, Texas—Dear Sir: We are in receipt of your favor of the 11th instant, with note of J. W. Coffee $7,500 and accompanying collateral, chattel mortgage, J. W. Coffee to yourself. We will, as requested, discount this note on May 6th in part renewal of note $15.900 due at that time. The discount on the $7,500 note from May 6th to maturity, November 8th, 186 days, at six per cent. per annum, will amount to $232.50. Please send us in addition $1.50 to cover the required revenue stamps which you have not affixed to the note.

"Yours respectfully, W. H. Perkins, President."

Thereafter Neal wrote as follows:

"Vernon, Texas, May 3rd, 1900.

"W. H. Perkins, Esq., President, The Bank of America, New York City—Dear Sir: I herewith hand you draft on the National City Bank of New York City for $8,634.00, covering your favor of April 16th.

"Yours very truly, R. C. Neal.

"Enclosure."

To which the bank replied:

"New York, 7th May, 1900.

"R. C. Neal, Esq., Vernon, Texas—Dear Sir: We are to-day discounting note J. W. Coffee $7,500.00, and applying proceeds on note $15,900.00, due this day, which find enclosed, stamped paid. The balance of said note was paid by check $8634.00, received in letter May 3rd, signed by you as president, which we presume was a mistake. Please confirm our action with reference to check $8634.00.

"Yours respectfully, W. M. Bennett, Cashier, by W. B. Husted."

To which Neal replied:

"Vernon, Texas, May 11th, 1900.

"The Bank of America, New York—Gentlemen: Your favor of the 7th to hand. I hereby confirm your action with regard to check $8634. The latter should have been signed straight R. C. Neal and check of 8634 applied as per your letter.

"Yours very truly, R. C. Neal."

The evidence shows that the notes held, respectively, by the co-appellants and the chattel mortgage were executed by the defendant J. W. Coffee, and that the notes are identical in terms, and that the chattel mortgage sent to the Bank of America is identical in its terms with the copy on file with the clerk of the county court. To us it seems clear that as between the co-appellants, even if their equities are otherwise equal, the claim of the National Bank of Commerce to the lien fixed by the chattel mortgage is prior in time, and therefore superior in right to the claim of the Bank of America, and that the Circuit Court did not err in so holding.

We do not understand that the appellees attack either the execution of the chattel mortgage or its due registration. They do contend, first, that the animals claimed by them are not sufficiently described in the chattel mortgage to fix a lien on them against subsequent purchasers for value without actual notice of the mortgage; second, that at the time of the giving of the mortgage the mortgagor was not the owner of these cattle, but that R. C. Neal, from whom the appellees bought, was the owner, and that therefore the registration of the mortgage did not charge them with notice or put them on such inquiry as would reasonably bring notice to them. The chattel mortgage made by J. W. Coffee describes the cattle thus:

"50 head of registered Hereford cows and heifers; 4 head of registered Hereford bulls ——— all located on my farm about fifteen miles north of Vernon, in Wilbarger county, Texas."

The sheriff's return on the writ of sequestration, so far as it touches these cattle, is as follows:

"Came to hand the 2nd day of November, 1900, and executed the 3rd day of November, 1900, by taking into my possession the following described property, pointed out by J. W. Coffee as the property described within, to wit, ——— 35 head of Hereford cows and heifers and 1 two yr. old bull and eighteen head of calves."

In the bill of sale taken by the appellees we find this description:

"65 head of registered Hereford cattle, consisting of cows, calves, heifers and bulls, of all ages, located in my pasture and at my home, at Doans & Vernon, in Wilbarger county, Texas."

On the hearing it was agreed "that reference shall be made to the return of the sheriff for the number of cattle there were." Waggoner testifies that, when he made the purchase, he knew that the cattle he was buying were out on the section of land he had bought from Neal, and that Mr. J. W. Coffee was looking after them, and that about two weeks after he bought them he saw Coffee and asked him if he would hold the cattle for the appellees at the same price, and, being answered "Yes," left them "right there in Coffee's keeping." He had known that Neal had such a lot of cattle; had seen them a few months before he bought. He says that such cattle are not marketable cattle, and testifying about them he designates them by their most conspicuous flesh mark as "white-faced," or "bald-faced," cattle, as do also the witnesses Coffee and Houssels. We think the appellees' first contention is not sound.

The proof shows that from April until September 22, 1900, Neal was speculating in cotton futures and was losing. In the early part of September he approached Waggoner and mentioned lightly that he would be obliged to have some money and asked a loan, but the matter passed off at that time, and a couple of weeks later Neal again approached Waggoner and told him that he needed $25,000 more than he had, and that he could not get it from anybody else, and urged Waggoner to make him the loan. Waggoner said he did not have the money in hand, and they bandied the subject back and forth for several hours immediately preceding the departure of a local train on which Waggoner was to leave Vernon, but Waggoner refused to do anything, got on the train, and thought he was rid of Neal. Before the train left Neal saw Robert Houssels and asked him to sign a note for $25,000. Houssels said he would not do it; it was too much money. Then Neal said he had made arrangements with Waggoner and that he had to get some money, and that he was going to make a deed to his home and some land and some white-faced cattle, that he had the deed made, and that he was going down to take it to Waggoner, and under that representation Houssels signed the note; the name of the payee then being in blank. Neal got on the leaving train and followed Waggoner to Oklaunion and begged him into signing the note. The note is in words and figures as follows:

"The Waggoner National Bank of Vernon.

"$25,000.00. Vernon, Texas, Sept. 22, 1900.

"Ninety days after date, we, I or either of us promise to pay to the order of National Bank of Commerce, at the Waggoner National Bank, Vernon, Texas, the sum of twenty-five thousand & no/100 dollars, for value received, negotiable and payable without defalcation or discount, with interest at the rate of 10 per cent. per annum from maturity until paid, and if sued upon or placed in the hands of an attorney for collection, I agree to pay all cost of suit, together with 10 per cent. on principal and interest, as attorneys' fees.

"[Signed] R. C. Neal,
"W. T. Waggoner,
"Robt. Houssels."

Robert Houssels had signed at Vernon, R. C. Neal had signed before Robert Houssels, and space was left between these signatures for the signature of W. T. Waggoner. W. T. Waggoner, while being examined as a witness, was asked:

"Q. Do you remember whether you signed that note with Mr. Houssels before or after you got the bill of sale or conveyance? A. They were all handed to me at the same time, and I signed them at the depot in Wichita Falls, and I told him good-bye, and told him I never expected to see him again. Q. Mr. Houssels and Neal had already signed the note before it was presented to you at Wichita Falls? A. Yes, sir. Q. Neal presented to you the note for signature? A. Yes, sir."

Neal told Waggoner that he would get the money on the note from the National Bank of Commerce, and that he was going right straight to New York and "try to win even."

The appellees took a bill of sale of the cattle and conveyance of Neal's homestead in the town of Vernon and of 960 acres of land. Waggoner testifies that the land was worth $2.50 to $3 an acre, and in the estimate he made of the property he valued the residence homestead at not exceeding $5,000. Houssels estimates the land and residence at a value somewhat higher. Houssels made no inquiry as to the title of the property before executing the note, and neither of the appellees made an examination, or caused any to be made, of the records of the county. Two weeks after the papers had passed Waggoner went out to see Coffee and the cattle that were in his charge. He asked Coffee if he had any interest in the cattle and Coffee said that he had not, but the next day Coffee came into town and told Waggoner something about the transaction that occurred in April, and thereupon they went to the clerk's office and after some search found the chattel mortgage. There was no want of intrinsic fairness in the dealings that took place between Coffee and Neal on the 5th of April. They used their own names. The mortgaged property was in existence and was fully worth the amount of $7,500. It was located in the county where the parties resided; had been there for some time before these dealings were had. It remained there until after this litigation began. It cannot be contended, and, as we understand, it is not suggested, that, as between Neal and Coffee and the National Bank of Commerce, the ownership of the property was not, in fact, as described in the chattel mortgage. The purpose of the transaction was to convert an unbankable asset of real value into negotiable securities, in which banks largely deal, and through the aid of such transactions commercial dealings are facilitated. The law in Texas does not require that the sale of cattle shall be evidenced by writing, nor does it expressly or impliedly forbid the making of such accommodation paper as resulted from these dealings between Coffee and Neal. As we read the argument of the distinguished counsel for the appellees, the gravamen of his complaint is that one seeking to purchase the cattle afterwards and making rational and reasonable inquiry as to their ownership, and as to there being any charges on them, would be misled by the apparent possession, and by the manner in which the indexes in the county clerk's office were or should have been kept respecting the registration of the chattel mortgage. These counsel say they use the terms advisedly when insisting that the cattle were "in Neal's exclusive possession." The equally able and distinguished counsel who represent the appellants, whenever any reference to the possession of the cattle is made in their argument or brief, say that

"Coffee was in actual possession of the property." We have recited the facts bearing on that point, so that this difference between counsel becomes immaterial.

As to the misleading indexes in the clerk's office resulting from the shape given to the chattel mortgage, we observe that the Texas state law provides:

"Upon the receipt of such an instrument the clerk shall endorse on the back thereof the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested; provided that if a copy be presented to the clerk for filing, instead of the original instrument, he shall carefully compare such copy with the original, and the same shall not be filed unless it is a true copy thereof; and a copy can be filed only when the original has been acknowledged." Sayles' Civ. St. 1888–89 Tex. art. 3190b, § 2.

"The county clerk shall keep a book in which shall be entered a minute of all such instruments, which shall be ruled off into separate columns, with heads as follows: Time of reception, name of mortgagor, name of mortgagee or trustee and cestui que trust, date of instrument, amount secured, when due, property mortgaged, and remarks; and the proper entry shall be made under each of such heads. Under the head of property mortgaged it shall be sufficient to enter a general description of the property pledged and the particular place where located, and index shall be kept in the manner as required for other records." Sayles' Civ. St. 1888–89, art. 3190b, § 4

"Each recorder shall make and enter in a well-bound book an index, in alphabetical order, to all books or records wherein deeds, mortgages or other instruments of writing concerning land and tenements are recorded, distinguishing the books and pages in which every such deed or writing is recorded. * * * It shall be a cross index and shall contain the names of the several grantors and grantees in alphabetical order." Rev. St. Tex. 1895, §§ 4608, 4609.

"The law contemplates that either the original or a true copy shall remain in the clerk's office, but it does not charge the mortgagee with the duty of overseeing the clerk. * * * He [the creditor] sued out his attachment on the 5th of January following, and the evidence shows that his attorney knew of the mortgage and hunted for it on that day, but did not ask the clerk for it, which it was his duty to do, and which, if he had done, he would have learned that it was on deposit as a chattel mortgage and had not been noted in the chattel mortgage register, because of the want of time or the negligence of the clerk, but the clerk would have shown him the original, as it was his duty to do." Parker v. Panhandle National Bank (Tex. Civ. App.) 34 S. W. 198.

It appears to us that, whenever the assignee of a negotiable promissory note secured by a chattel mortgage has done all that it is possible for him to do under the law for his protection, his rights are protected, and no subsequent act of the mortgagee or the mortgagor can operate to his injury. The mortgage having been deposited with the clerk for registration, the mortgagee's rights are not affected by the failure of the clerk to make the proper entries or keep the paper in the proper place. Ames Iron Works v. Chinn (Tex. Civ. App.) 38 S. W. 249. If the indexes were kept, as it seems to be required by law that they should be kept, it is difficult to perceive how one with that measure of knowledge necessary to make him fit for the work of examining such records could have been misled by the mere fact that the mortgage was to Neal, instead of being from him. But whether the record was kept strictly in the manner provided by the statute, it appears on reason and authority to be immaterial; the material fact being only

that the mortgage was duly acknowledged and a duly authenticated copy of it was retained by the clerk. It is, however, idle to speculate about how one might or might not have been misled by the condition of these registry books. It is too clear for comment that neither of the appellees ever made or caused to be made an examination of the records before taking the bill of sale from Neal for the cattle.

Counsel for the appellants have cited First National Bank v. National Live Stock Bank (Okl.) 76 Pac. 130–135, and Alexander v. Graves (Neb.) 41 N. W. 290, 13 Am. St. Rep. 501, while the counsel for the appellees have cited the case of Mackey v. Cole, 79 Wis. 426, 48 N. W. 520, 24 Am. St. Rep. 728. We have examined these cases. They all bear somewhat on the question before us, but we prefer to put our decision on the statutory provisions of the laws of the state of Texas and the decisions of the Texas courts. Breneman v. Mayer (Tex. Civ. App.) 58 S. W. 725–733; Kennard v. Mabry, 78 Tex. 151, 14 S. W. 272.

In our opinion the Circuit Court erred in finding and adjudging that the appellees are innocent purchasers for a valuable consideration, not chargeable with notice of the lien of the chattel mortgage.

Therefore, so much of the decree as finds and adjudges in favor of the appellees is reversed, and the case is remanded to the Circuit Court for further action, agreeably to equity and the views herein expressed.

BROWN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 19, 1906.)

No. 2,206.

1. POST OFFICE—UNITED STATES MAILS—SCHEME TO DEFRAUD—STATUTE—CONSTRUCTION.

Section 5480, Rev. St., as amended March 2, 1889, 25 Stat. 873, c. 393 [U. S. Comp. St. 1901, p. 3696], makes three matters of fact essential elements of the offense prescribed: (1) The accused must have devised or intended to devise a scheme or artifice to defraud. (2) He must have intended to effect the scheme or artifice by opening correspondence or communication with some person through the mail, or by inciting some person to open communication with him through the mail. (3) In and for executing the scheme or artifice, or attempting so to do, he must have either deposited a letter or other communication in the post office for transmission and delivery, or taken or received one therefrom.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 55.]

2. SAME—EXTENT OF INTENDED USE OF THE MAILS.

The statute includes any scheme or artifice to defraud in effecting which it is designed to use the post office establishment as an instrument or channel of communication, whether that be the sole or only part of the means to be employed in effecting it.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 55.]

3. SAME—INDICTMENT—REQUISITE AVERMENTS.

An indictment which states the essential elements of this offense, not merely in the general words of the statute, but with such reasonable particularity of act, intent, time, place, and circumstances as will, in view of the presumed innocence of the accused, apprise him with reasonable certainty of the nature of the accusation, to the end that he may prepare his defense, as will enable him to plead his conviction or ac-

quittal as a bar to a subsequent prosecution for the same offense, and as will enable the court to say that the facts stated are sufficient in law to support a conviction, satisfies the rules of criminal pleading; otherwise it is insufficient.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 193; vol. 40, Cent. Dig. Post Office, § 72.]

4. INDICTMENT AND INFORMATION—ULTIMATE MATTERS OF FACT, NOT EVIDENCE, TO BE STATED.

An indictment is not required to set forth matters of evidence, but only ultimate matters of fact.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 185, 187.]

5. CRIMINAL LAW—JOINT TRIAL OF SEPARATE INDICTMENTS.

Separate indictments against the same defendant may, in the discretion of the court and independently of any statute upon the subject, be tried together to avoid unnecessary delay and expense, in the interest of both the government and the accused, when the latter is not thereby confounded in his defense or otherwise prejudiced.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1376.]

6. SAME—SECTION 5480, REV. ST., CONSTRUED.

The provision of section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696], which limits the offenses which may be charged in a single indictment to the number of three and to such as may have been committed within the same six calendar months, does not prohibit a joint trial, as a matter of expedition and economy, of separate indictments charging in the aggregate more than three offenses covering a period of more than six months, where the defendant is accorded all the rights to which he would be entitled if the indictments were tried separately.

(Syllabus by the Court.)

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

Edward P. Sanborn (Emmet H. Gamble and Clyde Taylor, on the brief), for plaintiffs in error.

A. S. Van Valkenburgh, U. S. Atty.

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

VAN DEVANTER, Circuit Judge. Albert H. Brown, Joseph Ricker, Charles L. Ricker, and Thomas Evans, otherwise called William Marvin, were jointly charged in three indictments with having deposited certain letters in the mail in the execution of a scheme or artifice to defraud. Each indictment originally contained three counts, each charging the mailing of a separate letter. Two counts, one in the first indictment and one in the second, were eliminated by a nolle prosequi, and may be desregarded. The second and third indictments related to the same scheme or artifice, and the first related to a scheme or artifice which differed from that described in the other two only in respect of some of its minor details. Both were alleged to have been designed to accomplish the same result and to have been devised on the same day. Each indictment was confined to charging offenses committed within the same six calendar months, but the three indictments, taken together, charged offenses covering a period of more

than six months. Over the objections of the defendants, the three indictments were tried together. A separate verdict of guilty was returned on each of the seven counts and a single and separate sentence was given for the offenses charged in each indictment. The sufficiency of the indictments was questioned by demurrers addressed to each count, and by motions in arrest of judgment, which were overruled. No part of the evidence, or of the charge to the jury, and none of the rulings in the course of the trial have been preserved, and the only questions now sought to be presented are: Do the indictments sufficiently charge violations of the statute, and were they improperly tried together?

Section 5480 of the Revised Statutes, as amended March 2, 1889, c. 393, 25 Stat. 873 [U. S. Comp. St. 1901, p. 3696], so far as it is here material reads as follows:

"If any person, having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person, * * * by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet or advertisement in any post office, branch post office, or street or hotel letter-box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable * * *. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device."

Three matters of fact are thus made essential elements of the offense: (1) The person charged must have devised or intended to devise a scheme or artifice to defraud. (2) He must have intended to effect the scheme or artifice by opening correspondence or communication with some person through the mail, or by inciting some person to open communication with him through the mail. (3) In and for executing the scheme or artifice, or attempting so to do, he must have either deposited a letter or other communication in the post office for transmission and delivery, or taken or received one therefrom. If an indictment states these matters of fact, not merely in the general words of the statute, but with such reasonable particularity of act, intent, time, place, and circumstances as will, in view of the presumed innocence of the accused, apprise him, with reasonable certainty, of the nature of the accusation, to the end that he may prepare his defense, as will enable him to plead his conviction or acquittal as a bar to any subsequent prosecution for the same offense, and as will enable the court to say that the facts stated are sufficient in law to support a conviction, it satisfies the rules of criminal pleading; otherwise it is insufficient. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; Miller v. United States, 66 C. C. A. 399, 133 Fed. 337. But it is to be borne in mind

that what is required is reasonable, not absolute or impracticable, particularity of statement; else the rules of criminal pleading will be deflected from their true purpose, which is to secure the conviction of the guilty, as well as to shield the innocent. Evans v. United States, 153 U. S. 584, 590, 14 Sup. Ct. 934, 38 L. Ed. 830; Cochran v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704; Durland v. United States, 161 U. S. 306, 314, 315, 16 Sup. Ct. 508, 40 L. Ed. 709. It is also to be borne in mind that a defect in matter of substance is fatal, while a defect in matter of form only—and this includes the manner of stating a fact—which does not tend to the prejudice of the accused, is immaterial. Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720]; Dunbar v. United States, 156 U. S. 185, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Rosen v. United States, 161 U. S. 29, 32, 16 Sup. Ct. 434, 40 L. Ed. 606; United States v. Clark (C. C.) 37 Fed. 106; United States v. Rhodes (C. C.) 30 Fed. 431, 434.

With these observations, we proceed to consider the sufficiency of the indictments. They are long, not entirely grammatical and seem to have been hastily prepared, but when each count is considered in its entirety, its allegations and meaning are made clear to the common understanding. Briefly stated, the charge is that the defendants "had devised a scheme and artifice to defraud divers and sundry persons, to wit, the public generally, to be effected by opening and intending to open correspondence and communication with such persons by means of the post office establishment of the United States, and by inciting such person to open communication with them * * * by means of the said post office establishment;" that the substance of the scheme and artifice was this: One of the defendants was to insert in divers and sundry newspapers advertisements notifying country merchants and the public generally that he had for trade at Kansas City, Mo., a desirable country stock of general merchandise "and inviting correspondence" with a view to bringing about a trade of the same; that "upon receiving inquiries" from such persons "as might read the advertisements" he "was to enter into correspondence" with them "by means of the post office establishment of the United States" to induce them to come to Kansas City for the purpose of trading for the stock of merchandise so advertised; that, by means of certain described false and fraudulent representations on the part of the defendants, the persons so induced to enter into these negotiations were then to be induced to trade for the stock of merchandise, and to pay to the defendants a large sum of money in part payment therefor, in the belief, induced by such false and fraudulent representations, that the character and value of the stock of merchandise, which was the subject of the negotiations and trade, were as they were represented to be by the defendants, when in truth the defendants intended to deliver to such persons, as the property for which they had traded, a stock of merchandise the character and value of which were different from and much inferior to what they were represented to be by the defendants, and that the defendants "in and for executing" such scheme and artifice "and attempting so to do," placed in the post office of the United States at Kansas City, Mo., to be sent

and delivered by the post office establishment, a certain letter, the address upon which and the contents of which were fully set forth.

With respect to the first element of the offense, that of having devised a scheme or artifice to defraud, we deem it sufficient to say we have experienced no difficulty in arriving at the conclusion that it is adequately stated.

With respect to the second element, that of the intent to effect the scheme or artifice by use of the mail, it is objected that it is stated only indirectly, and that the statement is defective in substance because the statute uses the word "effected" in the sense of "consummated" or "carried to completion" and therefore does not include schemes or artifices in which it is designed to use the mail only as a channel of communication in inducing the intended victim to come to the place where he is to be defrauded. Neither objection can be sustained. As has been shown, the indictments first charge, in the language of the statute, that the defendants had devised a scheme and artifice to defraud, "to be effected" by use of the mail, and then, in describing the scheme or artifice, further charge that, as part thereof, one of the defendants, after advertising the purpose to trade the stock of merchandise and eliciting inquiries respecting the same, "was to enter into correspondence * * * by means of the post office establishment" with those making such inquiries for the purpose of inducing them to come to Kansas City, to the end that they might be there defrauded. This constitutes a sufficiently direct statement of the intent to use the mail as an instrument in effecting the scheme or artifice. Stokes v. United States, 157 U. S. 187, 190, 15 Sup. Ct. 617, 39 L. Ed. 667; Miller v. United States, 66 C. C. A. 399, 407, 133 Fed. 337, 345; Ewing v. United States (C. C. A.) 136 Fed. 53. While the word "effected" ordinarily has the meaning of "consummated" or "carried to completion," the statute does not say, "to be effected solely by means of the mail" or "to be effected by communication carried on solely by means of the mail," but, "to be effected by either opening or intending to open correspondence or communication with any person * * * by means of the post office establishment of the United States, or by inciting such other person or any person to open communication." As it is impossible to conceive of a scheme or artifice which can be consummated or carried to completion by merely "opening" correspondence by means of the mail, or by "inciting" another to do so, the necessary purport of this language is that the second element of the offense consists in the intent to use the mail as a channel of communication in effecting the scheme or artifice; that is, as a means, although not the sole means, of effecting it. That this is so is also indicated by the further provision that the punishment shall be proportioned "to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device." And in addition to the significance of the language of the statute, some regard may be properly had for the fact that the schemes or artifices to defraud which are consummated or carried to completion solely by correspondence through the mail are altogether exceptional, while

those in which use of the mail as a channel of communication is only part of the means employed in effecting them are of more frequent occurrence. Both involve use of the mail in the execution of a purpose to defraud, which is the evil sought to be remedied. Of course a penal statute is not to be enlarged by implication or extended to cases not plainly within its words and purport, but it is to be sensibly construed and given such reasonable operation, within its words and purport, as will render it of value in suppressing the evil at which it is directed. United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080; Johnson v. Southern Pacific Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363. These considerations enforce the conclusion that the statute includes any scheme or artifice to defraud in effecting which it is designed to use the post office establishment as a channel of communication, whether that be the sole or only part of the means to be employed in effecting it. In Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; and Miller v. United States, 66 C. C. A. 399, 133 Fed. 337, the statute was so applied without any discussion of the question; and in Weeber v. United States (C. C.) 62 Fed. 740, it was held that criminality under the statute is not "avoided by the fact that the act of using the mail is only one step in a series of acts intended to accomplish the fraudulent scheme."

With respect to the third element of the offense, it is objected that there is a failure to state the requisite facts to sustain the charge that the letter placed in the post office was placed there in executing or attempting to execute the particular scheme or artifice described, and also that the charge is only indirectly made. Because it is alleged that one of the defendants was to insert in divers and sundry newspapers advertisements giving notice of the purpose to trade a stock of merchandise and inviting correspondence in that connection, and, "upon receiving inquiries" from such persons "as might read the advertisements," was to enter into correspondence with them to induce them to come to Kansas City for the purpose of making a trade, it is argued that the scheme or artifice was limited to persons who should read the advertisements and make inquiries, and that to make the charge respecting the mailing of the letter complete it should be stated that the contemplated advertisements were inserted in the newspapers and that the letter was addressed to one who had read the advertisements and had made inquiry about the proposed trade. The argument is too technical and disregards the rule that an indictment is not required to set forth matters of evidence, but only ultimate matters of fact. As before shown, the charge is, not merely that the letter was placed in the post office for transmission and delivery, but that this was done "in and for executing" the scheme and artifice described "and attempting so to do." This is a statement of the ultimate fact in terms which are sufficiently direct.

The demurrers to the indictments and the motions in arrest of judgment were properly overruled.

Was there error in trying the three indictments together over the

defendants' objections? The contention that there was rests primarily on the concluding portion of the statute before cited, which declares:

"The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device."

This by necessary implication limits the offenses which may be joined in one indictment to three in number, and to such as may have been committed within the same six calendar months. The indictments severally conformed to this limitation, but in the aggregate charged seven offenses covering a period of more than six months, so the question arises whether the order under which they were tried together in effect merged and blended them into a single indictment and thus violated the statute. We think not, although it must be conceded that the question is not free from difficulty. The defendants take the position that the indictments were consolidated within the meaning of section 1024 of the Revised Statutes [U. S. Comp. St. 1901, p. 720], and confidently rely upon the cases of Ex parte Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174; McElroy v. United States, 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355, Bass v. United States, 20 App. D. C. 239, Turner v. United States, 13 C. C. A. 436, 441, 66 Fed. 280, 285, and Porter v. United States, 33 C. C. A. 652, 654, 91 Fed. 494, as establishing that the consolidation put all the counts in the three indictments "in the same category as if they were separate counts of one indictment," while the government takes the position that the indictments were not consolidated but were merely tried together as a matter of expedition and economy, and with equal confidence relies upon the cases of In re De Bara, 179 U. S. 316, 320, 21 Sup. Ct. 110, 45 L. Ed. 207; In re Haynes (C. C.) 30 Fed. 767, 769, 771; Howard v. United States, 21 C. C. A. 586, 596, 75 Fed. 986, 996, 34 L. R. A. 509; Betts v. United States, 65 C. C. A. 452, 458, 132 Fed. 228, 234; Hanley v. United States, 59 C. C. A. 153, 123 Fed. 849, Id., 62 C. C. A. 561, 127 Fed. 929, Id., 194 U. S. 634, 24 Sup. Ct. 858, 48 L. Ed. 1160; and Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706, as establishing that the "cases did not thereby lose their identity or consequences." It will not be necessary to enter into a statement of what has been decided in these cases respecting the effect of a consolidation under section 1024, because the record in the present case does not show that the indictments were intended to be or were in truth consolidated within the meaning of that section, but rather that they were merely tried together as separate indictments to avoid unnecessary delay and expense, in the interest of both the government and the defendants. It does not appear and is not claimed that the defendants were deprived of any right by way of challenge or otherwise to which they would have been entitled if the indictments had been tried separately. The court was invested with a discretion to direct that the indictments be thus tried together inde-

pendently of any statute upon the subject (Logan v. United States, 144 U. S. 263, 306, 12 Sup. Ct. 617, 36 L. Ed. 429), and this discretion was not affected by the limitation in section 5480 because it has reference to the joinder of offenses in such manner as will upon the trial restrict the rights of the defendant to what they would be if he were being tried for a single offense, and not to a joint trial of separate indictments in which the defendant is accorded all the rights to which he would be entitled if the indictments were tried separately. Of course the authority to direct that separate indictments be tried together should be exercised with caution lest the defendant be confounded in his defense or otherwise prejudiced thereby, and if at any time in the course of such a trial it is discovered that it tends to prejudice any substantial right of the defendant the court should compel the prosecutor to elect upon which indictment he will proceed. Pointer v. United States, 151 U. S. 396, 403, 14 Sup. Ct. 410, 38 L. Ed. 208. But there is nothing to indicate that the defendants were confounded in their defense or otherwise prejudiced in this instance. The indictments indicated that the schemes to defraud were devised on the same day, that they were almost identical, that the work of carrying them into effect was begun shortly after they were devised and that the letters set forth were all mailed at the same post office within 14 months thereafter. The offenses appeared to be so closely connected in respect to inception, time, place and subject as to justify the belief that proof of those charged in one indictment would almost necessarily bear upon those charged in the others. No part of the evidence has been preserved and the presumption is that the situation disclosed by it was not different from that indicated on the face of the indictments. In these circumstances it cannot be said that there was any error or abuse of discretion in trying the indictments together.

The judgments are affirmed.

MAYOR, ETC., OF CITY OF MERIDIAN v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1906.)

No. 1,470.

1. WATERS—SUPPLY TO CITY—CONTRACT—CONSTRUCTION.
   A contract between a city and a water company granting the company a franchise for and obligating it to construct a waterworks system and to maintain the same for a term of years, and by which the city agreed to take and pay for water during such term, in the absence of an express provision that the city shall not construct or operate a water system of its own during the term, cannot be construed to place such a limitation on the powers of the city by implication.

2. CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT DUE PROCESS OF LAW—COMPETITION OF CITY WITH WATER COMPANY.
   The construction and operation of a waterworks plant by a city in competition with a water company, which constructed its works under a franchise granted by the city, does not amount to a taking of the company's property without due process of law, within the meaning of the federal Constitution, nor to a taking of its property without just compensation, within the meaning of the Constitution of Mississippi.

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

For opinion below, see 139 Fed. 673.

W. N. Ethridge, S. A. Witherspoon, and W. E. Baskin (Ethridge & McBeath and Miller & Baskin, on the brief), for appellants.

Frank Spurlock and Foster V. Brown, for appellee.

Before PARDEE, McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The bill in this case is intended to be so framed as to show the jurisdiction of the Circuit Court by reason of the diverse citizenship of the parties, and also by reason of the presentation of a federal question. The suit was brought by the Farmers' Loan & Trust Company, a corporation under the laws of New York, against the mayor and boards of councilmen and aldermen of the city of Meridian, a municipal corporation of Mississippi, the several members of the boards, who are all citizens of Mississippi, the Meridian Waterworks Company, a corporation under the laws of Mississippi, and William S. Kuhn, a citizen of Pennsylvania. The bill avers a contract made by authority of a law of the state of Mississippi, between the city of Meridian and W. S. Kuhn, who assigned his interest to the waterworks company, and a mortgage by the latter to the trust company, and the enactment of subsequent ordinances by the city of Meridian, pursuant to acts of the Legislature of Mississippi, also passed subsequent to the contract and the mortgage, which ordinances and acts of the Legislature are alleged to impair the contract and mortgage, contrary to section 10 of article 1 of the Constitution, and also in violation of the due-process clause of the fourteenth amendment to the Constitution. It is alleged also that the acts and ordinances are contrary to and in violation of section 17 of the Constitution of Mississippi, which provides that:

"Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof in a manner to be prescribed by law."

The relief sought is an injunction restraining the city from exercising the powers conferred upon it by state legislation passed subsequent to the contracts, to build a new plant for the purpose of supplying itself and its inhabitants with water. The Circuit Court granted the injunction as prayed for, and subsequently overruled the motion of the city of Meridian to dissolve the injunction. From that interlocutory order an appeal was taken to this court.

There is a motion to dismiss this appeal, but we overrule it and take jurisdiction, because the suit is based on diverse citizenship as well as upon the alleged violation of the Constitution of the United States, and because other than federal questions are involved. American Sugar Refining Company v. New Orleans, 181 U. S. 277, 282, 21 Sup. Ct. 646, 45 L. Ed. 859.

The view we take of the case makes it unnecessary to state or to decide several questions of interest and importance that have been ably argued by counsel. The one question presented by this appeal

which it is now necessary to decide is whether or not, on the facts averred in the bill, the city of Meridian has made a contract which deprives it of the right to exercise the powers conferred on it by law to build a new plant for the purpose of supplying itself with water. To answer this question intelligently requires a condensed statement of the acts of the Legislature, the ordinances of the city of Meridian, and the contracts involved as disclosed by the bill and exhibits.

The waterworks company was incorporated under a special act of the Legislature of Mississippi on March 9, 1886 (Laws 1886, p. 739, c. 386), for the purpose of constructing, maintaining and operating a system of waterworks at Meridian with capacity to supply all the demands of the city, and with the right to contract with the city for furnishing it a supply of water. By another act of the Legislature approved March 16, 1886 (Laws 1886, p. 591, c. 325), the charter of Meridian was amended so as to authorize it to contract with any person or company for a supply of water for the city and for a supply of water for the public and to pay therefor at an agreed price every year. Acting under this authority, the city solicited propositions from parties to build a plant, and finally accepted a proposition made for that purpose by W. S. Kuhn, who transferred and assigned all his interest in the contract when made to the waterworks company. This contract provides that the grantee should construct a system of waterworks of a character set forth, laying a prescribed mileage of pipes and installing machinery of a designated power, and to increase the same from time to time to meet the demands of the city. The contract was to continue for a period of 25 years, unless the same should be terminated by purchase or forfeiture as provided in the contract. The grantee was given a right of way through the streets of the city. A stated number of hydrants for the city's use were to be placed on the original pipe lines and on the extensions ordered. The grantee and his successors were required to constantly use and operate the works during the full term and continuance of the franchise, and to constantly keep the hydrants supplied with water and in good working order, and the city agreed to rent a certain number of hydrants for the period of 25 years, and annually to levy a tax in amount sufficient to discharge this annual debt, but on condition that it was to have the right to purchase the plant in a manner stated, and thus terminate its obligation. Section 15 of the contract is as follows:

"Sec. 15. In consideration of the benefits which will be derived by the said city and its inhabitants from the construction and operation of the said waterworks, and in further consideration of the water supply hereby secured for public use, and as an inducement for the said grantee, his associates, successors, or assigns to enter upon the construction of the said waterworks, the franchise and the license hereby granted to and invested in him shall remain in full force and effect for a term of twenty-five (25) years, subject, however, to a prior termination by the rights of purchase made as in this ordinance provided; and for the same consideration, and as the same inducement, the city of Meridian rents of the said grantee, his associates, successors, or assigns, for the uses hereinafter mentioned, the hydrants hereinbefore described, for and during the term of twenty-five (25) years from the completion of said works, unless said term shall be sooner terminated as provided herein."

It was also provided that the grantee was required to accept the ordinances and to acknowledge his acceptance before some officer authorized to take acknowledgments, and that:

"From and after the filing of said acceptance, this ordinance shall have the effect of, and be a contract between the city and said grantee, and shall be the measure of rights and liabilities of the city and the said grantee, his associates, successors or assigns, and in case such an acceptance is not so made and filed immediately after the passage of this ordinance, the same shall be null and void."

The contract recognizes the right of the grantee or his successors to mortgage the waterworks, franchises, and rentals; and subsequently the waterworks company, the successor of W. S. Kuhn, did mortgage the plant to secure bonds for a large sum, which bonds are outstanding and unpaid. The trust company is made trustee in the mortgage. It was further alleged that the city in the year 1895 demanded an appraisement of the works with a view to their purchase under the rights reserved in the contract, but that, being dissatisfied with the price fixed by the arbitrators, it did not elect to purchase. It is alleged that the city of Meridian is taking steps, under authority of acts of the Legislature and ordinances of the city, to construct waterworks of its own. This, it is alleged, it is doing by authority of an act of the Legislature of Mississippi to authorize the city of Meridian to issue bonds and to purchase or construct waterworks and for other purposes, approved February 6, 1894 (Laws 1894, p. 107, c. 97). This act authorized the city to issue $150,000 of bonds. It was provided by the act that the question as to whether or not the bonds were to be issued was to be submitted to the qualified electors of the city. It is alleged that the question was so submitted, and that a majority decided in favor of issuing the bonds. It is alleged that the city, unless enjoined, will proceed to issue bonds for the purpose of building waterworks of its own. Various acts are alleged indicating the purpose of the city to build new waterworks. It is alleged that under the contract made in July, 1886, the waterworks company acquired the right to own and operate its works and to supply the city with water for public purposes for a period of 25 years, and that the city is obligated to allow the company to supply the water. This recital of facts is followed by the allegations, to which we have referred, that the action of the defendants is in violation of the designated portions of the Constitution of the United States, and in violation of the designated section of the Constitution of Mississippi.

The contract does not contain any provision by which the city expressly agreed not to establish and operate a waterworks plant of its own during the period of the existence of the contract between it and the Meridian Waterworks Company. The relief prayed for could only be granted upon the theory that the law under the circumstances will supply by its implications the want of an express agreement that the city would not build waterworks of its own. We need not consider what would be implied in the case of a contract like this between private parties. The contract here is one in which a municipal corporation makes a grant in which the public has an interest. When a

municipal corporation is exercising its functions for the public good, it is not to be shorn of its right to continue to exert its powers for the general good by mere implication. If by contract it may under the circumstances restrict the exercise of its public powers, the intention to do so must be shown by apt words so clear as not to reasonably permit any other construction. Unless there can be found in the contract in question words clearly depriving the city of Meridian of the right to build, own, and operate waterworks, the court should not by implication give such effect to the contract. The grant to Kuhn, which was transferred to the Meridian Waterworks Company, should be strictly construed against the grantee, and whatever was not unequivocally granted is withheld. Knoxville Water Company v. Knoxville (Supreme Court U. S. Jan. 2, 1906) 26 Sup. Ct. 224, 50 L. Ed. ——.

In Helena Waterworks Company v. Helena, 195 U. S. 383, 392, 25 Sup. Ct. 40, 43, 49 L. Ed. 245, the court said:

"Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in Walla Walla City v. Walla Walla Water Company, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341."

The city not having bound itself by contract not to build and operate waterworks of its own, the legislation authorizing it to do so, and its ordinances pursuant to such legislation, do not impair the obligation of its contract. The cases are numerous which sustain this conclusion. Many of them are cited in Knoxville Water Company v. Knoxville, supra. In that case, Mr. Justice Harlan, speaking for the court, said:

"It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations, and the doctrines of the adjudged cases, that grants of special privileges affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers."

The fact that the competition of the city in the operation of its own waterworks will lessen the value of the waterworks company's plant does not amount to a taking of property without due process of law, within the meaning of the federal Constitution, nor to a taking of property without just compensation, within the meaning of the Constitution of the state of Mississippi. Helena Waterworks Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245.

As the city is not excluded by contract from the right to build and operate its own waterworks, the complainant below has no interest to question the validity of the legislative act of 1904 nor the validity of the election held by the city looking to the issuance of bonds. We are of opinion that the injunction was improvidently granted.

The decree overruling the appellant's motion to dissolve the injunction is reversed, and the cause remanded, with instructions to enter a decree dissolving the injunction.

NESTER v. DIAMOND MATCH CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,164.

1. PLEADING—CONCLUSIONS.
An allegation in a declaration that a draft of a contract and letters between the parties constituted a binding contract was a mere conclusion of the pleader, and should be disregarded.

2. CONTRACTS—REQUISITES—EVIDENCE.
Defendant's agent returned the draft of a contract with objections, whereupon plaintiff's agent replied, suggesting modifications, and that defendant should go ahead with the work until the parties should meet and execute the contract. Defendant's agent, however, did not wire or write that he would go ahead with the work as suggested, but stated that he would send the contract signed in a few days which he did not do, after which a new draft of the contract was prepared. *Held*, that such facts did not show the making of a contract on the basis of the old draft and the letters.

3. LOGS AND LOGGING—BOOMS—CONTRACTS—BREACH.
In an action for alleged breach of defendant's contract to boom plaintiff's logs, certain counts in plaintiff's declaration alleged that defendant did not run, sort, and deliver the logs to plaintiff with reasonable dispatch and care, and also charged that defendant monopolized the entire channel of a river above where he had built its jam piers and sorting gaps for a distance of 10 miles and only permitted such logs to come down as were sufficient to keep its mills in operation, and that large quantities of plaintiff's logs were kept in the river from year to year until the defendant's logs had been sawed and plaintiff's logs had become sap-rotten, worm-eaten, etc. *Held*, that such allegations sufficiently showed a breach of defendant's covenant to properly boom and sort plaintiff's logs.

4. SAME—CONSIDERATION.
Plaintiffs' surrender to defendant of their legal privilege of running and controlling their own logs in the river was an ample consideration for defendant's covenant to boom and sort plaintiffs' logs.

5. SAME—DEFENSES—IMPOSSIBILITY OF PERFORMANCE.
Where defendant's failure to boom plaintiffs' logs as agreed lay not in their failure to put the logs into the boom below the sorting gaps, but in their failure to run the logs down the river to where they could be put into the boom, which failure was due to defendant's use of the river above such sorting gaps as a storage pond for its own logs instead of maintaining the river as a navigable waterway, it was no defense that the boom was of insufficient capacity to contain the logs which plaintiff placed in the river.

6. FRAUDS, STATUTE OF—CONTRACTS—PERFORMANCE WITHIN YEAR.
Where defendant contracted to receive, run, sort, and deliver to plaintiff their logs placed in a river continuously so long as defendant controlled, managed, and operated the river, such contract was not within the statute of frauds as a contract not to be performed within a year.

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

The writ of error is addressed to a judgment entered on the election of plaintiffs in error to stand by their declaration, in three counts, to each of which a general demurrer was sustained.

The first count declared on a written contract; the second, on a contract, unwritten, but completed by the parties' oral acceptance of mutual proposals,

or by their tacit acceptance of mutual proposals implied from their dealings; and the third, on a quasi contract, that is, on circumstances from which the law constructs reciprocal duties, for the breach of which an action may be maintained as if a contract existed.

The Ontonagon river in Upper Michigan is a navigable waterway. For some years prior to 1891 these parties and others had been using the river for the floatage of logs, which were thrown in indiscriminately and came down in a common mass. Near the mouth of the river it was necessary to maintain jam piers and booms, with sorting gaps, to arrest the mass and separate the logs according to ownership. Each count of the declaration is bottomed on defendant's alleged contract obligation, assumed or incurred in 1891, to take charge of plaintiffs' logs, separate them from the mass, and deliver them to the plaintiffs with reasonable dispatch and care, and on defendant's alleged breach of that obligation. Further facts, necessary to the decision, are stated in the opinion.

Timothy E. Tarsney and Burton Hanchett, for plaintiff in error.

Edwin Walker, for defendant in error.

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

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

1. Plaintiffs take the position that the alleged written contract is a lease of real estate, in which the services stated to be rendered by defendant stand as rent. On that basis, the writing, which was signed by plaintiffs, but not by defendant, would be mutually binding if it was accepted by defendant as a correct expression of the agreements at which the parties had arrived.

The count sets out the paper that was signed by plaintiffs; alleges that it was sent by mail to defendant; that defendant, after receiving it, wrote plaintiffs a letter (which, as well as the others mentioned later, was copied into the count); that plaintiffs thereupon sent an answer; and that defendant afterwards sent plaintiffs another letter. "And the plaintiffs aver that the said draft of contract aforesaid, with the said letters aforesaid, made and constituted a valid and binding contract between the said plaintiffs and the said defendant, according to the tenor and effect thereof; and that the said defendant then and there accepted said contract, and for a long period of time thereafter, to wit, eight years, acted thereunder, recognizing the same as in full force and effect."

The allegation that the draft of contract and the letters constituted a binding contract is the pleader's conclusion of law and must be disregarded. The draft and the letters can speak for themselves on that.

The general averment that defendant accepted and acted under "said contract," consisting of the draft and the letters, might prevail if it were not overborne by the facts specifically set forth.

After defendant received the draft of contract, Barber, president, and Comstock, manager, wrote plaintiffs letters containing objections that fill three pages of the printed record, and returned the draft.

Marston, agent of plaintiffs, on April 15th, sent Comstock a long letter in respect to the objections that had been raised, but did not return the draft of contract. He concluded his letter thus:

"I think I have touched upon all the questions mentioned in yours. Now as it would be very difficult for me here (at Detroit) to describe the boom, etc., I suggest that this letter explains quite fully the contract as we apparently both desire it, that you go on with your work as though the changes were made. I fully expect to be in Ontonagon (where was defendant's mill which Comstock managed) not later than June 15th, and we can then together redraft the contract in view of the additional knowledge we will then possess. I thank you for your kind wishes as to my health. I am improving daily, and it now looks as though I would be able to get South the latter part of this or the early part of next week, much too soon to get new contract signed and approved by all (the plaintiffs). I wish upon receipt of this that you would wire me that you will go ahead until I return and see you."

The next and last letter in the chain was sent on July 27th by Comstock, at Ontonagon, to plaintiffs, at Detroit:

"The writer was in Chicago a few days since and saw Mr. Barber and Mr. Graces (executive officers of defendant), both of whom approved of the contract as prepared during the last visit of Judge Marston to this place. I will in a day or two send it to you signed."

It is clear that Comstock neither wired nor wrote that defendant would go ahead on the strength of Marston's letter in answer to defendant's objections to the draft of contract; but that, on the contrary, he preferred to and did await Marston's return, when they could "together redraft the contract in view of the additional knowledge (they would) then possess"; that a new draft was in fact prepared; and that it alone was accepted by defendant as a correct expression of its obligations. The demurrer to the first count was properly sustained.

2. Though there is a difference in legal conception between the second and third counts (see Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Sceva v. True, 53 N. H. 627; People v. Speir, 77 N. Y. 144; Hertzog v. Hertzog, 29 Pa. 465), the facts are set forth so similarly that these counts may be considered together, particularly as the same grounds of objection are urged against each.

Without reciting the counts, it is enough to say that we have been unable to find any objections beyond those presented by defendant in support of the ruling on demurrer.

(a) The counts aver that at the beginning of the period when defendant undertook to handle plaintiffs' logs, defendant built and throughout the period maintained, along plaintiffs' water frontage and with plaintiffs' consent, "a certain storage boom, with a capacity sufficient to accommodate 10,000,000 feet of saw logs, especially and particularly for the storing of plaintiffs' logs, to be run, sorted and driven by defendant through the space in said river so controlled, managed and operated by it as aforesaid."

Defendant's promise was that from the beginning of the period "it would continuously, so long as it controlled, managed and operated said river as aforesaid, receive into the part of the river so controlled, managed and operated by it, all of plaintiffs' logs, and run and sort the same for plaintiffs through and in said portion of said river aforesaid, and deliver the same to plaintiffs into said storage boom by it especially built for the storing of plaintiffs' logs as aforesaid, with all reasonable dispatch and care."

The point is made that the allegations of breach of the foregoing covenants are mere conclusions of law and tender no issuable facts; and in support thereof the counts are quoted as follows:

"That defendant did not run, sort and deliver to plaintiffs said logs with reasonable dispatch and care."

If that were the whole of the assignment of breach, the contention would have to be examined. 1 Chitty. Pl. p. 282; Alabama v. Burr, 115 U. S. 426, 6 Sup. Ct. 81, 29 L. Ed. 435.

But the counts show that large quantities of plaintiffs' logs were detained above the sorting gaps from one to eight years, when the running season was only from April to November; and then continue:

"And plaintiffs aver that said defendant monopolized, appropriated and used the entire channel of said river above the point therein where it had built said jam-piers and sorting gaps, for a distance of 10 miles above said point, as a storage pond or boom for the accommodation of its saw logs, and only permitted saw logs to come down through said sorting gaps in quantities sufficient to keep its said mills in operation; that the capacity of said mills was inadequate to saw all of the logs owned by defendant from year to year in said river as they would naturally come down to said sorting gap; that large quantities of defendant's logs accumulated above said sorting gaps, and large quantities of plaintiffs' logs were kept by defendant in said river until the said large quantities of defendant's logs had been sawed into lumber at defendant's mills."

Whereby 150,000,000 feet of plaintiffs' logs became sap-rotten, worm-eaten, etc., to plaintiffs' damage. These averments take defendant's contention out of the range of debate.

(b) Want of consideration is urged. The counts declare that, in return for defendant's obligations, plaintiffs surrendered to defendant their legal privilege of running and controlling their own logs on a basis of equal right with defendant. This was ample.

(c) Defendant says that performance was physically impossible and therefore excused. The basis is this: Plaintiffs put 30,000,000 feet into the river each season; defendant only promised to deliver the logs below the sorting gaps "into the boom built for plaintiffs, which had a capacity of 10,000,000"; and 30 will not go into 10. Of course plaintiffs during the season from April to November could receive 30,000,000 feet in a boom that had the capacity of storing only 10,000,000 at a time. The counts aver that the boom was not the ultimate destination of plaintiffs' logs. If the promise to deliver into the boom were the part of defendant's obligations to which the allegations of breach were directed, the presumptions which are indulged against a pleading might free the defendant from fault. But the counts, as herein above quoted, make it clear that the fault lay, not in failing to put the logs into the boom below the sorting gaps, but in failing to run the logs down the river to a point where they could be put into the boom; and that this was due to defendant's use of the river above the sorting gaps as a storage pond for its own logs, instead of maintaining the river as a navigable waterway.

(d) The statute of frauds. Defendant's obligation being to receive, run, sort and deliver to plaintiffs their logs "continuously, so long as defendant controlled, managed, and operated said river as

aforesaid," and defendant being at liberty to give up the control and management at will, the contract is not within the statute which provides that every agreement, not in writing, shall be void if, by its terms, it is not to be performed within one year. "The parties may well have expected that the contract would continue in force for more than one year. It may have been very improbable that it would not do so; and it did, in fact, continue in force for a much longer time. But they made no stipulation which by terms or reasonable inference required that result. * * * The complete performance of the contract depending upon a contingency which might happen within the year, the contract was not within the statute." Warner v. Texas, etc., Railway Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, and cases therein reviewed.

The judgment is reversed, with the direction to overrule the demurrer to the second and third counts.

PECK v. KINNEY.

(Circuit Court of Appeals, Second Circuit. October 11, 1905.)

No. 233.

1. WILLS—INCOME—ANNUITY.

An annuity is a stated sum payable annually or a yearly payment of a certain sum of money granted to another in fee for life or for years, and is distinguished from a bequest of income in that the latter embraces only the net profits after deducting all necessary expenses and charges while the annuity is payable absolutely and without contingency.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1436, 1437.]

2. INTERNAL REVENUE—INHERITANCE TAX—ANNUITY OR INCOME.

Where testator created two trusts aggregating $400,000, and provided that the trustee should from time to time, as often as once in six months, pay from the trust including accumulations of income as well as the then corpus of the fund, at the rate of $14,000 per year in equal proportions to testator's widow and his three children or their descendants per stirpes, such $14,000 was a fixed sum to be paid to a class and to the surviving members thereof in case of the death of a daughter without issue, so that the bequest was taxable as an annuity and not as a bequest of income, as provided by War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307].

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

For opinion below, see 128 Fed. 313.

W. R. Tillinghast, for plaintiff in error.

F. H. Parker, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Walter A. Peck, late of Providence, R. I., died May 31, 1901, leaving a will in which he appointed plaintiff, his widow, executrix, and provided for the creation of two

trusts, which in the disposition of this case may be treated as one, aggregating $400,000. Said will provided, as to each trust, as follows:

"The trustee for the time being shall from time to time as often as once in each six months during the continuance of this trust pay out from the then trust funds and property (including accumulations of income as well as the then corpus of the estate) at the rate of $7,000 per year until the principal or corpus of said trust estate and property as well as all accumulations of income have been exhausted.

"During the lifetime of my wife if she survives me, she is to receive the same fractional share of each of said payments as would be payable to her upon an equal division of said payments between herself and my children living or represented by living issue at the time of such payments respectively. For example, if my family consists of its present members, one fourth to her, but if at my death or at any time during the term of her life either of my children should die leaving no issue surviving or the issue of any deceased child should all die, the fractional share of my wife is to be increased, from and after such occurrence to make her payments equal to that of each of my children then living. And if my wife survives me, and at my death or at any time during her life neither of my children nor any issue of theirs is surviving, the whole of said payments shall be made to her as they respectively become due and payable during the term of her life.

"At all times during the continuance of these trusts the child, children or descendants living at the time, of any child of mine that has previously deceased are to receive (per stirpes) the share of income that would have been payable to such child of mine under this will if such child was then living, and I expressly include in all the provisions of this will any child or children of mine hereafter born whether in my life time or not as well as my children now living. From and after my decease if I survive my wife, the whole of said payments as they become payable shall be paid to the same persons that would inherit real estate from me under the present laws of the state of Rhode Island had I then died intestate and in the same proportions that they would inherit such real estate from me.

"And from and after the decease of my wife if she survives me, the residue of said payments not due and payable to her as aforesaid shall be paid to the same persons that would inherit real estate from me under the present laws of the state of Rhode Island had I then died intestate, and in the same proportions that they would inherit such real estate from me."

The two provisions for the payment of $7,000 each may be considered as a provision for one payment of $14,000 per year or at the rate of 3½ per cent. on said principal. It is agreed that for the purpose of the questions herein the will may be interpreted as providing for a continuance of the trusts during the lives of testator's three daughters and the survivors and survivor of them, and, as there was no other disposition of the principal of the trust funds, that the remainder after the trusts have terminated vested in plaintiff under the residuary clause. The testator left surviving him the plaintiff (his widow) and three daughters of the ages respectively of 20, 18, and 17 years, and, as the will provided for the equal division annually between the widow and daughters of $14,000 ($7,000 from each of the trusts), the plaintiff, as executrix, returned as taxable $3,500 per annum against each one of the daughters—her own share of the annual payments, as well as the residue of the estate, being exempt under the statute—and paid the tax upon that basis to the United States government under the war revenue act of 1898. The Department of Internal Revenue claimed and assessed under said act and that of June 27, 1902, against each of the daughters because of the possibility of

their surviving their mother a further tax equal to one-third of the value of a life interest in plaintiff amounting to $163.11, which she paid under protest. The claim under which said liability was asserted and said payment was made has been decided adversely to the government by the Supreme Court of the United States in Vanderbilt v. Eidman, and as to this amount it is admitted that judgment should be rendered in favor of plaintiff. The Department further claimed that under said trust provisions each daughter took a life estate in an undivided one-fourth part of said fund of $400,000, and accordingly assessed taxes under said revenue act "as though each of said daughters was entitled to one-fourth part of the income of said trust funds, calculated upon the basis of 4 per cent. instead of being entitled to an annuity as returned by this plaintiff," which assessment the plaintiff also paid under protest, claiming that the amounts of $3,500 each payable to the daughters under said trust provisions were annuities and only taxable as such under said act. The difference between the amount of taxes claimed by plaintiff herein to be due and the amount collected by the government is $477.67, and the plaintiff thereupon brought this action against the collector of internal revenue to recover said difference. The defendant demurred to the complaint on the ground already stated, namely, that the daughters each received a life estate, and that the interest of each daughter was valued "in the form and manner prescribed for the valuation of life estates by the commissioners of internal revenue, in regulations and instructions promulgated under date of December 16, 1898, pursuant to the act of Congress." The court sustained the demurrer.

The "regulations and instructions" referred to contain two different provisions, one for the valuation of life estates, and one for the valuation of annuities. The questions of law, therefore, are whether the daughters took a life estate or an annuity, and whether the Department has properly applied its regulations and instructions.

The provisions of section 29 of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], pertinent to the issues herein, are as follows:

"Sec. 29. That any person or persons having in charge or trust as executors * * * any legacies arising from personal property * * * passing after the passage of this act from any person possessed of such property * * * by will * * * to any person or persons * * * in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States as follows: That is to say—where the whole amount of said personal property shall exceed in value ten thousand dollars, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be: where the person or persons entitled to any beneficial interest in such property shall be the lineal issue * * * to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property. * * * And where the amount or value of such property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half." Chapter 448, 30 Stat. 464; chapter 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307].

"Sec. 30. That the tax or duty aforesaid shall be due and payable in one

year after the death of the testator and shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or * * * until fully paid to and discharged by the United States; * * * and every executor * * * before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, * * * the amount of the duty or tax assessed upon such legacy." Chapter 448, 30 Stat. 465; chapter 806, § 11, 31 Stat. 948 [U. S. Comp. St. 1901, p. 2308].

By the "regulations and instructions" of the Internal Revenue Department the clear value of such interest is determined by a table furnished by the Department and based on the Actuaries' or Combined Experience Table, estimating money as worth 4 per cent. per annum. This table is headed as follows:

Legacy Taxes.

Table, single-life, 4 per cent., showing the present worth of an annuity, or life interest, and of a reversionary interest, with explanatory notes and examples.

(United States Internal Revenue Adjustment, 1898.)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of the death of a person of specified age.

Then follow the figures for different ages from 10 to 100 years, and the following illustrative examples:

"Example 1.

"A person dying bequeaths to his nephew an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one hundredths of a mill ($15.09295); therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

"Example 2.

"A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

"At a net interest of four per cent. per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues."

The plaintiff followed the rule illustrated by the first example for fixing the value of an annuity on the theory that each of the daughters took a fixed annual amount or annuity, with the result that the annuity amounted to 3½ per cent. per annum of the principal. The Department followed the rule illustrated by the second example, and calcu-

lated 4 per cent. on the principal, on the theory that each daughter was entitled to one-fourth of the income of said trust estate.

There is this distinction between income and an annuity. The former embraces only the net profits after deducting all necessary expenses and charges; the latter is a fixed amount directed to be paid absolutely and without contingency. Ex parte McComb, 4 Bradf. Sur. (N. Y.) 151, 152. "An annuity is defined as 'a stated sum, payable annually' (Pearson v. Chace, 10 R. I. 455), or as 'a yearly payment of a certain sum of money granted to another in fee, for life, or for years.' Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580; Bartlett v. Slater, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73." Goodyear Shoe Machinery Co. v. Dancel, 119 Fed. 692, 56 C. C. A. 300. It is a grant of a certain sum of money payable at the expiration of fixed, consecutive periods, for a definite term or for life. Lumley's Law of Annuities, 1.

In Booth v. Ammerman, 4 Bradf. Sur. 129, cited in Re Dewey, 153 N. Y. 63, 67, 46 N. E. 1039, and approved in Welsh v. Brown, 43 N. J. Law, 37, a bequest was of the interest upon a certain sum payable annually. The court said, referring to the bequest, as follows:

> "It is not a stated sum, but may be more or less, according to the earnings of the capital. In this respect it does not possess the characteristics of an annuity, but is merely interest or income. * * * The thing given is the profits of a certain portion of the estate, to be separated in money and invested."

A life estate or legacy for life is the income or interest of a certain fund consisting of profits to be earned, which income is uncertain in amount. It is not a fixed sum, nor to be made a sum certain. Pearson v. Chace, 10 R. I. 455; Whitson v. Whitson, 53 N. Y. 479.

Counsel for the government argues that the provisions in question do not create an annuity because, inter alia, the payments are not to be made in a single sum, and no definite sum is necessarily to be paid to any beneficiary. But the amount of $14,000 is fixed, and is to be paid to a class and to the surviving members thereof, in case of the death of a daughter without issue. The essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount. It is immaterial that the periods for the payment may be distributed through the year. Warren v. Gregg, 116 Mass. 304; Bates v. Barry, 125 Mass. 83, 28 Am. Rep. 207.

Counsel for the United States further argues that, if the provisions made for a daughter were an annuity, death would terminate it. The definitions cited above show that it is not essential, to constitute an annuity, that it should be for the life of the individual beneficiary. This court had occasion to consider this question incidentally in Goodyear Shoe Machinery Company v. Dancel, supra, and there held that "It is only when there is no explanatory language as to its duration that an annuity is limited to the life of the annuitant," but that where the grant of an annual sum is made with words of limitation, such words of limitation fix its duration.

All the pertinent provisions of this will indicate an intention to

create a joint tenancy and an annuity. The amount to be annually paid is a fixed sum, $14,000. In no event can the beneficiaries receive more than this sum, whatever the annual income may be, and, on the other hand, the testator provides for a practical guaranty of this amount by permitting the trustee to appropriate from "the principal or corpus of said trust estate and property, as well as all accumulations of income," sufficient to secure the payment of said sum of $14,000, until the whole estate has been exhausted. The effect of adopting the construction contended for by the United States would be to impose a tax on an assumed income of 4 per cent. from the principal fund, on the basis established by the internal revenue regulations, when the actual income is fixed at $3,500 or only 3½ per cent.

The judgment of the Circuit Court sustaining the demurrer is reversed, with costs, and the case is remanded to the court below with instructions to enter a judgment for plaintiff for $477.66, with interest and costs, unless upon sufficient cause shown the court below sees fit to give defendant leave to answer.

NORTHWESTERN SAVINGS BANK v. TOWN OF CENTREVILLE STATION, ILL.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,183.

1. TOWNS—BONDS—BONA FIDE HOLDERS—RIGHTS.
   Where town bonds recited on their face that they were issued under 3 Starr & C. Ann. St. 1896, c. 121, p. 3559, § 20, authorizing towns to borrow money for highway improvements, etc., and further recited that the supervisors and town clerk were acting under the direction of the commissioner of highways of the town to borrow money to build distinct and expensive improvements on the highways of the town, pursuant to a vote by ballot at a special town meeting, etc., authority for issuing the bonds appeared from such recitals, so that a purchaser in good faith was entitled to rest primarily on the presumptions arising from such recitals, establishing a prima facie liability against the town.
   [Ed. Note.—Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.]

2. SAME—EFFECT.
   The town being vested with legislative authority to issue bonds for the purpose recited, it was no defense, as against a bona fide holder, that the improvements for which the money was borrowed and expended were not strictly within the meaning of the act; the nature of the improvements not appearing in the recitals.

3. SAME—NOTICE TO HOLDER.
   Though a purchaser of town bonds is chargeable with notice of the terms of the legislative act under which the bonds were issued, he is not bound to ascertain the regularity of the municipal action thereunder, in the face of recitals conclusively importing that such action was properly taken.

4. COURTS—DECISIONS—EFFECT.
   In an action on town bonds by a bona fide purchaser for value, decisions of state courts of appeal holding such bonds invalid, rendered

subsequent to the issue and sale of the bonds in controversy, to which plaintiff was not a party, were inoperative to govern plaintiff's rights.

[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.]

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

The Northwestern Savings Bank, plaintiff in error, sued the town of Centreville Station, in assumpsit, for recovery upon a series of bonds issued by that municipality and held by the bank as bona fide owner for value. Upon trial of the issues before the court, on waiver of a jury, a general finding was entered in favor of the defendant town, and this writ of error is prosecuted from the ensuing judgment against the bank.

The issue of bonds in controversy aggregated $35,500, all held by plaintiff in error, and 10 bonds of $500 each were past due, with past due coupons on all the bonds. Their form and recitals (except as to numbers and date of maturity) were as follows:

"No. 1 $500.00

"United States of America, State of Illinois, County of St. Clair, Town of Centreville Station.

"Know all men by these presents, that the town of Centreville Station in the county of St. Clair and state of Illinois, is indebted to and will pay to the bearer hereof at the First National Bank of Belleville, Illinois, on the first day of September, A. D. 1904, the sum of five hundred dollars, lawful money of the United States of America, together with interest thereon at the rate of five and one-half per cent. per annum, from the date hereof until maturity of this bond, said interest being payable annually on the first day of September in each year, according to the tenor and effect of the interest coupons hereto attached.

"This bond is one of a series of seventy-one bonds, each bond being for the principal sum of five hundred dollars, and each bearing interest at the rate of five and one-half per centum per annum, from date until maturity, according to the terms of the interest coupons attached; said series being numbered consecutively from 1 to 71 both inclusive, and bearing even date herewith; the numbers 1 to 10 both inclusive being due and payable on the 1st day of September, A. D. 1907; the numbers 41 to 50 both inclusive being due and payable on the 1st day of September, A. D. 1905; the numbers 21 to 30 both inclusive being due and payable on the 1st day of September, A. D. 1906; the numbers 31 to 40 both inclusive being due and payable on the 1st day of September, A. D. 1907; the numbers 41 to 50 both inclusive being due and payable on the 1st day of September, A. D. 1908; the numbers 51 to 60 both inclusive being due and payable on the 1st day of September, A. D. 1909; and the numbers 61 to 71 both inclusive being due and payable on the 1st day of September, A. D. 1910. The entire issue of said bonds being issued under the authority granted said town of Centreville Station, by section twenty (20) of an act of the General Assembly of the state of Illinois, entitled 'An act in regard to roads and bridges in counties under township organization, and to repeal an act and parts of acts therein named approved June 23, 1883, and in force July 1, 1883,' by the supervisor and town clerk of the town aforesaid, acting under the direction of the commissioners of highways of said town, to borrow money to build distinct and expensive improvements on the highways of said town, pursuant to a vote by ballot at a special town meeting held within and for said town, on the 4th day of February, A. D. 1899, being duly held on the petition of the commissioners of highways and twenty-five freeholders of said town; said petition being duly filed in the office of the town clerk and of which said meeting notice was duly given in accordance with the statute in such cases made and provided. And due provision has been made by said town of Centreville Station, for the collection of a direct annual tax, sufficient to pay interest on such debt as it falls due, and also to pay and discharge the principal thereof at the time of the maturity of the said bonds according to the tenor and effect thereof,

in compliance with the requirements of section twelve (12) of article nine (9) of the Constitution of the state of Illinois of A. D. 1870.

"In witness whereof the supervisor and town clerk of said town of Centreville Station have hereunto set their hands and seals on this the 15th day of May, A. D. 1899.

"John Touchette, Supervisor. [Seal.]
"[Seal.] "Thomas J. Simmons, Town Clerk. [Seal.]"

These bonds purport to be issued under section 20 of an act of the Legislature of Illinois, entitled "An act in regard to roads and bridges in counties under township organization, and to repeal an act and parts of acts therein named," approved June 23, 1883, and in force July 1, 1883 (3 Starr & C. Ann. St. 1896, c. 121, p. 2559), which reads:

"¶20. Borrowing money for improvements—Vote of Special Town Meeting. Sec. 20. When the commissioners desire to expend on any bridge or other distinct and expensive work on the road, a greater sum of money than is available to them by other means, the said commissioners may petition the supervisors of the town to call a special town meeting to vote on the proposition, which shall be clearly stated in the petition substantially as follows: 'To borrow $——— to construct or repair (describe the bridge or other work),' which said petition shall be signed by said commissioners in their official capacity and by at least twenty-five freeholders of such town; and thereupon such petition shall be filed in the office of the town clerk of such town. Upon the filing of said petition, the supervisor shall order the town clerk, by an instrument in writing to be signed by him, to post up in ten of the most public places in said town, notices of such special town meeting; which notice shall state the object, time and place of meeting, the maximum sum to be borrowed, and the manner in which the voting is to be had, which shall invariably be by ballot, and shall be 'For borrowing money to (here define the purpose),' or 'Against borrowing money (here define the purpose).' The special town meeting shall be held at the place of the last annual town meeting, by giving at east ten days' notice, and returns thereof made in the same manner as other special town meetings are now, or may hereafter be provided by law; and if it shall appear that a majority of the legal voters voting at said election shall be in favor of said proposition, the supervisor and town clerk, acting under the direction of the commissioners of said town, shall issue from time to time, as the work progresses, a sufficient amount in the aggregate of the bonds of said town for the purpose of building such bridge, or other distinct and expensive work; said bonds to be of such denominations, bear such rate of interest, not exceeding six per cent., upon such time, and be disposed of as the necessities and conveniences of said town officers require; Provided, that said bonds shall not be sold or disposed of for less than their par value, and such town shall provide for the payment of such bonds and the interest thereon by appropriate taxation."

The declaration of the plaintiff, as amended, consists of two special counts and the common counts. The first count recites the foregoing statutory provision as authorizing the bonds, avers their issue pursuant thereto and their purchase by the plaintiff, without knowledge of their purpose except as stated on their face, and sets out a copy of one bond and coupons attached. It describes the bonds and coupons which are due—with the interest coupons paid prior to 1903, but unpaid thereafter—avers full compliance with all the statutory requirements, and that the bonds were issued "to borrow money to make distinct and expensive improvements on the highways of the town." In the second count, with like general averments, the facts and proceedings are detailed on which the bonds were predicated, including averments that the highway commissioners desired to make distinct and expensive improvements on distinct portions of 13 existing highways in the town and descriptions of the improvements made thereunder.

General and special demurrers were interposed to both special counts, and pleas of the general issue and statute of limitations were filed under the common counts, upon which issue was joined. The court sustained the demurrers to the first and second counts, and the plaintiff abided such counts.

Upon the trial, after the introduction of the bonds and formal proofs, the plaintiff tendered proof of all the facts and proceedings referred to, and these offers are well preserved in the bill of exceptions. The details, however, are not essential to this statement, as it is both undisputed and conceded in the brief on behalf of the defendant in error, that "all the requirements of the statute were complied with in the issuance of the bonds." Such evidence was excluded, under the view of the trial court that the invalidity of the bonds, for want of legislative authority was settled by a decision of the Supreme Court of the state in reference thereto, and error is assigned, in various forms, to these rulings upon the demurrers and offers and the exceptions which were saved.

In so far as the specific facts averred (and confessed by the demurrers) are deemed material for the purposes of this review, they are mentioned in the opinion.

Victor Koerner and B. H. Canby, for plaintiff in error.

R. J. Kramer and James J. Rafter, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The bonds in suit are executed on behalf of the town of Centreville Station, by the supervisor and town clerk, to borrow money for improvements, under the purported authority of an act of the Illinois Legislature, approved June 23, 1883, which appears as section 20, in 3 Starr & C. Ann. St. 1896, c. 121, p. 3559, par. 20. This act is entitled as one "in regard to roads and bridges in counties under township organization," and authorizes the issue of bonds "by the supervisor and town clerk, acting under the direction of the commissioners, when the commissioners desire to expend on any bridge or other distinct or expensive work on the road, a greater sum of money than is available to them by other means," upon petition, vote, and proceedings specified. Issuance under this act is expressly stated on the face of the bonds, together with recitals that the supervisor and town clerk were acting therein, "under the direction of the commissioners of highways of said town, to borrow money to build distinct and expensive improvements on the highways of said town, pursuant to a vote by ballot at a special town meeting" (mentioned in detail), and other proceedings are recited in conformity with all requirements of the act referred to and certain constitutional provisions. Authority for issuing the bonds thus appeared from the recitals, so the rule upheld in Lincoln v. Iron Co., 103 U. S. 412, 416, 26 L. Ed. 518, and County of Clay v. Society for Savings, 104 U. S. 579, 586, 26 L. Ed. 856, is plainly applicable, namely, that the holder in such case can rest, primarily at least, upon the presumptions arising from the recitals, and the burden of showing want of authority is cast upon the defendant, if provable in any view. The particular improvements intended or made out of the fund thus raised are not specified in the recitals, and surely no presumption arises that they were beyond the statutory authorization. The first count, therefore, stated prima facie liability, and was not demurrable, even on the assumption that such liability to this holder was open to contest for invalidity in fact.

The plaintiff in error, however, is a bona fide holder of the bonds for value, under the averments, and, unless its standing is impeached

as such holder, the rule is settled beyond controversy in the federal jurisdiction that the municipality is bound by the recitals in the bond when vested with legislative authority to issue bonds for the purpose recited. In the leading case of Commissioners of Knox Co. v. Aspinwall, 21 How. 539, 545, 16 L. Ed. 208, the doctrine was thus pronounced, and it is reaffirmed in a uniform line of decisions (collated in 3 Notes U. S. Rep. 897), including the recent case of Stanly Co. v. Coler, 190 U. S. 437, 450, 23 Sup. Ct. 811, 47 L. Ed. 1126. Consequently, inquiry is not open, by way of defense, whether the improvements for which the money was borrowed and expended were strictly within the meaning of the act referred to, as the nature of the improvements does not appear from the recitals. Although the purchaser of the bonds is chargeable with notice of the terms of the legislative authority, he is not bound to ascertain the regularity of the municipal action thereunder, in the face of these recitals and their conclusive import, under the doctrine stated.

The contentions on which the rulings and judgment against the plaintiff in error rest are substantially these: (1) That the improvements intended and effected out of the bond fund were beyond the objects authorized by the act; and (2) that decisions of the state Supreme Court and Appellate Court to that effect, which are cited, establish the want of authority for the issue of bonds. The decisions referred to are St. L., A. & T. H. R. R. Co. v. People ex rel., 200 Ill. 365, 367, 65 N. E. 715, and Town of Stites v. Wiggins Ferry Co., 97 Ill. App. 157, 159. While the first-mentioned case relates to this issue of bonds, and both cases involve interpretation of the statutory authority, both are subsequent to the issue and sale of the bonds in controversy, and are thus inoperative to govern the rights of the plaintiff in error, in any view under the authorities. Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359, and 10 Notes U. S. Rep. 446; Folsom v. Ninety-Six, 159 U. S. 611, 624, 16 Sup. Ct. 174, 40 L. Ed. 278; Stanly Co. v. Coler, 190 U. S. 437, 444, 23 Sup. Ct. 811, 47 L. Ed. 1126. This rule appears to be recognized, to a limited extent, in the brief for defendant in error, but it is contended that the decisions referred to are entitled to great weight, at least, as expressions of the state law. In so far as statutory construction and policy are determinative of the issue, it is of the utmost importance and well settled that state decisions, which are generally controlling, are in any aspect strongly persuasive when like questions are involved in the federal courts of co-ordinate jurisdiction. But in any view of the decisions cited, they are plainly inapplicable here, under the aforementioned doctrine, which protects the bona fide holder from a defense, opposed to the recitals in the bonds, that the legislative authority was not exercised in conformity with the statutory terms as interpreted by the courts.

The main reliance in support of the judgment is the case of St. L., A. & T. H. R. R. Co. v. People, supra, relating to the bonded indebtedness in controversy, and we are of opinion that the conclusions in that case are inapplicable for another reason. It arose upon the appeal of a taxpayer from a judgment of the county court for a de-

linquent "road and bond tax," levied on account of the same bonded indebtedness involved in the present suit, and the validity of the indebtedness was challenged, without the presence of bondholders. It was submitted upon stipulated facts that the bonds were voted and issued "to construct of rock and macadam four different public roads in said town under section 20 of the act," referred to, and plainly failed to show that several "distinct and expensive improvements on the highways" were contemplated and made, as stated, not only in these bonds, but in the proceedings offered in evidence. The conclusion there reached, therefore, that bonds so issued and the tax levy to pay interest thereon were without authority of law, may well stand as unquestionable under the facts so submitted, but is in no sense binding against the bondholders, or upon the state of facts appearing in the present record. Indeed, the opinion in that case implies, at least (page 367 of 200 Ill., and page 716 of 65 N. E.), that such distinct and expensive improvements as are indicated in these recitals are within the meaning of the statute; and they certainly cannot be treated as excluded under that ruling, if otherwise applicable. Discussion of the appellate court decision in Town of Stites v. Wiggins Ferry Co., supra, is unnecessary, as the narrow construction of the statutory authority there adopted, if not inconsistent with the first-mentioned opinion, can, in no view, disturb the rights of the plaintiff in error previously acquired.

We are satisfied that the first count sufficiently states the cause of action, and that error is well assigned for the ruling which sustains demurrer to such count. So the second count was not demurrable, though facts are averred which do not enter into the prima facie case. The plaintiff in error was entitled to recover upon the evidence received, and the finding and judgment contra were erroneous.

The judgment is reversed, and the case remanded, accordingly, for further proceedings not inconsistent with this opinion.

QUIGLEY et al. v. SPENCER STONE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,179.

1. CONTRACTS—CONSTRUCTION—MUTUALITY.

Complainants entered into a contract by which they agreed to furnish to the receivers of a railroad company 100,000 cubic yards of stone ballast to be crushed by them and delivered on board cars furnished by the receivers at the rate of 400 yards daily. The receivers agreed to furnish the railroad tracks necessary for the convenient and economical prosecution of the work and transportation for men, and to pay for the stone on monthly estimates made by their engineer, who was also made sole arbiter of any differences that might arise; the contract providing that complainants should have no right of action thereon, except such as might be found to exist under the terms of his final certificate. It also provided that, in case of complainants' failure to comply with its terms as to quality of material or rate of delivery, it might be canceled by the

receivers on 10 days' notice. *Held*, that such contract was mutual, and bound the receivers to take and pay for the full quantity of 100,000 yards if furnished in accordance with its terms.

[Ed. Note.—Mutuality in contracts, see note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.]

2. EQUITY—JURISDICTION—SUIT FOR BREACH OF CONTRACT.

Complainants, having a contract to furnish a certain quantity of stone ballast for a railroad, to be delivered in daily installments, transferred the same to one of the defendants, who assumed their obligations thereunder and purchased their machinery and the use of their quarries and tracks, agreeing to pay therefor in installments from the proceeds of the contract. Such defendant assigned his contract to his codefendant, which assumed his obligations to complainants thereunder, took possession, and carried on the work for a short time when it abandoned the same, and both defendants joined in a notice of a rescission of the contract with complainants. *Held* that, on an allegation of the insolvency of the first defendant, complainants were entitled to maintain a suit in equity against both defendants to recover their damages sustained by the breach of the contract, as their only adequate remedy.

3. SALE—SUIT TO RECOVER PRICE—WAIVER OF SECURITY.

A seller may maintain a suit in equity to recover the price of the thing sold from a second purchaser who has assumed the obligation to pay such price, notwithstanding his retention of title as security or his taking a bond from the first purchaser, where neither affords him an adequate remedy.

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

The appellants' bill alleged that on September 13, 1899, they entered into a written contract with the receivers of the Kansas City, Pittsburgh & Gulf Railroad Company, wherein they agreed to crush and load upon cars for the receivers 100,000 cubic yards of stone ballast of a specified grade "at the rate of 400 cubic yards per day until the completion of this contract," for the price of 50 cents (reduced on October 21, 1899, to forty-eight cents) per cubic yard, and wherein the receivers agreed to furnish the railroad tracks "necessary for the convenient and economical prosecution of the work" (the grading and bridging to be done at appellants' expense), to furnish free transportation over their lines "for the men, teams, tools and material necessary to be used upon the work," and to pay the agreed price upon monthly estimates of the resident engineer of the receivers, less 10 per cent. reserved "until the completion of the contract," and wherein it was mutually agreed that upon appellants' failure to comply with the contract, "either as to quality of material furnished or rate of delivery," the receivers should have the right to cancel the contract upon giving appellants 10 days' notice and appellants thereupon should have no right of action for damages, that appellants should have no claim for damages for the receivers' failure to furnish sufficient cars if they had made reasonable efforts to furnish them, that the monthly estimates should be subject to correction in the "final certificate" of the resident engineer, and that the resident engineer should be the sole arbiter of controversies respecting quality, amount or time of deliveries, and that appellants should have no right of action except such as might be found to exist under the terms of the final certificate; that after the execution of the contract appellants supplied themselves with quarries, machinery, supplies, and workmen, and began and continued the work contemplated until June 18, 1900; that on June 12, 1900, appellants entered into a written contract with appellee Blue, wherein they licensed Blue to use their quarries, buildings, and sidings during the time required to execute the contract with the receivers, employed Blue to carry out that contract for the compensation of 48 cents per cubic yard, and sold him their machinery and supplies at certain prices, and wherein Blue agreed to complete the contract with the receivers, to pay appellants for the use of the quarries five cents per cubic yard for all stone

taken and furnished to the receivers or to third persons, and to pay appellants $2,000 on delivery of the machinery and supplies and the balance in installments on the 20th of each month "in amounts equal to six cents for each cubic yard of stone quarried and crushed during the preceding month," and wherein it was mutually agreed that their contract might be assigned, but without releasing either, that title to the machinery should not pass to Blue until the purchase price was fully paid, and that each party should give the other a $5,000 bond with sureties for the faithful performance of their reciprocal obligations; that on June 18, 1900, the machinery inventoried $5,208.16 and the supplies $3,324.85, Blue paid appellants $2,000 and took possession, and on the same day Blue assigned his contract with appellants to appellee Spencer Stone Company, which company thereupon entered into possession of the quarries, machinery, and supplies, and assumed the execution of appellants' contract with the receivers; that on June 18, 1900, appellants, relying on their contract with Blue, discharged their employés, and appellants would have carried out their contract with the receivers if they had not relied upon Blue's doing so; that the stone company continued the work until August 11, 1900, when Blue and the stone company served a written notice on appellants that they rescinded the contract on account of fraudulent misrepresentations by appellants, and the stone company quit the work and abandoned possession of the quarries, machinery, and supplies; that appellants have thereby lost their royalty of five cents per cubic yard on 94,720 yards of crushed stone; that appellants will lose $7,500 in excess of the amount to be paid by the receivers in completing the work; that Blue is insolvent, and appellants are entitled in equity to have the stone company pay them the balance of the purchase price of the machinery and supplies, and also their royalties on 94,720 cubic yards, and also the loss they will sustain in completing the contract with the receivers. The bill further alleged that the abandoned machinery and supplies were liable to damage from exposure, decay, and theft, and that a caretaker or receiver should be appointed. (On agreement of the parties the court appointed a caretaker, who subsequently, under orders of the court, sold the machinery and supplies, realizing $4,002.34 above expenses. Appellants were the purchasers, and the court on March 4, 1901, confirmed the sale and accepted appellants' bond to account for the purchase price).

Appellees demurred to parts of the bill and answered the remainder. The demurrer was addressed to the alleged causes of action for royalties on 94,720 cubic yards undelivered, and for $7,500 which would be lost in completing the contract with the receivers. The demurrer was sustained. The answer set up alleged fraudulent misrepresentations by appellants which would justify the rescission of the contract. The master found the part of the bill that was answered to be true and the allegations of the answer to be false. As a conclusion of law, based on the conditional sale of the machinery and on the contract provision that deferred payments for the machinery and supplies should be made "in amounts equal to six cents for each cubic yard of stone quarried and crushed during the preceding month," the master found, on the theory that the contract between appellants and the receivers was void for lack of mutuality, that appellees had already paid appellants all they were entitled to receive.

Francis B. James, for appellant.

Smiley N. Chambers, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

In sustaining the partial demurrer and in entering a decree upon the master's report, the court adopted appellees' contention that the contract between appellants and the receivers was void for lack of mutuality because the receivers were not bound to take and pay for the 100,000 cubic yards of stone ballast.

The intention of the parties, as it is fairly and faithfully gathered from the entire instrument, is the pole star of interpretation. The receivers exacted of appellants a covenant to crush and put on the receivers' cars 100,000 cubic yards of ballast "at the rate of 400 cubic yards per day until the completion of this contract." The receivers, in turn, covenanted to furnish the railroad tracks "necessary for the convenient and economical prosecution of the work," the grading and bridging to be done at appellants' expense. That is, the receivers were to bear all other expenses, such as rails, ties, etc., in constructing such sidings and quarry tracks as were necessary. Necessary for what? For getting out 5 or 500 cubic yards of ballast? No; "for the convenient and economical prosecution of the work." What work? The only work that had been mentioned, the work that was the subject-matter about which the parties were negotiating, the work of getting out "100,000 cubic yards of stone ballast at the rate of 400 cubic yards a day" until completed. The receivers further covenanted to furnish free transportation for all "men, teams, tools, and machinery necessary to be used upon the work"—the same work. They further agreed to pay the stipulated price upon monthly estimates, less 10 per cent. reserved, "until the completion of the contract." We think it clear from these express provisions that the receivers impliedly covenanted to take and pay for the 100,000 cubic yards, and that the contract was mutually obligatory upon the parties—upon appellants to furnish and upon the receivers to accept and pay for the whole quantity. This conclusion, in our judgment, is made inevitable by a consideration of the further provisions of the contract. If the receivers were taking a mere option, terminable at will, why should they have been solicitous to provide a 10 days' notice of cancellation for appellants' failure to deliver 400 cubic yards a day of the specified quality? Why require that the monthly estimates be subject to correction in the "final certificate"? Why protect themselves so carefully as to the quality and measure of the entire 100,000 cubic yards by constituting the resident engineer the arbiter of differences? The only intention to be gathered is that the receivers should be liable for damages if they failed to accept and pay for the 100,000 cubic yards, provided appellants faithfully performed the contract on their part. St. Louis & Denver Land Co. v. Tierney, 5 Colo. 582; Bangor Furnace Co. v. McGill, 108 Ill. 656; Morier v. Moran, 58 Ill. App. 235; Black v. Woodrow, 39 Md. 194; Baker Co. v. Merchants' Ice Co. (Sup.) 37 N. Y. Supp. 276.

The contract between appellants and the receivers was not deprived of mutuality by the provision that the receivers' engineer should be the arbiter of controversies respecting quality, amount, or time of deliveries, and that the appellants should have no right of action except such as might be found to exist under the final certificate. Such provisions are common in building and construction contracts. The architect or engineer is required to act in perfect good faith in making his certificate; and, if he does not, the builder or contractor may recover without the certificate. 3 Page on Contracts, art. 1467.

The stone company assumed Blue's obligations to appellants. But

there was no privity of contract between appellants and the stone company. So, appellants could sue the stone company only in equity, where Blue could be brought in to answer as to his insolvency and the fact of his assignment to the stone company. National Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; McKee v. Lamon, 159 U. S. 317, 16 Sup. Ct. 11, 40 L. Ed. 165.

There was no adequate remedy at law. True the appellants might have retaken the machinery under their reservation of title as a security for the debt. But the value of second-hand machinery, less wear and tear, would not be likely to equal the purchase price plus interest. As the agreement to pay the purchase price was unconditional, appellants had the right to waive the return of the machinery, treat the contract as an executed sale, and recover the agreed price. 1 Mechem on Sales, art. 615. It is also true that appellants might also have prosecuted an action at law on Blue's $5,000 bond. But the unpaid balance of the purchase price of the machinery and supplies was $6,533.01, without interest; and this leaves out of view the items of damage to which the demurrer was sustained. Plainly the only remedy that was adequate to the situation was to bring all the matters into one suit in equity.

This equitable right was not destroyed by Blue's joining the stone company in the attempted rescission. Their action was wrongful, was an attempted fraud upon appellants, and from it no equitable rights should accrue to them or either. Further, as between appellees, there was no attempt by the stone company to rescind its assumption of Blue's obligations. Their notice was on the basis that Blue had incurred no obligations. And, finally, if the notice were to be construed as a rescission by the stone company of its obligations to Blue, there was no consideration for the release, and in an action at law by Blue against the stone company on its assumption the nudum pactum would be no defense.

The balance of the purchase price of the machinery and supplies was to be paid in monthly installments. But when appellees, on August 11, 1900, repudiated the contract, they committed a breach on account of which appellants were entitled to sue at once. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. On that part of the complaint which was answered appellants are entitled to $6,533.01, with 6 per cent. interest from August 11, 1900, less credits, as partial payments, of the amount received by appellants on account of the stone company's partial performance of the contract with the receivers and the $4,002.34 left in appellants' hands on March 4, 1901, as the proceeds of the caretaker's sale.

The demurrer to parts of the bill should be overruled and appellants permitted to show the amount of legal damages, if any, which they have sustained by the stone company's failure to complete the contract with the receivers.

No part of the costs in the way of the caretaker's charges and expenses should have been taxed to appellants. The general costs

should be taxed to appellees, apart from those that may accrue on the hearing respecting further damages, and in that respect the costs should abide the event.

The decree is reversed, with the direction to proceed in accordance with this opinion.

STATE BANK OF CHICAGO v. COX.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,184.

1. FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where the declaration in a suit in the federal courts contained the common counts and a special count, each alleging the amount in controversy to be $5,000, and a verdict was directed in favor of plaintiff for more than $2,000, the necessary jurisdictional amount sufficiently appeared.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 897.

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.]

2. BANKRUPTCY—FILING PETITION—EFFECT.

Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], provides that the formal title of the bankrupt to the estate passes to the trustee by operation of law as of the date of the adjudication, but subdivisions 4 and 5 also confer on the trustee title to property transferred in fraud of creditors and property which prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied on and sold. *Held*, that the filing of a bankruptcy petition operated as a caveat against subsequent proceedings, and hence that the trustee was entitled to recover money obtained by creditors by attachment between the date the bankruptcy petition was filed and the adjudication.

3. SAME—DAMAGES—AMOUNT.

Where defendant and another creditor of a bankrupt, after the filing of a bankruptcy petition, issued concurrent attachments of the bankrupt's property in Illinois, and were therefore required to prorate the proceeds of such property as provided by 1 Starr & C. Ann. St. 1896, p. 466, c. 11, § 37, the bankrupt's trustee, on subsequently affirming a sale of the property under such proceedings and suing in assumpsit, was only entitled to recover as against defendant the amount actually received by it.

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

This is a suit in assumpsit, by the trustee in bankruptcy, to recover assets of the bankrupt which were appropriated by State Bank of Chicago, plaintiff in error, through attachment and garnishee process, pending the proceedings in bankruptcy; and the writ of error is from the judgment, upon verdict, for $2,692.36 against the bank. The bankruptcy proceedings were in the District Court of the United States for the Western District of New York, against Muskoka Lumber Company, a New York corporation, upon petition for involuntary bankruptcy filed August 20, 1901; and adjudication as a bankrupt was entered May 1, 1902. On August 21, 1901, the plaintiff in error commenced attachment proceedings against the bankrupt, in the circuit court of Cook county, Ill., under which property of the bankrupt was seized and certain of its creditors were served with garnishee process. The John S. Owen Lumber Company followed with another attachment, through

the same attorneys, returnable at the same term, and thus became a prorating attachment creditor under the Illinois statute. Section 37, c. 11, 1 Starr & C. Ann. St. 1896 (2d Ed.). Through the attachment on the part of the plaintiff in error the sheriff collected $286.13 and the garnishees paid $2,014.52. Of this aggregate it appears that the share actually received was $1,902.78; the remainder being costs and pro rata share of the other attaching creditor. The trustee in bankruptcy brought the present action, against the plaintiff in error alone, May 11, 1903, no claim having been filed or appearance entered on its part in the bankruptcy proceedings, and various questions of pleading were raised, which involve no substantial controversy not otherwise presented for review, aside from jurisdictional features which are referred to in the opinion. Upon issues joined, with the substantial facts undisputed, the case was tried and resulted in a verdict, directed by the court, against the plaintiff in error for the entire amount so realized and interest, without deduction for the share of the prorating attachment.

Lewis W. Parker, for plaintiff in error.

Wm. Ritchie, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). Error is assigned for want of jurisdiction in the Circuit Court—that the requisite amount was not involved in the controversy—and the right to entertain the suit must be ascertained before inquiry is open upon the merits. The declaration contains the common counts and a special count, and each states the amount and value involved to be $5,000. In the special count it is averred, in substance, that the plaintiff in error caused the seizure of money and goods of the bankrupt and appropriated to its own use the money and proceeds of the goods of the value and to the amount of $5,000, and recovery of that amount is sought as for an implied promise to pay the trustee thereupon. The bona fides of the valuation and claim exceeding $2,000 for the principal sum recoverable is not only manifest in the contentions on the trial, but the right to such money was upheld in the rulings of the trial court and directed verdict. Thus the utmost of jurisdictional tests, under all the authorities, is fairly met, and it is immaterial to that inquiry whether the plaintiff succeeds or fails in such recovery. Barry v. Edmunds, 116 U. S. 550, 561, 6 Sup. Ct. 501, 29 L. Ed. 729; Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 500, 504, 13 Sup. Ct. 416, 37 L. Ed. 255; Scott v. Donald, 165 U. S. 58, 89, 17 Sup. Ct. 265, 41 L. Ed. 632; Kunkel v. Brown, 39 C. C. A. 665, 667, 99 Fed. 593; Turner v. Southern Home Building Ass'n, 41 C. C. A. 379, 386, 101 Fed. 308; Board of Commissioners v. Vandriss, 53 C. C. A. 192, 198, 115 Fed. 866.

The questions arise for review therefore: (1) Whether the trustee in bankruptcy establishes a right of recovery; and, if so (2) whether the true measure of damages was awarded. As the material facts are undisputed, the inquiry is within narrow compass, if not otherwise free from difficulty.

1. Upon the first question the contentions are twofold: (1) That under the present bankruptcy act (Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), the trustee is vested with title to the property of the bankrupt, "as of the date he was ad-

judged a bankrupt," so that he cannnot recover for property theretofore attached and sold; and (2) that in any view, if such attaching creditor obtained no greater percentage than other creditors of like class, the proceeds were not recoverable as a preference. The attachment processes under consideration were instituted in Illinois on the day following the commencement of the bankruptcy proceedings in New York, but both attachment and appropriation of the proceeds were prior to the adjudication of bankruptcy, and the first-mentioned proposition is thus fairly involved.

The general purposes and scope of bankruptcy enactments, to take and administer all of the assets of the bankrupt for pro rata distribution to the unsecured creditors, is well recognized. In conformity with this view the provisions of the present act, alike with those of the former acts, are uniform—from section 1, cl. 10 (30 Stat. 544—[U. S. Comp. St. 1901, p. 3418]), to and including section 70, cl. 5, in fixing the date when the petition was filed as the time bankruptcy jurisdiction is established over the property then possessed by the bankrupt, as the date from which the sequestration of property becomes operative and with reference to which the validity or invalidity of the various transactions affecting the estate must be ascertained. As well remarked by Mr. Chief Justice Fuller, speaking for the Supreme Court, in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866), and on adjudication title to the bankrupt's property became vested in the trustee (sections 70, 21e, 30 Stat. 565, 52 [U. S. Comp. St. 1901, pp. 3451, 3430]), with actual or constructive possession, and placed in the custody of the bankruptcy court."

In this court the view is clearly expressed in the opinion by Judge Jenkins, in Re Rodgers, 60 C. C. A. 567, 578, 125 Fed. 169:

"The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."

In other words, it is the established doctrine that bankruptcy proceedings are in rem, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court, and that, when bankruptcy is adjudicated, the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as "a caveat to all the world," preventing interference by attachments or other means in derogation of the interests of the estate. In re Pekin Plow Co., 50 C. C. A 257, 259, 112 Fed. 308; Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 264, 122 Fed. 593; Loveland's Bankruptcy (2d Ed.) 366; Collier on Bankruptcy (5th Ed.) 553. While title rests in the bankrupt up to adjudication, and in form until a trustee qualifies, it is subject to the pending sequestration, and no rights can be acquired thereunder which are not equally amenable. The formal title of the bankrupt to the estate passes to the trustee

(section 70a) "by operation of law" as of the date of adjudication, but the trustee is vested as well under subdivisions (4) and (5) with property transferred in fraud of creditors, and "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. Thus the narrow construction of the first-mentioned provision, which is sought for escape from liability for the plain violation of the act through the seizure in question, not only ignores these succeeding and comprehensive clauses, but it would nullify the terms and entire policy of the act for the protection of creditors against spoliation of estates subject to bankruptcy proceedings.

We are clearly of opinion that such rights of action, arising out of transactions prohibited by the act, vest in and are enforceable by the trustee, unaffected by the date when the legal title passes from the bankrupt to the trustee. In re Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. 308; In re Garcewich, 53 C. C. A. 510, 513, 115 Fed. 87; In re Breslauer (D. C.) 121 Fed. 910, 914; Chesapeake Shoe Co. v. Seldner, 58 C. C. A. 261, 265, 122 Fed. 593. The question is not raised in Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, but the recovery affirmed in that case could rest on no other view.

In reference to the further contention that the proceeds of the attachment and sale gave the plaintiff in error no percentage upon the indebtedness to it beyond that received by other creditors, and thus no preference in fact, it is sufficient to remark that the alleged cause of action does not rest upon the provision relating to preferences, but upon the prohibited seizure and appropriation of property of the estate vested in the court of bankruptcy for administration. Whether the amount realized was more or less than the percentage which might otherwise have been awarded the creditor cannot enter into consideration.

2. The second objection to the verdict and judgment, as predicated on an erroneous measure of damages, must be sustained. In this action the tort was waived for the unlawful seizure and sale of the property and the trustee sued in assumpsit; thus affirming the sale and resting on the implied promise to pay over the proceeds. The general rule is well settled in such case, and is substantially conceded, that recovery is limited to the amount realized. Morrison v. Rogers, 2 Scam. 317, 319; McDonald v. Brown, 16 Ill. 32, 33; De Clerq v. Mungin, 46 Ill. 112, 114; Jones v. Hoar, 5 Pick. 285, 290. The amount, however, for which the plaintiff in error is charged by the verdict, includes both the amount received by it and the share apportioned to the other attaching creditor, under the provisions of section 37, c. 11, of Illinois statutes (1 Starr & C. Ann. St. 1896, p. 466), which requires such division between concurring attachments. In support of such award of the entire proceeds the general rule is invoked which makes one wrongdoer (through attachment or otherwise) so liable, notwithstanding others joined in the wrong and shared in the proceeds. We are of the opinion that the rule referred to is inapplicable to the case of concurring attachments under this statute, in any view of the effect of waiving the tort. The plaintiff in error

had no part in nor control over the other attachments. Proceeding independently it cannot be held answerable for the attachments which followed, with enforced division of proceeds, nor through the fact that all employed the same attorneys.

Under the undisputed facts the verdict, as directed, was in excess of the liability of the plaintiff in error, and error is well assigned thereupon. All other assignments are overruled, and for the reason stated the judgment is reversed, with direction to grant a new trial.

TOLEDO, ST. L. & W. R. CO. v. GORDON.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,206.

1. RAILROADS—REMOVAL OF TRESPASSERS FROM TRAINS—MEASURE OF CARE REQUIRED.

The only duty owing by those in charge of a railroad train to one who is on the train without right is to abstain from wanton and reckless injury to him, when rightfully expelled; but that duty is imperative, and whether or not it was observed in any case depends upon all of the circumstances involved, and is a question for the jury, where the material facts are in dispute under the evidence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 878, 887.

Rights of trespassers on trains, see note to Southern Ry. Co. v. Shaw, 31 C. C. A. 76.]

2. SAME—ACTION FOR INJURY TO TRESPASSER—INSTRUCTIONS.

Instructions considered and approved, in an action against a railroad company to recover damages for the injury of plaintiff by being expelled by the conductor from a moving train of defendant in the night while passing over a trestle, plaintiff being on the train without right, where they in effect charged that to entitle him to recover he must prove by a preponderance of evidence that, while the train was passing over a dangerous portion of the road, which was not known to plaintiff, the conductor, knowing that fact, willfully and wantonly ejected plaintiff or compelled him to jump from the train by commands or threats or demonstrations of violence, such that a reasonably prudent man in a like situation would have yielded to them.

3. SAME—EXEMPLARY DAMAGES.

A railroad company cannot be held liable in punitive damages for the willful and wanton act of a conductor in wrongfully ejecting a trespasser from one of its moving trains in a dangerous place causing his injury, where the company neither authorized nor ratified the act; and the fact that the conductor was not discharged prior to the trial of an action brought by the injured person to recover damages is not sufficient to constitute a ratification.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 906.]

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

The defendant in error, George Gordon, was the plaintiff below and recovered verdict and judgment against the Toledo, St. Louis & Western Railroad Company, plaintiff in error, in an action on the case for personal injuries, caused by expulsion from a railroad train. This writ of error is brought thereupon, and the alleged errors which are relied upon for reversal are (1) refusal of the court to direct a verdict of not guilty, (2) refusal of

instructions requested by the plaintiff in error, and (3) an instruction to the jury that punitive damages could be awarded.

The declaration contained five counts, but the court sustained a demurrer to three and withdrew another from consideration as unsupported by the evidence—thus withdrawing all counts which were predicated on the relation of passenger upon the train—and the case was submitted to the jury under the fifth count only, which charges, in effect, wanton and malicious expulsion from the train, with violence, while crossing a trestle in darkness, and willfully causing the injuries sustained by the defendant in error. In other words, the issues were submitted in the view that the injured party was on the train without authority and not entitled to carriage.

The defendant in error, with five other men, returning from the State Fair, arrived at Cowden Junction too late to catch a passenger train for Lerna, their destination. The night was dark and rainy, and they waited in a lumber shed about an hour, when a freight train on the road of the plaintiff in error slowed up for the crossing, bound in the direction of Lerna, and the party entered upon the platforms of the caboose, Gordon and another at the rear platform, and the others at the front. They were discovered by the trainmen, soon after passing the crossing but the testimony is conflicting as to the terms of the altercation and violence used in the expulsion of Gordon; or, as stated in the brief for the plaintiff in error, "there is a wide divergence between the stories of Gordon and his witnesses and that of the" trainmen. These facts, however, are well established: That the conductor insisted upon their jumping from the train while in motion and refused to stop to let them off; that the night was extremely dark and stormy; and that the expulsion of the defendant in error occurred upon a high trestle, causing his fall and serious injury. The conflict is in reference to details of the insistence—the extent of violence in language, threats, or force, rather than the facts of command and threat. On behalf of the defendant in error the testimony plainly tends to prove that the conductor was extremely violent in language and threats, from which physical violence was apprehended, at least, in the expulsion of Gordon; that it was too dark for the latter to discover, and he did not know, that the train was on or near the trestle; and, that he jumped from the step in fear of actual force on the part of the conductor, supposing the place to be reasonably safe and on the level.

The instructions refused and given, on which error is assigned, are sufficiently mentioned in the opinion.

Chas. A. Schmettau, for plaintiff in error.

James Vanse, Jr., for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The primary contention, that the plaintiff in error was entitled to a peremptory instruction in its favor, is untenable, as we believe, in any view of the issues of fact under the rule which governs the expulsion of any person from a railroad train when no contract duty exists. In the absence of the relation of carrier and passenger, it is well settled that the only duty then owing one who is on the train without right is "to abstain from wanton or reckless injury to him" (Purple v. Union Pacific R. Co., 51 C. C. A. 564, 114 Fed. 123, 129, 57 L. R. A. 700), when rightfully expelled, but that duty is imperative. Whether it is justly observed in any case depends upon all the circumstances involved—the conditions under which removal was imposed, and not alone the extent of violence in its enforcement. When an issue of fact fairly arises under the testimony, whether the conduct on the part of the railroad company was wanton and reckless in expelling a trespasser from the car, willfully exposing him to imminent danger and

harm, the solution is for the jury under proper instructions and not for the court. It is true that another issue may arise in such case, in reference to the conduct of the injured party, whether, without physical compulsion, he may not have acted voluntarily, and assumed the risk of jumping from the car, in the face of recognized danger (vide Bosworth v. Walker, 27 C. C. A. 402, 83 Fed. 58), which is equally a question of fact for the jury, if the testimony is not conclusive one way or the other. Without needless. comment on the testimony in the present record, we deem it sufficient to remark that neither version of the transaction authorized a directed verdict in favor of the plaintiff in error.

The instructions under which the case was submitted to the jury, upon the issue of the alleged willful and wanton conduct on the part of the conductor, clearly defined that issue, and are not open to complaint on the part of the plaintiff in error. A single exception, which is preserved to that portion of the charge, in reference to the authority of the conductor, is plainly without merit.

Upon the further issue, the instructions do not specifically define what may constitute a voluntary act of the injured party and assumption of risk, but the jury were instructed, in plain and repeated terms, that the burden of proof was upon the plaintiff (below) to establish all the allegations; and it was specifically stated that he must prove by the preponderance of evidence "that while the train was moving over a dangerous portion of the road, the conductor, knowing that fact, willfully and wantonly ejected the plaintiff from the train, the plaintiff not knowing the danger of the location," to authorize a verdict in his favor; also that the proof must establish "that the conductor here knew of the trestle and the plaintiff did not know of the dangerous location of the train, and the conductor compelled the plaintiff to jump off by commands or threats or demonstrations of violence, and that those commands or threats or demonstrations of violence were such that a reasonably prudent man in a like situation would have yielded to them and would have jumped off." We are satisfied that no reversible error was committed in this branch of the instructions, and that the jury were well advised and cautioned for their consideration of the evidence, under these issues, or in any view of the burden of proof, without prejudice to the plaintiff in error.

In reference to the several instructions requested on behalf of the plaintiff in error and denied by the court, aside from one relating to exemplary damages, to be considered separately, discussion in detail is deemed unnecessary. Those pressed for consideration, which are not plainly covered by the general instructions, are numbered 3, 4, 5, 7, 10, and 15. Of the first five, it is sufficient to remark that each relates to the act of the plaintiff in error in jumping from the car, and instructs, in effect, that he cannot recover if his act was voluntary. No. 3 instructs against recovery, if warned by the conductor not to get off while on the trestle, and No. 4 that, even if told to get off, he would not be justified in doing so on the trestle, but had the right to disobey such order, when compliance exposed him to obvious danger. No. 5 instructs that, if he knew, or exercising reasonable

care could have known of the peril, he was not bound to obey the command; and, unless he thus left the train, justified in fearing and in actual fear of a vicious assault, he could not recover for the injury. No. 7 defined obedience to such command, when the danger of obeying is perceived and obvious, as "essentially a voluntary act" for the consequences of which there can be no recovery. No. 10 instructs that he could not recover, though ordered to leave, if "it was optional with him whether to get off or not," and he deliberately made the attempt. Upon these requests a general observation sufficiently supports the ruling of the trial court. In so far as either assumes to instruct that Gordon was not entitled to recover, if he was warned or was chargeable with knowledge of the danger incurred, such instruction was fully covered by the general charge. The further requests, defining, in the language of authorities cited, voluntary action which would defeat recovery, if given without modification adapted to the evidence, would tend to mislead the jury, and their refusal was not erroneous. With the jury expressly instructed that the defendant in error must fail of recovery, unless the preponderance of evidence established, not only that he was compelled by the conductor to jump from the moving car, when the night was dark and stormy, but that the conductor knew they were on the dangerous trestle and the defendant in error did not know "the danger of the location," surely the utmost burden authorized under the rules was thus discharged. Whether the command to leave the train was accompanied with physical force does not impress us to be essential under the issue of fact thus framed and found by the verdict, and we are of opinion that error is not well assigned for denial of such requests; nor for denial of request No. 15, which was sufficiently included in the general charge.

The remaining question for review arises upon request No. 21, for an instruction that exemplary damages cannot be recovered, and the instruction which was given instead, that the jury were entitled, in their discretion, to award "punitive damages." Under the decision in Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 107, 13 Sup. Ct. 261, 37 L. Ed. 97, the instruction so given was erroneous and presumptively harmful. In this court the rule thus settled is exemplified and followed in Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822, 826. Also, see, notations in 12 Notes U. S. Rep. 297. As remarked in the leading authority first mentioned, the decisions contra in various state courts are disapproved, and this rule is adopted: The principal must respond in full compensatory damages for injury wantonly caused by an agent in the line of his employment, but not for exemplary damages, unless the wrongful act in question was authorized or ratified by the principal. Comment on the line of cases thus disapproved is unnecessary, and it is not open to question that the allowance of exemplary damages was reversible error. It would, indeed, be a harsh rule—harsh in its effect on all employés—that would hold a railroad company to have ratified the employé's act merely because before trial the employé was not discharged. Such rule would put their continued employment in jeop-

ardy every time an accident occurred, not because the employé was shown to have been guilty of wanton conduct, but because the railway company stood in danger that wantonness might be established. In reference to the case of Bass v. Chicago & Northwestern Ry. Co., 42 Wis. 654, 669, 672, 24 Am. Rep. 437, cited as supporting the instruction, within the doctrine of ratification, it may well be remarked that no such issue of fact was submitted to the jury by this instruction, as in that case; and were it assumed, without so intimating, that the peculiar circumstances which there appeared, including two prior trials, were sufficient evidence of ratification to uphold the verdict, nevertheless the evidence in the present record is plainly insufficient to establish, as a conclusion of law, that the alleged wanton acts of the conductor were ratified by the plaintiff in error.

The judgment is reversed, for error in such instruction, and the cause remanded for a new trial.

CARTER v. NEW ORLEANS & N. E. R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 24, 1906.)

No. 1,460.

1. CARRIERS—INTERSTATE COMMERCE—DISCRIMINATION—SHERMAN ACT—VIOLATION—ACTIONS—LIMITATIONS—STATE STATUTES.

   Ann. Code Miss. 1892, § 2741, providing that actions to recover a forfeiture or penalty on a penal statute shall be brought within one year, has no application to an action in the federal court against a common carrier to recover damages for discrimination in violation of Act Cong. Feb. 4, 1887, c. 104, §§ 2, 8, 24 Stat. 379, 382 [U. S. Comp. St. 1901, pp. 3155, 3159] providing that for a violation of the terms of the act the carrier shall be liable to the persons injured for the full amount of damages sustained, and for a reasonable counsel or attorney's fee to be taxed by the court.

2. SAME.

   Such action was governed by Rev. St. § 1047 [U. S. Comp. St. 1901, p. 727], providing that no suit or prosecution for any penalty or forfeiture accruing under the laws of the United States shall be maintained, except as otherwise specially provided, unless commenced within five years from the time when the penalty or forfeiture accrued, etc.

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

S. A. Witherspoon, for plaintiff in error.

Jno. W. Fewell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a suit for damages brought in the Circuit Court of the United States for the Southern District of Mississippi. The damages claimed are alleged to be the result of the violation by the defendant in error of sections 2 and 8 of the act regulating commerce, Act Feb. 4, 1887, c. 104, 24 Stat. 379, 382 [U. S. Comp. St. 1901, pp. 3155, 3159]. Section 2 of said act prohibits any common carrier engaged in interstate commerce by any special rate,

rebate, drawback, or other device, to charge, demand, collect, or receive from any person greater or less compensation for any services rendered or to be rendered, than from any person for whom it does a like and contemporaneous service in the transportation of a like traffic, under substantially similar circumstances and conditions.

Section 8 of the act provides that if the common carrier shall violate the provisions of section 2, it shall be liable to the persons injured thereby for the full amount of damages sustained in consequence of such violation of the provisions of the act, and also for a reasonable counsel or attorney's fee, to be fixed by the court.

After demurrer overruled and answer filed, the defendant below filed a plea of the statute of limitations, and alleged that the cause of action did not accrue within one year next before the bringing of said action, and said action is barred by the statute of limitations of one year, under section 2741 of the Annotated Code of Mississippi of 1892, which reads as follows:

"Action for penalty commenced in one year.—All actions and suits for any penalty or forfeiture on any penal statute brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after."

To the plea of the statute of limitations, the plaintiff in error demurred on the grounds that the plea sets up no defense to the cause of action. That the action is one for damages resulting to the plaintiff from the acts of the defendant, and is not a suit for any penalty or forfeiture under any penal statute, and therefore section 2741 of the Annotated Code of Mississippi of 1892 has no application; because this section of the Mississippi Code is a limitation of acts and suits for forfeitures and penalties in the state courts, and not in the federal courts; and because section 1047 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 727], is the law fixing the limitation of actions for penalties or forfeitures accruing under the laws of the United States. The demurrer to the plea of the statute of limitations was overruled by the court, and, the plaintiff failing to plead further, final judgment was rendered by the Circuit Court in favor of the defendant, and the suit dismissed. Thereupon the plaintiff below sued out this writ of error and assigns for error that the court erred in overruling the demurrer of the plaintiff to the plea of the statute of limitations interposed by the defendant, and that the court erred in rendering final judgment against the plaintiff and in dismissing said suit.

Conceding that, in the absence of any provision of the act of Congress creating a liability fixing a limitation of time for commencing actions to enforce it, the statute of limitations of a particular state wherein the action is brought is applicable (McClaine v. Rankin, 179 U. S. 158, 25 Sup. Ct. 410, 49 L. Ed. 702), we do not think that section 2741 of the Mississippi Code applies in the present case. If the action is remedial only—that is to recover statutory damages—the terms of that section exclude its application. If the action is one for a forfeiture or penalty, and the act creating the liability fixed no limit of time for commencing the action to recover the penalty, then section

1047 of the Revised Statutes of the United States seems to cover the case. The said section is as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

The contention of the defendant in error is that the section 1047 only applies to actions for forfeitures and penalties brought by the United States, and the argument is that the other sections of the same chapter of the Revised Statutes deal only with government prosecutions, and that it is the settled policy of Congress to leave all civil actions brought by one person against another to be controlled by the statutes of limitations of the several states. To support this contention counsel rely upon the remarks of Mr. Justice Brown in Campbell v. Haverhill, 155 U. S. 618, 15 Sup. Ct. 217, 39 L. Ed. 280, which was an action to recover damages for the infringement of a patent, and upon the opinion of Judge Clark in City of Atlanta v. Chattanooga F. & P. Co. (C. C.) 101 Fed. 900, which was an action to recover damages under the Sherman trust act, and here conceded not to have been a suit to recover a penalty.

It is to be observed that the section 1047 was originally enacted as the fourth section of an act entitled "An act in amendment of the acts respecting the judicial system of the United States," approved February 28, 1839 (Act Feb. 28, 1839, c. 36, 5 Stat. 321), and is there disconnected from all specific offenses and regulating acts and in terms covers the present action, if it be one for a penalty, as though made for it, and that the proviso means, as held by Judge Lowell in United States v. Brown, 2 Low. 267, Fed. Cas. No. 14,665:

"That in suits for pecuniary penalties there must have been, within the five years, an opportunity for personal service on the defendant, and in suits for specific forfeitures there must have been a possibility of seizing the property, within the same period."

In Adams v. Woods, 2 Cranch, 336–339, 2 L. Ed. 297, which was an action of debt brought to recover a penalty, Chief Justice Marshal, in commenting on the limitation act (Act April 30, 1790, c. 9, 1 Stat. 119), said:

"It is contended that the prosecutions limited by this law, are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt. But if the words of the act be examined, they will be found to apply, not to any particular mode of proceeding, but, generally, to any prosecution, trial or punishment for the offense. It is not declared that no indictment shall be found nor information filed for any offense not capital, nor for any fine or forfeiture under any penal statute, unless the same be instituted within the two years after the commission of the offense. In that case the act would be pleadable only in bar of the particular action. But it is declared, that 'no person shall be prosecuted, tried, or punished;' words which show an intention, not merely to limit any particular form of action, but to limit any prosecution whatever.

"It is true that general expressions may be restrained by subsequent particular words which show that in the intention of the Legislature, those general expressions are used in a particular sense, and the argument is a strong one which contends that the latter words describing the remedy imply a restriction on those which precede them. Most frequently they would do so. But in the statute under consideration, a distinct member of the sentence describing one entire class of offenses, would be rendered almost totally useless by the construction insisted on by the attorney for the United States. Almost every fine or forfeiture under a penal statute may be recovered by an action of debt as well as by information; and to declare that the information was barred while the action of debt was left without limitation would be to attribute a capriciousness on this subject to the Legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable would be to overrule express words and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In this particular case the statute which creates the forfeiture does not describe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained."

In Stimpson v. Pond, 2 Curt. 502, Fed. Cas. No. 13,455, which was an action of debt brought to recover penalties for marking the word "patent" on an unpatented article, it was held that the fourth section of the act of February 28, 1839 (5 Stat. 322), now section 1047, was applicable.

In United States v. Henry Maillard and Oscar Mussinan, 4 Ben. 459, Fed. Cas. No. 15,709, which was a suit brought to recover the value of certain forfeited merchandise, it was contended that the United States was not embraced within the fourth section of the act of 1839, because not expressly named therein; that to bind them by the limitation of that section would bar them of a right, and would violate the principle of public policy that the government is not to be prejudiced by the negligence of public officers to whose care the public interests are confided, and that it is a settled principle that the government is never barred by an act of limitation unless named therein. Citing United States v. Knight, 14 Pet. 301, 315, 10 L. Ed. 465. But the court held that under the plain language of the section the act was applicable to actions brought by the United States on the ground that the court cannot ingraft on a statute of limitations an exception which the statute itself does not make. And see Raymond v. United States, 14 Blatchf. 51, Fed. Cas. No. 11,596.

In Hatch v. The Boston (D. C.) 3 Fed. 807–810, which was a suit to recover a penalty under section 4465, Rev. St. [U. S. Comp. St. 1901, p. 3046], as follows:

"It shall not be lawful to take on board of any steamer a greater number of passengers than is stated in the certificate of inspection and for every violation of this provision the master or owner shall be liable to any person suing for the same to forfeit the amount of the passage money and ten dollars for each passenger beyond the number allowed."

In which case it was decided that by section 1047, Rev. St., five years from the time when the penalty for forfeiture occurred is the limitation of such suits or prosecutions, and this whether the action is in personam or in rem. We see no good reason to ingraft on section 1047 an exception which the statute itself does not make.

The judgment of the circuit court is reversed, and the cause is remanded, with instructions to sustain the demurrer to the plea of the Mississippi statute of limitations of one year, and otherwise proceed according to law.

In re ELLIS et al.

ELLIS et al v. HARKNESS & TOWLER et al.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1906.)

Nos. 1,486, 1,487.

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—PETITIONERS HAVING PROVABLE CLAIMS.

A subcontractor has no provable claim against a building contractor which entitles him to join in a petition in involuntary bankruptcy against such contractor under Bankr. Act. July 1, 1898, c. 541, § 59b, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3445], for work and material for which the contractor has not yet been paid by the owners furnished under a contract which provides that the liability of the contractor to the subcontractor for such labor and material shall only accrue after the owners shall have paid the contractor on account thereof, and also with respect to payments that the contractor shall pay the subcontractor as the work progresses in the same proportion as he receives payment from the owners under the principal contract and the final payment when he receives final payment from the owners and not before.

Petition to Review an Order of the District Court of the United States for the Southern District of Ohio.

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

Louis J. Dolle and Constant Southworth, for bankrupts.

Otis H. Fisk, Kramer & Kramer, W. J. Overbeck, and Galvin & Galvin, for petitioning creditors.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is a petition of alleged bankrupts to review an order made by the District Court in a bankruptcy proceeding. An appeal was taken from the same order, but the matter will be considered upon the petition.

The alleged bankrupts, William H. Ellis and Harry E. Kennedy, doing business as W. H. Ellis & Co., are building contractors, and, among others, had the contracts for the construction of the large office buildings known as the "Ingalls Building," in Cincinnati, and the "Harrison Building," in Columbus, Ohio. Three of their subcontractors, Harkness & Towler, the Gem City Boiler Company, and Voightmann & Co., alleging that they had provable claims amounting respectively to $55.01, $299, and $1,793.93, in all exceeding $500, petitioned that Ellis & Co. be adjudged bankrupts, averring the latter were insolvent and had committed an act of bankruptcy. Ellis & Co. answered, denying they were insolvent, denying they had committed an act of bankruptcy, and, after describing the origin of the claims relied on, denied any indebtedness to the petitioners or that the

latter had any provable claims. A hearing was had before the District Court upon the pleadings and evidence, on the sole question whether the petitioners had provable claims authorizing them to act and the court found they had. There is no dispute as to the facts, which are conceded. While the court made no finding of the facts, they are stated in the petition for review, and appear with sufficient clearness in the pleadings and evidence. The question for decision is one of law. In re Taft, 133 Fed. 511, 66 C. C. A. 385.

Ellis & Co. constructed the Ingalls Building in Cincinnati, at a contract price of $450,000, and the Harrison Building in Columbus, at a contract price of $300,000. In each case the owners refused to make the last payment under the contract, and suits were brought by Ellis & Co. in the state courts at Cincinnati and Columbus, for $90,918.39 on account of the balance due on the Ingalls Building, and for $94,000 on account of the balance due on the Harrison Building. Two of the petitioning creditors, Voightmann & Co. and the Gem City Boiler Company, were subcontractors on the Ingalls Building, and the third, Harkness & Towler, a subcontractor on the Harrison Building. The contracts for the construction of these buildings each provided that the contract price should be paid upon certificates of the architects to be issued monthly at the rate of 50 per centum of the value of the material on the ground, and 90 per centum of the value of the work in place, the final 10 per centum of the contract price not to be paid until, in the case of the Harrison Building, 30 days, and, in the case of the Ingalls Building, 60 days, after the work should be completed, approved by the architects, and accepted by the owners. Each of the subcontracts upon which the petitioners found their claims had attached to and made a part of it a copy of the contract for the entire building, and each contained substantially similar provisions respecting the liability or obligation of the contractor and the payment of the contract price.

Taking for illustration the contract with the Gem City Boiler Company, the obligation or liability of the contractor was thus limited and defined:

"The party of the second part [the subcontractor] agrees that the performance of this agreement shall proceed under the direction of the party of the first part [the contractor], and that every order made by the 'owners' affecting the work, material and labor herein contracted for, shall have the same binding force and effect upon the party of the second part [the subcontractor] that it or they may have upon the party of the first part [the contractor], and that the liability of the party of the first part [the contractor] to pay for such material and labor shall only accrue after such material shall have been placed in position and the 'owners' shall have paid the party of the first part [the contractor] on account of such material, work and labor."

And the payment of the contract price was thus regulated:

"The party of the first part hereto, in consideration of the promises and agreements of the party of the second part, as herein set forth, and in consideration of the due performance thereof, doth hereby agree to pay to the said party of the second part the sum of three thousand ($3,000.00) dollars in the following manner, that is to say: It will pay to the party of the second part a sum of money equal to 50 per cent. of value of material on

ground and 90 per cent. of value of work in place per centum for all labor and material which has been placed in position and for which payment has been made by said 'owners' to said party of the first part, except the last payment, which the said party of the first part shall pay when it shall receive final payment for the labor and material performed hereunder, at which time it will pay to said party of the second part the balance due under this agreement."

As to the amount of the claims, that of the Gem City Boiler Company is concededly for the retained 10 per cent. alone. Those of the other petitioning creditors include also some small disputed items not approved by the architects. It is admitted with respect to each that the owners have not yet paid the contractor for the labor and material covered by the claim. The question for consideration is, therefore, whether a subcontractor has a provable claim against a contractor for work and material for which the contractor has not yet himself been paid by the owners, under a contract which provides that the liability of the contractor to the subcontractor for such material and labor shall only accrue after the owners shall have paid the contractor on account thereof, and which further provides, with respect to payments, that the contractor shall pay the subcontractor a sum of money equal to 50 per cent. of the value of the material on the ground, and 90 per cent. of the value of the work in place, for all labor and material which has been placed in position, and for which payment has been made by the owners to the contractor except the last payment, which the contractor shall pay when he shall receive final payment, and not before.

Section 59b of the bankruptcy act of July 1, 1898, provides that:

"Three or more creditors who have provable claims against any person which amount in the aggregate * * * to $500.00 or more * * * may file a petition to have him adjudged a bankrupt." 30 Stat. 561, c. 541 (U. S. Comp. St. 1901, p. 3445).

Provable claims are defined in section 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), which provides among other things:

"Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded on open account, or upon a contract express or implied."

The claims in question are presented as claims upon accounts for material furnished and labor performed in the construction of the buildings mentioned. They are not, however, founded upon open accounts, but upon express contracts, being the subcontracts mentioned; and obviously whether they are provable claims depends upon whether, at the time of the filing of the petition, they were debts of the alleged bankrupts for which the latter were then liable and under obligation to pay.

On the part of the petitioning creditors, it is insisted that, having done the work and furnished the material covered by the claims, the contractor then became indebted to them under the contract for the value of the same, and the provisions referred to only postponed the time of payment; that the debt came into existence when the work was done and the material furnished, but the contract post-

poned its payment until the owners should pay the contractor. We are unable to take this view of the effect of the contracts. The conditions mentioned do not simply regulate payment, but limit liability under the contracts. The contractor was made an intermediary between the owners and the subcontractor. Under the direction of the contractor, the subcontractor was to carry out the orders of the owners, and the liability of the contractor was only to accrue after the material was in place and the owners had paid the contractor on account of it.

A similar condition was annexed to payment. The contractor was not to pay till he had been paid. The owners had the right to retain 10 per cent. and not make the final payment until a certain time after the entire work was completed and accepted. The contractor naturally incorporated similar conditions into the subcontract, limiting his liability to the value of labor and material in place for which he had been paid by the owners, and stipulating that he should make the last payment only when he had received final payment from the owners. The contract governs, and under its terms he agrees to pay only for the labor and material for which he is paid. He assents to become the medium of payment to the subcontractor, but assumes no independent liability. His obligation, his debt, is altogether dependent upon the payments to him by the owners. This stipulation is doubtless a measure of protection. Such a contractor may not be able to pay until he is paid, and therefore limits his liability accordingly. Loveland on Bankruptcy, § 112; Wait on Eng. & Arch. Juris. §§ 342, 345, 412; Holdipp v. Otway, 2 Williams Saunders. 106; Clarke v. Watson, 18 Com. Bench Rep. N. S. 278; Wentworth v. Whittemore, 1 Mass. 471; Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33; People v. Arguello, 37 Cal. 524; Riggin v. Magwire, 15 Wall. 549, 21 L. Ed. 232; Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084.

It is not contended that the contractor has wrongfully colluded with the owners, or in any other way is responsible for the delay in making the final payments on these buildings. He is therefore entitled to the protection of the contracts, under which, in our opinion, no liability on his part had then accrued, to pay for the labor and material in question. There being no liability, obligation, or debt, no provable claims existed.

The order of the court below is reversed, and the case remanded, with directions to dismiss the petition.

NATIONAL REFINING CO. v. WILLIS.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1905.)

No. 1,470.

MASTER AND SERVANT—INJURY OF SERVANT—UNSAFE APPLIANCE.

Where, in the construction of an oil tank by defendant company, 40 feet in height, it was necessary to build a scaffolding across the top, after the sides were completed, to hold the workmen and their tools while constructing the roof, and also as a support for a jack to lift and hold in place the steel rafters in the center until they were so secured as to be self-supporting, it was the positive duty of defendant to make such scaffolding strong enough for both purposes and reasonably safe, not only as a place to work, but as an appliance to work with in constructing the roof; and it is liable for the death of a workman, who was killed by reason of the falling of the scaffold while being used in the ordinary way, because of its negligent construction and insufficient strength.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 207.]

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

Blandin, Rice & Ginn (Ross & Kinder, of counsel), for plaintiff in error.

Blackford & Blackford, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for the wrongful death of the plaintiff's intestate, Willis, who was killed by the fall of a scaffold built and used in the erection of a large tank for the storage of oil. The scaffold was built by a tank carpenter and his assistant, especially employed for the purpose. Willis was employed to assist in riveting the tank. It was charged the scaffold fell because it was negligently constructed; that it was not reasonably safe, either as a place for the employés to work while erecting the tank, or as an appliance with which to work. The case was submitted to the jury, and there was a verdict and judgment for the plaintiff. In addition to the denial of the court to direct a verdict for the defendant, the errors assigned are based on the refusal to give certain charges requested and on exceptions taken to portions of the charge given.

There was testimony tending to establish the following facts: The tank to be constructed was circular in form, about 40 feet in diameter, and 40 feet high to the roof. The sides were of sheets of steel riveted together in rings. The roof was to be made of sheets of iron, supported on iron rafters; the outer ends being riveted by angle irons to the top of the tank, and the inner ends coming together at the center, forming a shoe about 3 feet higher than the top of the sides. In constructing the tank, it was necessary to build a shell scaffold, about 5 feet wide, both on the inside and the outside of the tank. For each ring added to the shell as the work progressed upwards, it was necessary to construct a new shell scaffold. The construction of the

tank was in the hands of one Hummel, as the representative of the company, who had full charge of the entire work. He employed a gang to erect the tank. Willis was one of them. He assisted in the work of riveting. In addition he employed a tank carpenter, one Brown, with an assistant, to construct the scaffolds under his (Hummel's) direction, and he did so. When the sides of the tank were completed, it was necessary to put on the roof, and Brown, acting under Hummel's orders, constructed a scaffold or platform, extending from the shell scaffold on one side of the top of the tank to that on the other, for use in putting on the roof. This was made of three pieces of timber, 6 inches by 4, on which loose boards were laid. The center piece was about 37 feet long and was spliced. The side pieces were each 8 or 10 feet from the center and were not spliced. To strengthen the center piece, Brown built below it a V-shaped truss or brace, made of boards 6 inches wide and 1 inch thick. After this platform was constructed, the adjustment of the rafters was begun. There were, in all, 14 rafters. They were adjusted in order, beginning at a certain point and proceeding around the circular top of the tank. After 3 were adjusted, it became necessary, in order to adjust the next, to furnish a support and lift for the inner ends of the rafters forming the central shoe. Accordingly, an oil barrel was placed on the scaffold near the center, on it a block, then a jack, and between the jack and the shoe another block. By putting a pressure on the jack, the inner ends of the rafters forming the shoe were held and lifted until the adjustment was made. Proceeding in this way, 11 of the rafters were thus adjusted, being riveted to the angle iron at the top of the sides and to the shoe in the center. At this point, with 3 rafters yet to be adjusted, it was observed that the truss or brace under the middle piece of the scaffold had shifted or tilted, and was out of alignment some 6 or 8 inches. Brown testified this was caused by the pressure of the rafters. Hummel's attention being called, he directed Brown to straighten the brace and Willis to assist him. Brown went below to get his tools. Willis, taking a rope, went out to the center of the scaffold and seated himself crosswise of the center piece. Then the center piece broke, the platform fell, and Willis was killed.

There was expert testimony to the effect that it was necessary, in constructing a roof of this sort, to erect a central support, resting upon the ground, which would sustain the weight of the rafters until they could be adjusted and become self-supporting. Brown, the tank carpenter, testified that, while the work of placing the truss or brace under the scaffold was going on, he told Hummel of it, who said he thought it would be all right just to put the timbers across without any support. Brown says he told Hummel he did not believe it was safe; that a bearing should be built up in the middle, something in the shape of a derrick. Hummel answered it would be "too much expense and material." When the V-shaped brace was found out of alignment, Brown says Hummel asked him why the scaffold would not carry the weight, and he told him it was because he had the weight on the roof. Hummel said he didn't think it would break. Brown told him it would if he kept the weight there. Then Hummel issued

instructions to straighten it. The deceased, Willis, was not Brown's helper. He worked on the outside of the shell, assisting in riveting. The shell of the tank being completed, he was doing nothing at the time he was directed to assist Brown.

We think these facts, which the jury were at liberty to regard established by the testimony, were sufficient to justify the court in declining to direct a verdict for the defendant. It is true that, if the scaffold was constructed for the sole purpose of holding the workmen and their tools, and during the progress of the work, because of an unexpected emergency, not within reasonable contemplation, was improperly used also as a foundation for the jack and its pressure, the negligence consisting solely in such use, no recovery could be had; for the negligence would be that of a fellow servant. In other words, if the scaffold was fit for the intended use, and was negligently used for an improper and unanticipated one, the company would not be liable. Maxfield v. Graveson, 131 Fed. 841, 65 C. C. A. 595, 598. But, on the other hand, if the scaffold was erected, not only for the purpose of holding the workmen and their tools, but also of serving as a foundation for the jack and its pressure, and through the negligence of Hummel it was not made strong enough, and broke, the company would be liable; for the duty to make it strong enough for both purposes, and reasonably safe, not only as a place to work, but as an appliance to work with, in erecting the roof, would be a positive one, which could not be delegated, so as to relieve the master from responsibility. National Steel Co. v. Lowe, 127 Fed. 311, 62 C. C. A. 229, 235; Chambers v. American Tin Plate Co., 129 Fed. 561, 64 C. C. A. 129. If the jack supplied by the company through Hummel had proved defective and broken, and as a result a workman, without fault on his part, had been hurt, the company would have been liable; for it was bound, as a personal duty, to furnish a reasonably safe appliance for raising and holding the rafters. The case of the scaffold, on which the jack rested, was in nowise different. It, too, was an appliance for the same purpose and came under the same rule.

Now, the question of fact as to the nature of the negligence which caused the accident, whether one of use or one of construction, was submitted to the jury under proper instructions, and the jury necessarily found that the negligence was in the construction, and not in the use, and that Hummel, as the direct representative of the company, should have anticipated the use and made the scaffold strong enough to bear it; negligently failing to do which, the company was liable. This disposes of the main question in the case, and furnishes the rule for the determination of the others.

The defendant made seven requests to charge. The court gave the first and second, refused the third, fourth, and fifth, and slightly modified the sixth and seventh. The applicable propositions of law contained in the third, fourth, and fifth are stated in the sixth and seventh, and in the general charge. In addition, these requests contain statements of fact not established beyond dispute by the evidence. They were, therefore, properly refused. The sixth request was of

doubtful propriety, even as aided by the qualifications added by the court. The addition made to the seventh was intended to keep before the jury the distinction to which we have already alluded between negligence in construction and negligence in use, and in our opinion was not only proper, but necessary. The jury was instructed that if the negligence shown was only in the improper use of the scaffold—that is, only in the doing of a detail of the work of constructing the tank—the company could not be held liable, for the negligence would be that of a fellow servant; but at the same time it was cautioned that if the use could and should have been anticipated, and in spite of this an inadequate and dangerous scaffold was constructed, not reasonably safe for the purposes contemplated, and the accident resulted as a consequence, the company would be liable, for the duty of making such a scaffold reasonably safe was a positive and nondelegable one. These seem to be the only points which need discussion.

The judgment is affirmed.

CINCINNATI, N. O. & T. RY. CO. v. COX.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1906.)

No. 1461.

TRIAL—REOPENING CASE FOR FURTHER EVIDENCE—DISCRETION OF COURT.

The refusal of a trial court on the second trial of an action to reopen the case to permit defendant to introduce an additional witness, after the second argument had been made to the jury, *held* a proper exercise of its discretion; no sufficient showing of surprise or of diligence to procure the testimony having been made to entitle defendant to the right claimed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 159, 160].

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

W. L. Frierson and Edward Colston, for plaintiff in error.

D. F. Snodgrass and T. C. Latimore, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action for personal injuries sustained by the plaintiff below, while in the employ of the defendant railway company as a fireman. Through the breaking of the shaker bar, the plaintiff was thrown from a moving engine, receiving severe injuries. It was charged that the shaker bar was defective, the handle bar not being securely fastened to the upright piece; that a proper inspection would have disclosed this, but there was no such inspection. The case went to the jury, and there was a verdict and judgment for the plaintiff. A reversal is asked on several grounds: First, because the court refused to direct a verdict for the defendant; second, because the court, after the evidence had closed and the arguments begun, refused to permit the defendant to introduce a certain witness; and, third, because the court should have granted a new trial for lack of the evidence of this witness.

1. The shaker bar is used to shake and loosen the ashes, cinders, and clinkers in the grate. It consists of an upright piece and a handle bar. The upright piece has a grate connection below and comes up into the cab alongside the boiler. At the upper end it is connected with a handle bar, also called the shaker bar; the latter having jaws which fit on either side of the end of the upright piece, and are fastened to it by a bolt held in place by a nut. When not in use, the handle or shaker bar drops down against the upright piece. When in use it is raised to a horizontal position and worked laterally. The accident occurred about 6:15 o'clock on the evening of October 23, 1903. The plaintiff and his engineer had been on the engine only that day, having been ordered to change to it at Oakdale about 5:30 o'clock that morning. Before they left Oakdale at 6 o'clock, the engineer inspected the engine; but the testimony conflicts as to whether he did or did not inspect the shaker bar. He says that the running parts of the engine were all the engineer was supposed to inspect thoroughly, but that he did look at the shaker bar, and saw the nut which holds in place the bolt. The plaintiff, on the other hand, says that he was in the cab during the inspection; that the engineer put in his time looking over the running parts and did not inspect the shaker bar, which was partially covered by the drip pan, or get into the cab, until they were about to leave. Both the engineer and the plaintiff used the shaker bar during the day. The plaintiff noticed it was loose, but not more so than other shaker bars. There was testimony that neither one nor two men could break the handle bar loose, if it was properly fastened to the upright piece. This handle bar, when found after the accident, had one of its jaws bent or sprung about a quarter of an inch. The plaintiff, after being hurt, requested his fellow employés to preserve the shaker bar and broken pieces—the bolt and nut; but the bolt and nut were either never found or not produced.

The plaintiff and his engineer by orders "swapped" engines at Oakdale the morning of October 23d, with Engineer Niles and his fireman, Cross. The latter had had engine 663, on which the accident occurred, for a week or more preceding. This case was tried twice. On the first trial Niles and Cross were both still in the employ of the railway company, and neither was produced as a witness. On the last trial, Cross was out of the employ of the company and was produced as a witness by the plaintiff. He testified that on the 18th of October, as they were leaving Chattanooga, he happened to "shake the grate" and the bolt of the shaker bar fell out. He told the engineer, and got down and got the best bolt he could out of a bolt keg on the side of the track, and put it in so that he could shake the grate until he got back to Oakdale. This bolt was smaller than the ordinary one. It came through about a half or three-quarters of an inch and had no "tap" on it. Although he reported the fact to Engineer Niles, nothing was done to repair the shaker bar, and it remained in that condition when he left the engine.

During the course of the trial, both before and after Cross testi-

fied, counsel for the plaintiff repeatedly referred to Niles as one in the employ of the defendant who would make an important witness, whom the plaintiff had attempted to subpœna, and who should be produced, and indirectly charged the company with running him off. After Cross testified, no request was made by the defendant for time in which to produce Niles. The trial proceeded, and the witnesses for the defendant were examined, a motion for peremptory instructions was submitted and overruled, and the arguments begun. The next morning, after the second argument was concluded, the defendant moved the court to be allowed to introduce Niles as a witness, supporting the application by the affidavit of its counsel, in which he stated that he was taken by surprise by Cross' testimony; that after hearing it he had sent for Niles, who was present, and would disprove Cross' statements if permitted to testify. This motion was overruled, and an exception taken. This took place on April 8, 1905. The record made at the time does not show the ground of the court's action. After the verdict there was a motion for a new trial, which was heard upon affidavits filed by each side. The main ground was the refusal to permit Niles to testify. This motion was overruled in an opinion filed May 13th. In this, after commenting on the affidavits, the court announced the conclusion that the railway company and its counsel had not used due diligence in the preparation of their side of the case, or they would not have been surprised by Cross' testimony. So the court denies the motion for a new trial on the ground of surprise. But the court—having thus given a good reason for denying a new trial in order to permit Niles to testify; in other words, having vindicated its exercise of the discretion undoubtedly vested in it to refuse to allow Niles to testify after the arguments had begun—became reminiscent, and, in explanation of its ruling during the trial, said it had refused to allow Niles to testify then because it did not think that "as a matter of law it could rightly permit the introduction of this evidence over objection of the plaintiff in the exercise of any power or discretion vested in the court in that behalf."

It is now contented that the court did have the power to permit Niles to testify, and for that reason the judgment should be reversed. We agree that the court had such power (3 Wigmore on Evidence, §§ 1878, 1879); but we think it did right in refusing to permit him to testify under the circumstances, and that the latter (the propriety of its action) is the question that was reserved by the record, and the only one. The exception taken at the time was to the denial of the motion, not to a refusal to entertain it for lack of discretionary power, as in Felton v. Spiro, 78 Fed. 576, 581, 24 C. C. A. 321; and if it was rightfully denied, the exception falls. That this is the only exception taken is apparent from the assignment of error, which reads as follows:

"Error on the part of the court in refusing to allow the defendant to introduce witness J. B. Niles, which application was supported by the affidavits of Charles R. Head and said Niles, after the evidence had closed the evening before this application was made; the application being made on the arrival of Niles in Chattanooga from Somerset, Ky., the next morning."

It is unnecessary to discuss the assignment based on the refusal to instruct in favor of the defendant. There was testimony tending to establish the charge of negligence, and the case was properly submitted to the jury.

The judgment is affirmed.

BARATARIA CANNING CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 30, 1906.)

No. 1,466.

REMOVAL OF CAUSES—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Ann. Code Miss. § 4287, defines what shall amount to railroad extortion, and section 4288 declares that the party injured may recover of the person or corporation guilty of extortion twice the amount of damages sustained by the overcharge or discrimination, as the case may be. *Held* that, where a declaration against a railroad company for extortion minutely alleged the overcharges claimed, which amounted to $837.18, and the amount of the recovery on that account was alleged to be $1,674.36, the amount in controversy was not sufficient to justify a removal of the cause to the federal court, though the declaration also alleged that, by the railroad company's failure to pay the damages alleged, plaintiff had been damaged in the sum of $2,500.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 130, 131.

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.]

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

This action was begun in one of the state courts of Mississippi. The declaration, after stating the venue and the term of the court in which it was brought, proceeds thus: "The Barataria Canning Company, plaintiff in this suit, by attorney, complains of the Louisville & Nashville Railroad Company, defendants, in action of debt: For that, whereas, heretofore, to wit, on and before the 1st day of January, 1900, it was operating and using a railroad known as the Louisville & Nashville Railroad, running through the state of Mississippi from the state line of Alabama through Biloxi, Harrison county, Miss., to the city of New Orleans, La., and having a connection and an interest in the lines of other railroads in different parts of the United States, for the purpose of carrying persons and property for hire and being then and there a public highway and common carrier for all persons for the transportation of themselves and their property, and for passengers, freight and cars, on the payment of a reasonable compensation to the railroad for such transportation. And, whereas, the Louisville & Nashville Railroad, or persons managing such railroad, did demand and receive more for the services rendered in the transportation of such freight than was allowed by the tariff of rates as fixed by said railroad company, or by the persons in control, with its approval, is guilty of extortion in the manner hereinafter stated [then follow 36 specifications, after which the declaration proceeds]. And said plaintiff further avers that said defendant railroad company did then and there, as above stated, being a common carrier, receive from said plaintiff the sums of money above stated, amounting in the aggregate to the sum of $837.18 above the sum agreed upon by them for such transportation, contrary to statute made and provided, thereby becoming liable and indebted to the plaintiff in the sum of $1,674.36, being the penalty and amount of overcharging to be paid by the defendant railroad company to said plaintiff

whenever requested so to do. And, whereas, the said defendant railroad company, between the 1st day of May, 1900, and the 1st day of June, 1903, had received certain other sums of money, to wit, the sum of $837.18, to and for the use of said plaintiff, to be paid by said defendant railroad company to said plaintiff, when he, the said defendant, should be requested so to do, has not as yet paid the said plaintiff the said sum of $1,674.36, statutory damages above demanded, or any part thereof, but the said defendant railroad company has hitherto refused to do this, and still doth refuse, to the damage of the plaintiff in the sum of $2,500: Wherefore, he brings this suit."

The defendant applied to the state court for removal of the case into the Circuit Court. The petition, as far as material, is in these words: "Your petitioner, the Louisville & Nashville Railroad Company, shows to the honorable court that it is the defendant in the above-entitled cause, and that the matter and amount in this cause exceeds the sum of $2,000.00, exclusive of interest and costs. That the controversy herein is between citizens of different states. That all the plaintiff, the Barataria Canning Company, was at the time of the commencement of this suit, has continued to be and still is a citizen of the state of Mississippi, and that your petitioner, the Louisville & Nashville Railroad Company, was at the time of the commencement of this suit, and still is a citizen of the state of Kentucky; it being a corporation created and organized under the laws of Kentucky, and having its principal place of business therein."

In the Circuit Court the plaintiff moved to remand the case for want of jurisdiction. That motion was overruled, the case proceeded to trial and resulted in a verdict and judgment in favor of the defendant. The plaintiff brought the case here by writ of error, and now assigns that the court erred in overruling the plaintiff's motion to remand this case to the Circuit Court of Harrison county, Miss., where it was originally brought.

D. W. Harper and A. Y. Harper, for plaintiff in error.

Gregory L. Smith, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, announced the decision of the court.

The record in this case fails to disclose such diverse citizenship as to confer jurisdiction on the Circuit Court. Knight et al. v. Lutcher & Moore Lumber Company, et al. (C. C. A.) 136 Fed. 404. The amount of the extortion claimed in the declaration is minutely and carefully summed up, showing the aggregate to be $837.18. The suit is for this amount and for the penalty provided by the statute of Mississippi. Section 4287 of the Annotated Code of Mississippi defines what shall be extortion, as applicable to this case, and the following section (4288) says: "The party injured may recover of the person or corporation guilty of extortion twice the amount of damages sustained by the overcharge or discrimination, as the case may be"—and the declaration clearly states the amount of the recovery it seeks on this account, namely, $1,674.36. We think this minute and full and accurate statement of the damages pleaded cannot be affected by the concluding language of the declaration to the effect that the railroad company has refused payment thereof to the damage of the plaintiff in the sum of $2,500. City of Baltimore v. Postal Telegraph Company (C. C.) 62 Fed. 500. In the case just cited it appears that an action was brought by the city in the state court to recover a tax of $2 for each of 509 telegraph poles maintained in the street, but the declaration concluded: "And plaintiff claims $10,000." Held, that the actual amount in

dispute was the amount of taxes, $1,018, and the Circuit Court could not take jurisdiction by removal.

The judgment of the Circuit Court is reversed, with costs against the defendant in error and the case is remanded to the Circuit Court with instructions to proceed according to law and in conformity to the opinion of this court in this case and in the case of Knight et al. v. Lutcher & Moore Lumber Company et al., supra.

SUN KWONG ON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 6, 1906.)

No. 148.

CUSTOMS DUTIES—CLASSIFICATION—DUCKS' EGGS—EGGS OF BIRDS.

Paragraph 549, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683], relating to "eggs of birds," does not include eggs of the domesticated duck, which are dutiable under paragraph 244, Schedule G, § 1, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], as "eggs, not specially provided for."

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

The decision below, G. A. 5,966 (T. D. 26,151), affirmed the assessment of duty by the collector of customs at the port of New York.

The opinion of the board reads as follows:

WAITE, General Appraiser. The goods in this importation are described in the invoice as "salt eggs," and consist of ducks' eggs in the shell, packed in salt and mud. They were assessed for duty at 5 cents per dozen under paragraph 244, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], which reads as follows: "244. Eggs, not specially provided for in this act, five cents per dozen." It is contended on behalf of the importer that the articles are properly exempt from duty under the provisions of paragraph 549, Free List, § 2, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683], which reads as follows: "549. Eggs of birds, fish, and insects: Provided, however, that this shall not be held to include the eggs of game birds or eggs of birds not used for food, the importation of which is prohibited, except specimens for scientific collections, nor fish roe preserved for food purposes."

The testimony shows that the goods are the eggs of domesticated ducks, and were imported from China. The only witness produced at the hearing testified that the ducks were kept about the house and were tame, and that the eggs are imported for food. It seems clear that the domesticated duck would itself be classified as "poultry." It has frequently been held by this board that ordinary barnyard fowl, such as domestic chickens and geese, were not within the exemption of "birds and land and water fowls" in paragraph 494, Free List, § 2, of the act (30 Stat. 196 [U. S. Comp. St. 1901, p. 1681), being more specifically provided for as "poultry" under paragraph 278, Schedule G, § 1, 26 Stat. 172 [U. S. Comp. St. 1901, p. 1652]. In re Moreau, G. A. 166 (T. D. 10,516); In re Croley, G. A. 3,305 (T. D. 16,660; In re Jones, G. A. 5,103 (T. D. 23,616). It would seem to follow that the eggs of the domestic duck are not eggs of "birds," within the meaning of paragraph 549. That Congress intended paragraph 244 to cover eggs of poultry is confirmed by its position in the act. It is found in Schedule G, 26 Stat. 170 [U. S. Comp. St. 1901, p. 1649], covering "agricultural products and provisions," and falls under the subdivision "farm and field products." It is obvious that, if para-

graph 549 exempts ducks' eggs, it also exempts hens' eggs and eggs of other poultry. This would leave practically no eggs of commercial importance for paragraph 244 to operate upon, as the only eggs not enumerated in paragraph 549 would be such eggs as those of reptiles, frogs, etc. Such a view is too absurd to be entitled to serious consideration.

Counsel for the protestant cites T. D. 23,799, which publishes for the information and guidance of customs officers an act of Congress approved June 3, 1902 (32 Stat. 285, c. 983 [U. S. Comp. St. Supp. 1905, p. 55]), removing the prohibition of paragraph 549 with reference to eggs of game birds imported for propagation; but we cannot see that this statute has any application to the merchandise in this case, which, as we have seen, is not eggs of game birds. We therefore hold that the goods in controversy are not specially provided for in paragraph 549, and were rightfully assessed under paragraph 244 at 5 cents per dozen.

The protest is overruled, and the collector's decision affirmed.

The following is the opinion of the circuit court:

"TOWNSEND, Circuit Judge. Decision affirmed, on the opinion of the Board of General Appraisers."

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer.

Henry A. Wise, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed, approving the opinion of the Board of General Appraisers.

COLUMBIA WIRE CO. v. KOKOMO STEEL & WIRE CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1905.)

No. 1,077.

1. PATENTS—INFRINGEMENT—IMPROVEMENT PATENT.

The patentee of an invention which, although for an improvement only, is of undoubted utility and constitutes a marked advance in the art, is entitled to protection, not only against colorable changes, but also to the benefit of the doctrine of equivalents commensurate with the invention disclosed.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 379.]

2. SAME—CHANGE IN FORM OR ARRANGEMENT OF PARTS.

A patentee is entitled to protection against evasions of the wording of a claim in form or nonessential details, where the substance of the invention, which is unmistakably disclosed in the claims and specification, has been appropriated.

[Ed. Note.—For cases in point see vol. 38, Cent. Dig. Patents, § 370.]

3. SAME—INTERCHANGEABILITY OF PARTS.

Interchangeability of parts in two machines is not a conclusive test of infringement, where in the alleged infringing machine the parts have merely been rearranged by transferring their different functions, while the principle of operation remains the same, and the recombination as a whole is the equivalent of that of the patent.

4. SAME—PROTECTION AGAINST IMPROVER.

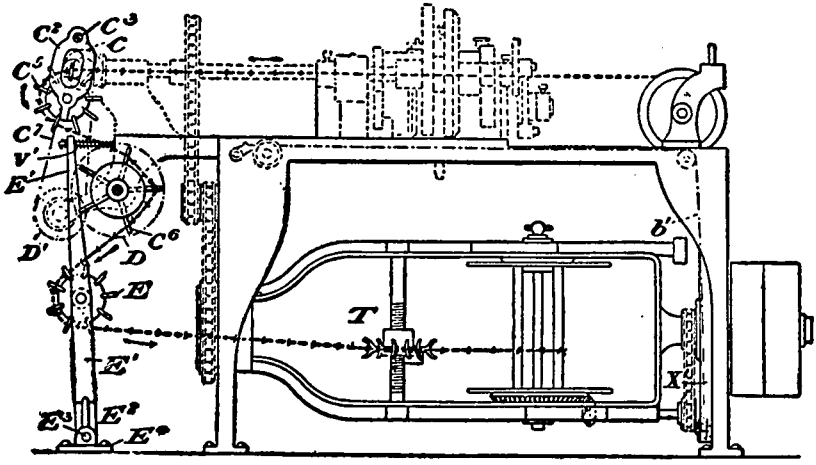
The exclusive privilege of a patentee is to be protected to the full extent of his invention and grant, equally against an improver and the general public.

5. SAME—WIRE-BARBING MACHINE.

The Bates patent, No. 365,723, for a wire-barbing machine, in which three butterfly wheels are used in combination in delivering the wire from the barbing mechanism to the twisting and spooling mechanism, discloses patentable invention; also *held* infringed by the machine of the Fredrich patent, No. 711,303.

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

The appellant, Columbia Wire Company, is the owner of letters patent No. 365,723, issued June 28, 1887, to A. J. Bates, and this appeal is from a decree dismissing its bill for infringement thereof for want of equity. The patent specifies, as the subject-matter of the invention, "improvements in wire-barbing machines," and the mechanism is a combination and arrangement of old means in the art for making barbed wire, "in which short pointed barbs are cut from a wire, then coiled around one or both of the strand wires, and the strand wires firmly twisted together and reeled upon a spool." In its general structure, objects, and operation, the mechanism is not novel, and the only elements of novelty claimed or involved in the suit are the combination of three so-called butterfly-wheels applied to the feeding means in the manner and for the objects described in the patent, so that elaborate specifications therein of the various means employed in the machine as a whole are not essential for an understanding of the issues. While the butterfly-wheel appears in the prior art, no three-wheeled combination is disclosed prior to this patent. These wheels are arranged between the coiling and the twisting-and-spooling means, and accomplish a great improvement in the speed and accuracy of the production. The following drawing, exhibited at the hearing, clearly indicates the structure of this three-wheel combination:



The structure and operation of these wheels respectively are thus well described in the appellant's brief:

"The top wheel, the wheel, C⁵, of the patent, is an oscillating wheel, mounted on a swinging arm, C², which is oscillated back and forth by a crank-roller, C. Each forward swing of this wheel draws a certain length of wire forward, and at each back swing the wire thus drawn forward is taken up by the wheels below and by the twister. The part of the strand wire back of the butterfly-wheel therefore moves intermittently, with periods of rest at which the barbs are cut and coiled on the strands, while the part of the strands in advance of this wheel is taken up continuously by the spooler and twister and travels without stop. The middle wheel, C⁶, of the patent has stationary bear-

ings, and the bottom wheel, E, of the patent is mounted on a yielding arm, E^1, backed by a spring, V^1, so that it will yield towards and from the twister as the tension of the barbed wire increases or diminishes. The wire passes around these wheels in a zigzag manner and from the lower wheel it passes to the twister. Each forward swing of the top butterfly-wheel draws a certain length of wire forward through the barb-coiling mechanism. In so doing it coacts in an important way with the middle wheel, for as the strand wires pass forwardly around the top wheel and then rearwardly around the middle wheel, the top wheel acts upon a bight or doubled portion of the wire, and will draw forward an amount of wire twice as long as the distance of its own oscillation. The rotating butterfly-wheel below is at the same time also drawing the wire forward at an equal rate, so that at each forward oscillation of the top butterfly-wheel four times the distance of its travel in length of wire is drawn through the machine. The patent specification emphasizes this as important and says: 'During each half rotation of the machine, while the barbs are being placed on the strand wires, it is supplied with wire by the slack wire given out by the return vibration of wheel, C^5; and when wheel, C^5, is vibrated reversely to take up the wire, wheel, C^6, is fed by drawing the wire around wheel, C^5, at the same time said wheel, C^5, is taking up, and thus during the time wheel, C^5, is taking up wire, wheel, C^6, has drawn one-half the required feed around wheel, C^5, and as the wire is passing to and about wheel, C^5, and back toward the machine to wheel, C^6, by means of such passage of the wire, the wire taken up by wheel, C^5, is equal to twice the distance of the vibration of said wheel, and thus said wheel, C^5, is vibrated but one-fourth the distance that the barbs are placed apart, and consequently has a very easy and uniform movement.'

"The importance of the 'easy and uniform movement,' which the specification mentions, is that, notwithstanding the high speed of the machine and the great frequency of oscillation of the top butterfly-wheel, the extent of its oscillation, being reduced to one-fourth of the length of the wire drawn out thereby, is so short that it produces very little jar and friction, and the machine can therefore be used without rapid and destructive wear. The top butterfly-wheel vibrates 600 times per minute. If the middle wheel were dispensed with, the top wheel would no longer operate upon a bight of the strand wire. The distance of its oscillation would have to be doubled in order to draw out the same length of wire. It would have to travel twice as far in the same length of time. This would double the jarring of the parts; and as the item of wear and tear is of the greatest consequence, the saving which is effected by the simple expedient of reducing the travel of the top wheel by using the middle butterfly-wheel is an important element. It enables the machine to be driven at a very high speed without increasing the wear of the working parts. The bottom butterfly-wheel is of like importance. It is mounted on a yielding arm, E^1, and the barbed wire passes from it directly to the twister. Therefore every change in the tension of the wire will be indicated by the position of the arm, E^1. The operator's eye will detect at once a forward motion of the arm which indicates too great tension on the wire, or a relaxing of the arm which indicates too little tension, and in response to the indication thus afforded he can immediately adjust the friction brake and maintain the tension uniform. The machine can therefore be driven at the highest rate of speed of which it is capable without impairing the control exercised by the operator. All he has to do is to glance occasionally at the position of the yielding arm which operates as visibly and as certainly during rapid running as when the machine is running slowly. The specification says on this point: 'The yielding end of arm, E^1, which supports the butterfly-wheel, E, serves as an indicator for the operator of the machine to indicate to him about what tension is on the barbed wire as it passes to the spooling mechanism. When spring, V^1, on rod, V, of said arm is closely compressed, it indicates that the tension is too great, and the operator then turns back the hand-wheel, b, to loosen the spooler-brake, and when said tension is loosely expanded it indicates that the tension is not sufficient, and the operator then tightens the brake of the spooling mechanism, and thus is enabled to maintain a uniform tension.'"

The patent contains thirteen claims, but claims 5, 7, 9, and 13 are relied upon for the alleged infringement, namely:

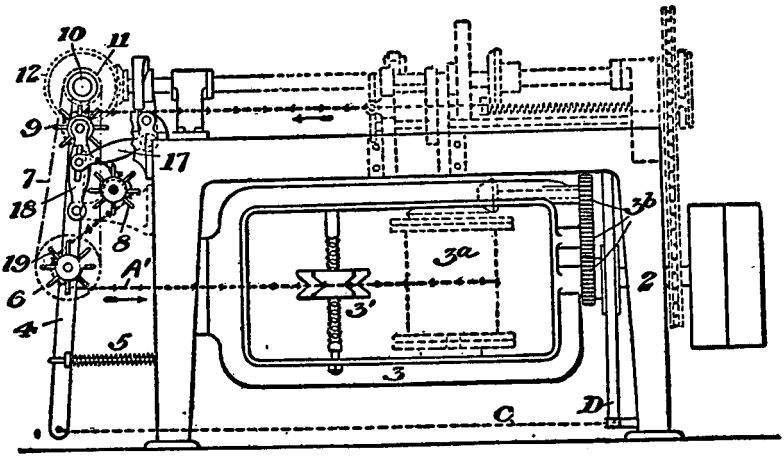
"(5) In a wire-barbing machine, and in combination with the barbing mechanism, the vibrating butterfly-wheel, C^5, yielding butterfly-wheel, E, and stationary driven butterfly-wheel, C^6, and mechanism, substantially as described, for operating said parts, as and for the purpose set forth."

"(7) In the wire-barbing machine described, and in combination with the positively-driven wheel, C^6, and a driven spooler, the yielding wheel, E, arranged between said wheel, C^6, and spooler, substantially as and for the purpose set forth."

"(9) In the wire-barbing machine described, the combination of the oscillating butterfly-wheel, C^5, driven butterfly-wheel, C^6, and yieldingly-supported butterfly-wheel, E, constructed and arranged to operate in the manner substantially as and for the purpose specified."

"(13) In a wire-barbing machine wherein the strand-wires, being barbed, are intermittingly drawn through the barbing mechanism of the machine, the combination of a butterfly vibrating wheel arranged to move toward and from and support the barbed wire moving from the barbing mechanism, a continuously-driven butterfly-wheel arranged to take and support the barbed wire from said vibrating wheel, and an idler butterfly-wheel arranged to take and support the barbed wire paid out by said driven butterfly-wheel and guide it to the spooling mechanism, whereby the barbed wire is intermittingly drawn through the barbing mechanism by the joint action of the movement of said vibrating butterfly-wheel from the barbing mechanism, and the said driven butterfly-wheel drawing the wire from and over said vibrating wheel, and whereby the barbed wire is continuously paid out to the spooling mechanism by means of the continuous movement of said driven wheel, being supplied with slack wire from said vibrating wheel during the time said vibrating wheel is moving toward the barbing mechanism, substantially as and for the purpose specified."

The defenses set up were (1) want of invention, (2) noninfringement, and (3) justification under letters patent No. 711,303, issued to J. E. Fredrich, October 14, 1902; and the decree of the Circuit Court rests on the view that the appellee's machine (made in conformity with the Fredrich patent) does not infringe the three-wheel combination of the Bates patent. The structure of this machine, in so far as concerns the charge of infringement, appears in an exhibit drawing, as follows:



Other facts which are deemed material are mentioned in the opinion.

For opinion below, see 139 Fed. 578.

John R. Bennett and T. W. Bakewell, for appellant.

Thomas A. Banning and C. C. Shirley, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

The evidence is convincing, as well as undisputed, that the three-wheel combination of the Bates patent achieved success and popularity in the production of barbed wire, with great improvement in the speed and accuracy of the operation, and thus made desirable advance in the barb-wiring art. In reference to the contention that the patent is invalid for want of invention—that it involved "nothing more than mechanical skill" to so improve the two-wheeled combination disclosed in an earlier patent, No. 270,646, issued to Edenborn & Griesche in 1883—it is sufficient to remark that the assumed prototype for the use of two butterfly-wheels was a failure, and Bates was the pioneer in his conception of a three-wheel combination, which solved the problem where other inventors had failed in the quest. Exact measurement of the faculty thus brought to the solution is needless in the face of this undeniable achievement. The combination so devised is both new and useful in the sense and within the objects of the patent law, and its patentable novelty is substantially conceded by a leading expert, testifying on behalf of the appellee. That it was patentable subject-matter is undoubted.

In the subsequent device of Fredrich, under which the appellee's machine is made, three butterfly-wheels are used in a combination, with all the general characteristics and advantages of the Bates three-wheel combination, and differing only in certain details and transpositions, upon which escape from infringement is sought. The facts are neither complicated, nor disputed in any feature deemed material, and solution of the issue of infringement rests on the scope of the invention and claims in suit. The machines are alike in adopting the barbing devices and the twisting and spooling mechanism of the prior art. Both adopt the butterfly-wheel combination for delivering the barbed wire from one to the other of the mechanisms. The combination thus introduced automatically regulates the delivery for twisting and spooling, so that uniform tension is preserved in both operations, while the wire is reeled and accumulating upon the spool. No such effective device appears prior to that of Bates, and the want of it was well recognized as limiting the speed and reliability of the operation. With the Bates device the production was increased about 50 per cent., and the machines under the patent came into extensive use and popularity.

In the Bates machine the upper wheel, C^5, is an oscillating wheel, mounted on a swinging arm, C^2, oscillated by the crank roller, C. The middle wheel, C^6, has stationary bearings and is "the positively-driven wheel," while the lower wheel, E, is an idler mounted on a yielding arm, E^1, provided with a spring, V^1, so that it will yield to and fro as the wire passes to the twister. In the appellee's machine the three wheels are alike in general location, aside from individual function—the upper wheel oscillating, the middle wheel on stationary bearings, and the lower wheel on a yielding arm provided with a spring—with like function of the combination in conveying the barbed wire to the twister and spooler. The departures from the patent specifications, upon which the defense relies, are these: (1) Instead of driving the

middle wheel, the power is applied to the lower wheel, so that it becomes "the positively-driven wheel," and in this view it is mounted on a swinging arm attached above the wheel, instead of below, with the spring transposed accordingly, while the middle wheel is made the idler, which is, in the language of the appellee's brief, "exactly the reverse of the case of the Bates patent"; and (2) while the lower wheel of Bates serves as an indicator of the tension for the operator to make adjustment with the friction brake, the appellee attaches the cord of the brake to the yielding arm, so that the motion of the arm automatically effects the adjustment.

1. The first-mentioned transposition of the functions of middle and lower wheels plainly evades the specific form of the combination described in the patent. It is true, as urged on behalf of the appellee, that it has "no middle positively-driven stationary" wheel, "no lower yieldingly mounted idler" wheel, and "no yielding butterfly-wheel arranged between the positively-driven wheel and the spooler." With the power transferred to the lower wheel and the middle wheel used as the idler, these descriptions are, of course, inapplicable, except in like reverse order, though the several elements and advantages of the patent combination are substantially appropriated. Obviously this change involves mere mechanical rearrangement of the driving means and yielding arm, and no difference in principle or result of the combined means and operation. The contentions that the alleged infringement is not an adaptation of the Bates three-wheeled combination, but is founded upon and follows the teachings of the two-wheeled combination of the prior Edenborn & Griesche patent (No. 270,646), and that it is, substantially, a new two-wheeled combination, are without merit. True it is that the unsuccessful device of Edenborn & Griesche shows two butterfly-wheels, one of which oscillates and the other is stationary and positively driven; but the third wheel of Bates' device with its yielding-arm provision and results—conceded by the appellee's expert to be novel and "substantive improvement"—neither appears nor is suggested in that patent. This essential element of the combination is equally distinguishable in the appellee's machine for like effect, and is plainly derived from Bates. The three wheels are actually used in the alleged infringing machines, as equivalent means for equivalent objects, so that it is unnecessary to consider whether its idler wheel can be taken out and leave the machine operative, minus the function of the idler. If infringement thus appears, the owner of the patent cannot be denied relief, though protection may be limited by the terms of the claims to such three-wheel form. Du Bois v. Kirk, 158 U. S. 58, 66, 15 Sup. Ct. 729, 39 L. Ed. 895.

The conception of Bates was not pioneer invention in the broad sense of the term, and the mechanism described in the patent was merely an improvement upon old wire-barbing machines. Nevertheless the invention was meritorious—a marked advance in that art, and of unquestionable utility—so that the patentee is not only entitled to protection of his monopoly against colorable evasions, but, for such protection, is entitled as well to the benefit of the doctrine of equivalents, commensurate with the invention disclosed, though not of the broad range which is accorded

an invention of primary character. Miller v. Eagle Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310, 38 L. Ed. 121, 12 Notes U. S. Rep. 487; Bundy Manufacturing Co. v. Detroit Time-Register Co., 94 Fed. 524, 540, 36 C. C. A. 375; National Hollow Brake Beam Co. v. Interchangeable B. B. Co., 106 Fed. 693, 710, 45 C. C. A. 544.

We are of opinion that the means thus transposed in the appellee's machine, if not within the definition of colorable evasions which infringe the patent in any view of its scope, are plain appropriations of the essence of the Bates conception by equivalent means, and infringements of the patent within the well settled rule referred to. All the elements of the patent combination are employed with substantial identity in their use, and departure appears from the letter of the claims only, in the arrangement of these elements, without substantial difference in the principle of operation. The policy and rules of the patent law require that the patentee be protected against such evasions of the wording of a claim in form or nonessential details, when the substance of the invention is thus used and is unmistakably shown in the specifications and claims. Winans v. Denmead, 15 How. 330, 343, 14 L. Ed. 717; 5 Notes U. S. Rep. 331; Ives v. Hamilton, 92 U. S. 426, 431, 23 L. Ed. 494; Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; and 9 Notes U. S. Rep. 533; Elizabeth v. Paving Co., 97 U. S. 126, 137, 24 L. Ed. 1000; Hoyt v. Horne, 145 U. S. 302, 308, 12 Sup. Ct. 922, 36 L. Ed. 713; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 568, 18 Sup. Ct. 707, 42 L. Ed. 1136; International Mfg. Co. v. H. F. Brammer Mfg. Co. (C. C. A.) 138 Fed. 396, 400.

The form in which the middle and lower wheels respectively are arranged for use in the combination is not of the essence of the invention. Patentability resides in the combined use of the wheels, and to adapt one or the other to be driven, for the object in view was incidental only—a matter of mere mechanical choice and skill. To change the driving function from the stationary (middle) wheel to the yielding (lower) wheel corresponding changes of equipment to that end were, of course, needful, as exemplified in the appellee's structure; but there is no substantial departure in principle or idea of means for the combination. With such "necessary rearrangement of the driving mechanism," it is admitted in the testimony of the appellee's expert that the yielding wheel of the Bates device can be made the driven wheel (while the middle wheel becomes the idler), and thus "operate as well as in the construction shown in the patent," and that no reason appears why the "defendant's machine would not operate perfectly" with the middle wheel "made the positively-driven wheel."

Interchangeability is referred to in Miller v. Eagle Mfg. Company, supra, and other cases cited in the argument on behalf of the appellee, as an "important test in determining the question of infringement," and it is contended that the interchangeability of parts and functions thus conceded does not meet the requirements for such test, upon the assumption that the interchange involves substantial reorganization of one and the other structure. This contention is without force, under our conclusion that these deviations are plain equivalents within the scope of the patent, and do not depart substantially from the invention. If the test

is applicable to such cases of recombination, the corresponding arrangement of means is essential for its application, and in that view interchangeability appears for any value it may have in solving the issue. While the middle wheel is deprived of its function as a driven wheel, in the changed structure, it retains the function of regulating the tension of the wire in connection with the action of the top (oscillating) wheel, and is so employed in the alleged infringement. It is immaterial whether this benefit is of less importance in the appellee's structure, or whether the machine can be made operative without this wheel (Du Bois v. Kirk, supra), as difference in the degree of benefit will not authorize such use nor establish want of identity, in the sense of the patent law, of the means so combined. Moreover, in the Fredrich patent (No. 711,303), under which justification is sought for its use, this wheel is made an element of the claim and described as "a fixed intermediate guide-wheel over which the barb-wire travels for intermittently feeding the wire."

The further argument that noninfringement must be presumed from the grant of the above-mentioned Fredrich patent is equally unsound upon the foregoing view of substantial identity in fact. Any inference so arising is, of course, rebuttable, and is rebutted in the present instance, as we believe, not only by the evidence referred to, but in the fact that subordination to the patent in suit appears to be expressly recognized in the proceedings upon the Fredrich application, as shown in the file contents in evidence. On rejection of the original broad claims in that application, for conflict with the Bates patent, such claims were amended upon representation that the invention "was an improvement over the construction of Bates."

2. The remaining contention, that the appellee's device escapes infringement through its additional means and function in the automatic regulation of tension, does not impress us as tenable, under our conclusion that the three-wheel combination of the patent is appropriated, with all its results, as an entirety. In the testimony of one of the experts for the appellee the sole distinction between the devices in this feature is stated in plain terms. After mentioning the difficulties which had arisen in making barbed wire from want of uniformity in tension as the spooling progressed, the witness states: These evils "are corrected in the Bates machine" by "a rope, b^1, which passes to the friction brake, x^1, and is operated by the workman, in accordance with the indication afforded by the movement of the swinging spring-held arm which carries the third butterfly wheel"; while in the appellee's machine "these same evils are corrected by a like rope which passes to the friction break," and instead of operation by the workman, upon the indication given by the swinging arm, such arm "not only indicates the difference in tension, but automatically, with such indication, pulls the rope." This is a mere addition to the patented machine, supplementing the function of one element, without changing the co-operative function of the wheels in their combination. So, assuming that it is an important improvement (which is disputed in the appellant's testimony), and patentable as an improvement, its association with the means of the prior patent is unauthorized without license from such patentee. Cochrane v. Deener, 94 U. S. 780, 787, 24 L. Ed. 139; Cantrell v. Wallick, 117 U. S. 689, 694, 6 Sup. Ct.

970, 29 L. Ed. 1017; Hoyt v. Horne, 145 U. S. 302, 309, 12 Sup. Ct. 922, 36 L. Ed. 713; Walker on Patents (3d Ed.) § 347.

The alleged improver may have a valid patent for his new means, and is entitled to its exclusive use; but the prior patent equally excludes him from the use of the prior invention, with or without his improvement. As expressed by Mr. Justice Bradley, in Cochrane v. Deener, supra, he cannot appropriate the earlier invention, "even though supplemented by and enveloped in very important and material improvements" of his own. Each has the right to enjoy the monopoly awarded by his patent, but cannot be permitted to invade the limits of the other's invention and patent privilege. The object of the law authorizing the grant is to stimulate invention by this reward to the inventor. It must be administered in conformity with this liberal policy, as a wise exception from the common-law rule against monopolies. So the exclusive privilege of the patentee must be protected to the full extent of his invention and grant, while its limitations are to be strictly observed, to prevent interference, beyond the fair scope of valid grant, with improved means or other inventions, the promotion of which is the constant view of the patent policy. Within such limitations, however, the exclusion applies equally against the improver and the general public, and we are of opinion that the alleged improvement does not escape the patent.

The decree of the Circuit Court is reversed accordingly, with direction to enter a decree in favor of the appellant in conformity with this opinion.

MAHONY v. MALCOM.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,176.

PATENTS—INVENTION—EYE SHADES.

The Mahony patent, No. 729,500 for an eye shade consisting of two pieces of thin light flexible material, such as celluloid, one crescent shaped and the other a straight strip, pivotally attached together at the ends so as to lie flat when not in use, and to form a visor and a band for the back of the head, respectively, when in use, while for a simple device was not anticipated, and discloses invention. Also *held* infringed.

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

Henry Love Clarke, for appellant.

Florence King, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. Appellant's bill for infringement of letters patent No. 729,500 issued to him on May 26, 1903, was dismissed on the ground that the patent was void for want of invention.

The patent is for an eye shade made of two pieces of flat, thin, light, flexible material, such as celluloid. One piece is cut in the form of a crescent; the other, of a straight strip long enough to reach between the horns of the crescent. The horns and the ends of the strip are pivotally connected by detachable clips. When not in use, this

eye shade lies flat. In use, the flat crescent by conforming to the forehead is made into a visor, and the strip, turning on the pivots, becomes a band about the back of the head. There are minor features relating to adjustability and ventilation, but the validity of each of the twelve claims (a recital whereof is unnecessary on account of appellee's admitted appropriation) depends upon the patentable novelty of the device as above described.

Twelve earlier patents are shown in the record, ranging in date from 1876 to 1899. Ten of them, and they cover the whole period, are for various modifications or improvements of the old, stiff, curved visor. None responds in any way to the claims in suit. Neither of the remaining two, the Platt patent of 1877 and the Wagenet of 1884, can be read upon appellant's patent. Platt's eye shade consists of a rigidly curved visor and a rigidly curved head band, pivotally connected, so that the two pieces may assume various angles to suit the wearer's notion of a proper fit. After the publication of appellant's patent 26 years later, it was easy enough to see that if Platt's rigidly curved head band were turned up at right angles to the horns of the rigidly curved visor (a position that was never intended in use or not in use) and then the whole were hammered flat, the result might serve as a pattern for cutting from flexible material something that would resemble appellant's eye shade. But Platt did not do it; neither did any of the other eleven inventors who during those years were animated with the hope of capturing the trade by producing an eye shade that was better for the manufacturer, for the merchant, and for the wearer. Ten of them stuck to the old rigid form. Only one, Wagenet, saw the advantage of using flexible material. And if the mental picture of the Platt eye shade flattened out as a pattern was so obvious to the workman skilled in the art, it is strange that Wagenet should have spent his time and money in producing the cumbersome thing that he did, something like a big horseshoe, with an exaggerated toe, cut out of celluloid, to be fastened together at the heels. That was in 1884. If, after Wagenet had proven the advantages of flexible material, to the manufacturer in simplifying production, to the merchant in handling articles that save space and are neatly cartoned, and to the wearer in having a light, easy-fitting, flexible, flat-lying eye shade, the skilled mechanic might reasonably have been expected to produce the device in suit by combining the teachings of Platt and Wagenet, it is remarkable that the seven patentees during the succeeding 15 years should have reverted to the rigid type.

Outside the record, it is said that from time immemorial eye shades have been made by cutting visors from paper and tying them on with strings. If this was a matter of common knowledge, so much the more marked was the intuitive flash that finally came to Mahony's mind, and to his alone.

We think there was invention of the "happy thought" kind, as explained in Williams v. American String-Wrapper Co., 86 Fed. 641, 30 C. C. A. 318, and in Eastman v. Mayor of New York (C. C. A.) 134 Fed. 844. As we said in Regent Mfg. Co. v. Penn Electrical Co., 121 Fed. 80, 57 C. C. A. 334:

"The device seems exceedingly simple; but its very simplicity, in such an old field, should be a warning against a too ready acceptance of the ex post facto wisdom of the bystander."

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

STOVER MFG. CO. v. ARCADE MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,166.

PATENTS—INFRINGEMENT—MOP STICK.

The Stewart patent, No. 499,402, for a mop stick, as limited by the prior art, *held* not infringed.

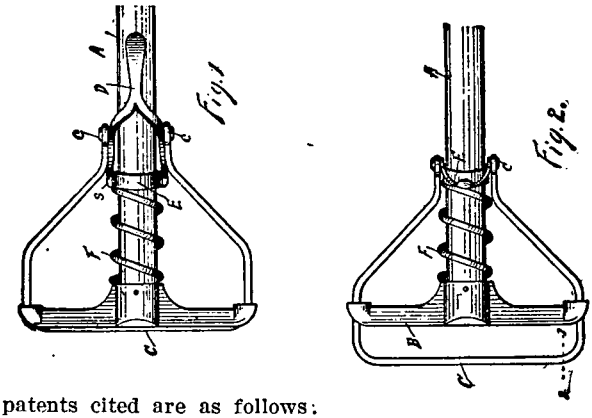
Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill in the Circuit Court was to restrain the infringement of letters patent No. 499,402, issued June 13th, 1893, to Thomas W. Stewart for a mop. The claims of the plaintiff are as follows:

1. A mop stick, comprising a stick proper, provided with the T-head having the grooved ends, forming one portion of the clamp, the rod having a straight portion forming the other part of the clamp and from thence converging rearwardly to the sides of the stick, a lever to which the free ends of said rod are pivoted, a ring loose on the stick, to which the forked ends of the lever are pivoted, and a spring between said ring and the T-head; substantially as set forth.

2. The combination of a mop stick provided with a T-head, forming one part of the clamp, a movable rod forming the other part of the clamp, a lever to which the free ends of said rod are pivoted, said lever being fulcrumed to a movable support on the stick, and a spring exerting a resistance against the lever when the latter is thrown back; substantially as set forth.

The drawing is as follows:



Other patents cited are as follows:

No. 3,306, Oct. 18, 1843, S. Johnson; No. 41,081, Jan. 5, 1864, Mason & Sheldon; No. 69,368, Oct. 1, 1867, G. W. Sanders; No. 89,803, May 4, 1869, G. Stackpole; No. 110,180, Dec. 13, 1870, L. Williams; No. 112,556, March 14, 1871, J. Davis; No. 112,615, March 14, 1871, J. Messinger; No. 117,943, Aug. 8, 1871, Luke W. Taylor; No. 202,434, April 16, 1878, G. W. Gomber; No. 208,165,

Sept. 17, 1878, H. L. Franklin; No. 211,987, Feb. 4, 1879, W. Geist; No. 249,766, Nov. 22, 1881, J. Hunt; No. 257,294, May 2, 1882, F. Davis; No. 262,008, Aug. 1, 1882, J. B. Crawford; No. 267,289, Nov. 7, 1882, A. Walker; No. 297,880, April 29, 1884, G. M. Van Riper; No. 335,295, Feb. 2, 1886, J. McWilliams; No. 350,240, Oct. 5, 1886, G. W. Fuller; No. 368,486, Aug. 16, 1887, J. H. Omo; No. 420,798, Feb. 4, 1890, J. M. Holmes; No. 457,425, Aug. 11, 1891, A. H. Jackson; No. 466,521, Jan. 5, 1892, W. L. Litts; No. 468,036, Feb. 2, 1892, W. F. Loan; No. 472,471, April 5, 1892, C. Christy, Jr.; No. 685,858, Nov. 5, 1901, C. Morgan; No. 699,312, May 6, 1902, A. S. Held; No. 699,313, May 6, 1902, A. S. Held; No. 699,314, May 6, 1902, A. S. Held; No. 699,315, May 6, 1902, A. S. Held; British patent No. 392 of 1884, R. W. Kenyon.

In the Circuit Court it was found that appellee's device did not infringe the patent, and the bill was dismissed for want of equity.

The further facts are stated in the opinion.

L. L. Morrison, for appellant.

Harry Bitner and Lysander Hill, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion.

The gist of appellants' invention is in so placing a fulcrum next to a ring placed loosely around the handle—the whole cushioned on a spiral spring running also around the handle—that when the lever is brought down, the spring will close, thus intensifying the grip of the clamp upon the mop. The appellee's device contains all these elements except the ring. If the appellant had been the first person to utilize a spring cushion for the purpose of intensifying the grip of the clamp upon the mop, the patent might be given a scope that would include appellee's device as the mechanical equivalent. But the appellant was not the first to utilize, for that purpose, a spring cushion upon which rested the fulcrum of the lever. Johnson as early as 1843 used a clamp, intensified by a spring that wound around the handle. Jackson in 1891 fulcrumed his lever upon cushioned springs. The only respect in which appellant's device differs mechanically from a long line of well known mops, is in the introduction of the loose ring—an element pointed out in the first claim as an essential element; and unquestionably implied in the second claim. The appellee omits this element; and does not employ, therefore, any part of the combination patented that was not open to him in the prior art.

The decree of the Circuit Court is affirmed.

HASKELL GOLF BALL CO. v. PERFECT GOLF BALL CO.

(Circuit Court, S. D. New York. February 3, 1906.)

PATENTS—INFRINGEMENT—GOLF BALLS.

In the Work & Haskell patent, No. 622,834, for a golf ball comprising a core composed wholly or in part of rubber thread wound under tension and an inclosing shell of gutta-percha, the word "thread" is not limited to a compound cord made by twisting together two or more strands, but includes any strip of rubber of whatever shape, and the patent is infringed by a ball made as described therein with a core made by winding a rubber band under tension.

In Equity. Bill for alleged infringement of golf ball patent No. 622,834, dated April 11, 1899, and granted to Bertram G. Work and Coburn Haskell, and thereafter assigned to the complainant, Haskell Golf Ball Company.

Charles Neave (Edmund Wetmore, of counsel), for complainant.
Warfield & Duell, for defendant.

RAY, District Judge. As the defendant admits, or at least does not question, the validity of the patent in suit, the only question here involved is that of infringement. The defendant insists that in view of the file wrapper and contents, which are in evidence, the complainant's patent is so limited that the defendant is at liberty to produce and sell a golf ball in every respect like that of the complainant, both in material, form of construction, and size, except that defendant substitutes what it calls an exceedingly thin and highly elastic rubber band in place of the rubber thread mentioned in the specifications and claims of the patent in suit. The contention seems to be that, in view of the file wrapper and contents, the complainant is limited in making the core of its ball to "a rubber thread" and is not entitled to the doctrine of equivalents, and that as the defendant in making its ball uses a very thin rubber band about one inch in width when not stretched substantially to its limit, and which is about two or three tenths of an inch in width, and much thinner when stretched substantially to its limit, it does not infringe.

It is not substantially disputed that this thin rubber band, so called by the defendant, is the equivalent in all material respects of a rubber thread. In both cases the mode of constructing the core of the ball is to wind the thread in the one case and the band in the other, stretched substantially to its utmost tension, upon itself or upon some small hard substance forming a center, until a ball of the required size is obtained. In either case, and whether we use the thread or the band, we have a hard ball, composed entirely of rubber except when the center mentioned is used, and this ball of rubber, called "the core," is then inclosed in a covering of gutta-percha called in the specifications of the patent "a gutta-percha shell of adequate thickness." In the claims this shell is termed "a gutta-percha inclosing shell for the core," and in claim 2 "an inclosing shell of gutta-percha." In both claims it is specified that this inclosing shell of gutta-percha shall be "of such thickness as to give it the required rigidity."

The patent in suit contains two claims, both of which are claimed to be infringed, and these claims read as follows:

"(1) A golf ball, comprising a core composed wholly or in part of rubber thread wound under high tension, and a gutta-percha inclosing shell for the core, of such thickness as to give it the required rigidity, substantially as described.

"(2) A golf ball, comprising a central core section of relatively nonelastic material, rubber thread wound thereon under tension, and an inclosing shell of gutta percha, of such thickness as to give it the required rigidity, substantially as described."

As originally presented at the Patent Office the patent contained five claims, as follows:

"(1) A ball, comprising an elastic core and a gutta-percha shell inclosing said core, substantially as and for the purpose set forth.

"(2) A ball comprising a core formed with a rubber thread wound into spherical form under tension approaching the elastic limit, and a shell of relatively hard, inelastic material inclosing said core, substantially as and for the purpose set forth.

"(3) A ball comprising a core composed wholly or in part of rubber thread wound under high tension, and a gutta-percha shell inclosing said core, substantially as and for the purpose set forth.

"(4) A ball comprising a central core section, rubber thread wound thereon under tension, and an inclosing shell of relatively hard, inelastic material, substantially as and for the purpose set forth.

"(5) A ball comprising a central core section of relatively nonelastic material, rubber thread wound thereon under tension, and an inclosing shell of gutta-percha, substantially as and for the purpose set forth."

Eventually all of these claims were dropped or abandoned, excepting claims 3 and 5, which claims were amended and allowed in the form and reading as above stated.

It will be noted that claim 3 read "a ball" and that the claim as allowed reads "a golf ball," and that claim 3 read "and a gutta-percha shell inclosing said core, substantially as and for the purpose set forth" while claim 1, as allowed, reads "and a gutta-percha inclosing shell for the core of such thickness as to give it the required rigidity, substantially as described." The changes relate to the shell. It will also be noted that claim 5, now claim 2, read "a ball," and now reads "a golf ball," and that claim 5, now claim 2, ended with the words "substantially as and for the purpose set forth" while now it reads "of such thickness as to give it the required rigidity, substantially as described," the latter words quoted being substituted for the former quoted words. This change relates to the shell. In reading the file wrapper I do not find that the words "rubber thread" were in any way defined or limited, nor do I find that the meaning of these words was at any time brought in question.

In the specifications of the patent, as finally allowed, we find the following:

"Our object is to provide a ball for the above purposes 'the game of golf, though it may be used in other games where a ball of similar properties is desired,' which shall possess the essential qualities of lightness and durability and which shall also have the property of being comparatively nonresilient under the moderate impacts incident to its use, but highly resilient under the stronger impacts. We accomplish the objects sought by making the main body of the core of rubber thread wound under tension into spherical form

and providing the same with an adequately thick covering of gutta-percha or one of its substitutes, such as balata gum, the covering possessing the attributes, comparatively speaking, of inelasticity, toughness, hardness, and lightness. * * * The preferred manner of making the ball is by winding a rubber thread upon itself, under a tension approximating the elastic limit, to produce a spherical core A and covering this core with a gutta-percha shell of adequate thickness. * * * The shell thus formed to be effective must be of such thickness as to remain comparatively rigid under the moderate impacts to which the ball is subjected, as in the case of light blows with the golf club or on striking the earth, but to yield under the more violent impacts, as in 'driving,' whereby the force is brought to bear upon the elastic core. * * * It is an essential feature of the construction that the core shall closely fill the interior of the shell and desirable that the core be confined therein under some compression. A core produced by winding a rubber thread under high tension into spherical form possesses a remarkably high degree of elasticity coupled with high rigidity in the sense of resistance to deformation, which imparts to the ball the property of very great resilience. As the result of the described construction, therefore, our golf ball has exceptionally high driving qualities owing to the fact that the impact of a golf club is capable of distorting it through the shell by reason of the adequate flexibility of the latter and little tendency to bound by reason of the fact that little, if any, distortion takes place upon contact with the ground. The highest resistance to change in form, therefore, is attained when the thread is at all parts of the ball under a tension close to the elastic limit, tending to maintain a perfect sphere, whereby the slightest distortion is resisted by approximately the full strength of the material, and the effect is enhanced by the close environment of the elastic body within the comparatively unyielding shell. In the appended claims the term 'elastic core' is meant to cover that portion of the ball included within the outer shell and composed wholly or mainly of rubber thread, while the term 'gutta-percha shell' is intended as limiting the claims wherein it is employed to gutta-percha or one of its substitutes, such as the one mentioned above."

We do not find in these specifications any description of the rubber thread to be used in the construction of these golf balls. We are not limited to a thread of any particular shape or size. It is not suggested that this rubber thread must be round or square; that it may not be wider than it is thick; that it must be a twisted strand of rubber or composed of two or more strands twisted or spun together. In the Century Dictionary we find that thread is "a twisted filament of a fibrous substance, as cotton, flax, silk or wool, spun out to considerable length. In a specific sense, thread is a compound cord consisting of two or more yarns firmly united together by twisting." It is, I think, evident that the words "rubber thread" are not used in this sense in this patent. The Century Dictionary gives the secondary meaning as "A fine filament or thread-like body of any kind; as, a thread of spun glass; a thread of corn silk." A further definition is "In mining, a thin seam, vein, or fissure filled with ore." A further definition is "A very slender line applied on a surface." We also find that "A thin strip of gilded paper often used in Oriental brocaded stuffs," is called a thread. The word "filament" may mean a separate fiber or fibril of any vegetable or animal tissue or product, natural or artificial, or of a fibrous mineral; as a filament of silk, wool, cobweb, or asbestos; a cortical or muscular filament.

While ordinarily we understand by the word "thread" some twisted filament of a fibrous substance, still this would not apply when speaking of a thread of glass or necessarily of a thread of leather. Would

it be incorrect to speak of something, like a horse blanket or heavy fur overcoat, as being sewn together with threads of leather, when such threads were formed of long small strips of leather cut substantially square? Looking to the definition of the word "strand" we find that a single thread is a strand; a string is a strand, and one of a number of flexible things, as grasses, strips of bark or hair when used to be twisted or woven together is called a "strand." It must be conceded that within the strict definition of the word "thread" the defendant does not use a thread of rubber in making the core of its golf ball. It is more nearly a band of rubber, and still it is not in the strict sense a band or intended to be used as a band. I think, however, that within the meaning that should be given to the word "thread" in the patent in suit the defendant's strip of rubber is a thread within the broad definitions already referred to. It serves every purpose of the thread there mentioned, and is its equivalent in every respect. It answers the same purpose and performs the same function. In winding it upon itself to form the core it may be that it is difficult, if not impossible, to give the same tension to its outer edges that we give to its center, but this fact in no way impairs the completed structure.

Again, I find nothing in the patent or in the file wrapper that limits the complainant in the construction of his golf ball to the use of a rubber thread in the strict or narrow sense. We are to give a reasonable and a common sense construction to the language of this patent. If, however, there was anything in the action of the Patent Office that rejected a claim for the core of a ball wound with such light and thin bands of rubber as we find in defendant's structure, and the patentee abandoned such claim and substituted something different in the claim as allowed or accepted the claim as allowed with the word "thread" confined to its narrow meaning as distinguished from such a strand or band as is used by the defendant, then we are compelled to give to the claim of the patent that narrow and restricted meaning, and the defendant does not infringe. But I fail to find in the contents of the file wrapper any suggestion that any claim of the patent was rejected or modified because of any contention or difference in opinion as to the meaning of the word "thread" as used in the claims of the patent or the specifications thereof when originally filed or as subsequently modified. Nor do I find that any claim of the patent was rejected or modified because it included a core wound with or made of rubber bands of the character used by the defendant. It is, of course, true, that a patentee may limit himself by the use of language to a very narrow claim when his invention would warrant a broad claim. One of the essential elements of claim 1 of the patent in suit is "a core composed wholly or in part of rubber thread wound under high tension" and in claim 2 of "a central core section of relatively nonelastic material, rubber thread, wound thereon under tension."

So far as the elements relating to the core of the original claims 3 and 5 are concerned no change was made as finally allowed except to limit the ball to a golf ball. The composition of the central core section of claim 2 in the patent as allowed and the composition of the

core mentioned in claim 1 of the patent as allowed are not changed. Each claim is for a combination and the combination is that of a core and a shell in a golf ball. The core is a ball of itself, but it is not to be used as a ball outside of the inclosing shell, and it is not constructed for use outside of the shell. September 1, 1898, the Patent Office rejected claim 1 as originally made on the Giblin patent, No. 165,994, and claim 2 as originally made was rejected on Giblin in view of Taylor No. 262,257. Claims 3, 4, and 5 as originally made, were rejected on the above-mentioned references taken with Shibe No. 272,984. The Patent Office said:

"In these references, the structure of Taylor is considered the equivalent of the core in applicant's device while the vulcanized covering of Giblin is equivalent to his gutta-percha shell, as their function is identical; and there would be no invention in substituting the parts of these balls to form applicant's structure."

Neither the Giblin, nor the Taylor, nor the Shibe patent is in evidence or before this court, and it is impossible for it to consider them or determine what the elements of those patents were. It must be presumed that the defendant would have put them in evidence if they contain or show anything that would tend to limit the complainant's claims. These patents were within reach of the defendant, and it is fair to infer that neither of them contains or would show anything tending to limit the complainant's claims in the patent as granted. The file wrapper contains a communication from the applicant's attorneys, dated September 14, 1898, in which they describe the Giblin patent, and for the purposes of this case this must be taken as correct. So taken, that patent contains nothing to limit the construction that is given to the patent in suit. In the same communication complainant's attorneys say, speaking of the other references above mentioned:

"None of the references discloses a core produced by winding a rubber thread upon itself under a tension approaching the elastic limit. We believe that it detracts in no wise from the merit of this feature of applicant's invention that balls have been formed from cotton or woolen yarn wound tightly on itself. It is possible after the invention is made to study out the reasons for the improved result; but it might be centuries before any one would by unaided abstract reason arrive at a conclusion that a ball formed from a delicate, easily stretched rubber thread would, when completed, produce an exceedingly elastic distortion-resisting ball, possessing the qualities set forth. It is not seen that the Taylor patent has any bearing on the present case, unless it is to show that where a person produces a ball out of materials not before used in the art, or by combining materials already used in a manner to produce great improvement, he is entitled to his patent. * * * In the present case no one has used the combinations set forth in the claims."

Inasmuch as the patents referred to by the examiner are not put in evidence, this court will assume that these statements as to the composition and elements thereof are correct. These statements were not disputed by the examiner.

September 30, 1898, the examiner wrote:

"Balls made of rubber thread, wound under high tension are notoriously common in this office. To substitute one of these balls in the Giblin patent for the parts marked A and B, would be a complete answer to each of applicant's claims. The claims are again rejected."

In reply to this the claimant's attorneys wrote:

"We respectfully request, before further argument or amendment, that a reference showing a core composed of a rubber thread wound under high tension be added to the record in support of the examiner's statement."

This communication was dated October 25, 1898. November 15, 1898, the examiner said, changing his ground entirely:

"The claims are rejected on the patent to Castle, 281,238, July 17, 1883 (Balls & Bats). The word 'Office' in the second line of the last official letter should be 'city.' The examiner has personal knowledge of the use of balls made of rubber bands, under high tension for the last 15 years, and to substitute such a ball in Castle's patent would not involve invention."

There is no affidavit made by this examiner, and he changes the basis of his rejection from the Giblin, Taylor, and Shibe patents to the Castle patent, which was not put in evidence, and is not before this Court. It may be presumed that the Castle patent would have been put in evidence did it show anything limiting the construction to be given to the language of claims 1 and 2 of the patent in suit describing the core. September 30th, the examiner said that balls made of rubber thread wound under high tension were notoriously common in the Patent Office. November 15th, he abandons this claim entirely, and substitutes "city" for "office" and says that he has knowledge of the use of balls made of rubber bands under high tension. The examiner undoubtedly referred to a fact that every ball player is familiar with, viz.: That in playing the game of baseball these playing balls were frequently made of rubber bands wound upon themselves and covered with a thin layer of leather. This court does not think that this mere statement of this examiner, unaccompanied by any affidavit, should limit the construction to be given to the claims of the patent in suit, which are not for a playing ball, but for the core of a golf ball; something entirely different. But even this contention was seemingly abandoned, for without further correspondence so far as appears, claims 1 and 2 of the patent in suit, being claims 3 and 5 of substituted claims submitted under date of August 9, 1898, were allowed, and the commissioner said under date of December 29th:

"Please find below a communication from the examiner in charge of your application for Ball, filed August 9, 1898."

That communication of the examiner reads:

"Claims 1, 2, 4, and 6 are rejected on Giblin, July 27, 1875, 165,994, and Castle, July 17, 1883, 281,238. See, also, British patent to Wolfgang, May 10, 1869, No. 1,424 (Balls & Bats). Claims 3 and 5 are allowed. In view of the fact that balls composed of rubber bands wound under high tension are common; and balls composed of various kind of fillings and covered with gutta-percha are also common, it is held that the invention, if any, is fully covered by the allowed claims and embraces all the applicant is entitled to. The description should be revised to harmonize with the above views."

In view of this rejection of claims 1, 2, 4 and 6, and the allowance of claims 3 and 5, it becomes important to turn again to the claims and ascertain what, in fact, was rejected and what was allowed and also what substitutions and limitations, if any, had been made.

Under date of August 9, 1898, the claimant had substituted specifi-

cations and claims, and I now refer to the substituted claims, claim 6 having been added. These amended or substituted claims were as follows:

Canceled Jan. 30, 1899.	"(1) A golf ball, comprising in combination an elastic core and a close fitting inclosing shell for the core of relatively hard material, having such thickness as to give it the requisite degree of rigidity, substantially as described. "(2) A golf ball, comprising a core formed with a rubber thread wound into spherical form under tension approximating the elastic limit, and an inclosing shell therefor of relatively hard material of such thickness as to give it the required rigidity, substantially as described.
	"(3) A golf ball, comprising a core composed wholly or in part of rubber thread wound under high tension, and a gutta-percha inclosing shell for the core, of such thickness as to give it the required rigidity, substantially as described.
Canceled Jan. 30, 1899.	"(4) A golf ball, comprising a central core section, rubber thread wound thereon under tension, and an inclosing shell or relatively hard material, of such thickness as to give it the required rigidity, substantially as described.
	"(5) A golf ball, comprising a central core section of relatively nonelastic material, rubber thread wound thereon under tension, and an inclosing shell of gutta-percha, of such thickness as to give it the required rigidity, substantially as described.
Canceled Jan. 30, 1899.	"(6) A golf ball having a core wholly or in part of elastic material and an inclosing shell therefor of relatively hard material having such thickness as to render it approximately inflexible under the moderate impacts incident to its use but sufficiently flexible under the stronger impacts to bring the elastic property of the core into action, substantially as described."

Claim 1 rejected was for a golf ball comprising in combination "an elastic core" and a shell which it is not necessary to describe. It is evident that any ball having a core composed of elastic material would be covered by this claim, and a core composed of any elastic material is therefore excluded. Claim 2 rejected included a core formed with a rubber thread wound into spherical form under tension approximating the elastic limit and also the shell. The shell under this claim might be composed of any relatively hard material. Claim 3 allowed as claim 1 in the patent includes a core composed either wholly or in part of rubber thread wound under high tension and a gutta-percha inclosing shell for the core. As claim 3 was allowed with a gutta-percha inclosing shell substituted for a shell of relatively hard material which would include any hard material, it is evident that the patent is limited to a gutta-percha shell, and it is also evident that as rubber thread wound under high tension is retained and takes the place of "rubber thread wound into spherical form under tension approximating the elastic limit" as stated in claim 2 rejected, that it was not intended to reject claim 2 because of the language relating to rubber thread or to the core, but because of the description of the inclosing shell. The core must necessarily be of a spherical form. The words "rubber thread" are used in both claim 3 allowed and claim 2 rejected, and

this court is unable to discern any difference between rubber thread wound under tension approximating the elastic limit, and rubber thread wound under high tension, except that the tension in the one case might be greater than in the other. Claim 4 rejected contained a central core section as element 1; rubber thread wound thereon under tension, element 2; and the inclosing shell. The inclosing shell was of relatively hard material, any hard material; and hence this claim was rejected. The core section was to all intents and purposes the same as the core section of claim 3 allowed, with the single exception that claim 3 allowed has the words "high tension" while claim 4 rejected had the word "tension" alone. In claim 3 allowed the core is composed either wholly or in part of rubber thread, and hence it may have what was described in claim 4 rejected, viz., a central core section with rubber thread wound thereon. Claim 5 allowed has a core section of relatively nonelastic material, and rubber thread wound thereon under tension and an inclosing shell of gutta-percha. The central core section has the rubber thread wound under tension but not necessarily high tension. Claim 6 was rejected because the core was composed wholly or in part of any elastic material and because the inclosing shell was not confined to gutta-percha.

It seems clear that the Patent office intended to reject a claim for a golf ball having in the combination any other than the gutta percha inclosing shell and one having in the combination a core composed of any elastic material. The Patent Office did not intend to reject and did not reject a claim for a golf ball comprising in combination a core composed wholly or in part of rubber thread or its equivalent, if of rubber and capable of being wound under tension either upon itself or upon some central core formed of some relatively non elastic material, and a gutta-percha inclosing shell of such thickness as to give it the required rigidity described in the specifications. Nowhere do we find any limitation placed upon rubber thread except that it is to be composed of rubber and capable of being wound either upon itself or upon the central core piece referred to.

If the rubber strip or band used by the defendant is not the equivalent of and to be regarded as the rubber thread referred to and included within the meaning of the claims of the patent in suit, then a very thin and very narrow strip of rubber would not be and a strip of rubber one one-thousandth part of an inch in thickness and one one-hundredth part of an inch in width would not be regarded as a rubber thread. Such a strip of rubber would be a rubber band, and not a rubber thread, because of much greater width than thickness, because not "a twisted filament of a fibrous substance spun out to considerable length," because not a compound cord consisting of two or more strands of rubber united together by twisting, because not round.

In Bundy Manufacturing Company v. Detroit Time Register Company, 94 Fed. 524, 36 C. C. A. 375, the Circuit Court of Appeals said:

"To be estopped by the action of the Patent Office, a patentee must be shown to have surrendered something which he now claims in order to obtain that which was allowed."

In the case at bar can it justly be said that the patentee surrendered every size and form of light, thin rubber band in order to obtain the allowance of rubber thread? The difference, if any, is in size and form (width merely) and not in utility, function or result. The court has carefully examined the authorities cited by the defendant. The defendant made no showing of the prior art except such as we find in the file wrapper. So far as the meaning to be given to the words "rubber thread" is concerned this court finds no limitation either in the specifications or the claims or the action of the Patent Office.

Infringement is made out, and as the validity of the patent is conceded, there will be a decree for the complainant that the patent is valid; that the defendant infringes, and for an injunction and an accounting.

DOVER et al. v. GREENWOOD et al.

(Circuit Court, D. Rhode Island. January 30, 1906.)

No. 2,664.

1. PATENTS—RIGHT TO OBTAIN BY BILL IN EQUITY—CONSTRUCTION OF STATUTE.
Act Feb. 9, 1893, c. 74, § 9, 27 Stat. 436 [U. S. Comp. St. 1901, p. 3391], creating a Court of Appeals for the District of Columbia, which vests in such court jurisdiction of appeals from the decisions of the Commissioner of Patents theretofore vested in the Supreme Court of the District, and also gives a right of appeal to such court in interference cases, does not by implication repeal Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], giving an applicant for a patent whose application is refused a right to obtain a patent by a bill in equity.

2. SAME—RES JUDICATA.
The decision of the Court of Appeals of the District of Columbia on an appeal from the Commissioner of Patents, taken under Act Feb. 9, 1893, c. 74, 27 Stat. 436 [U. S. Comp. St. 1901, p. 3391] does not constitute an adjudication which precludes the maintenance of a suit in equity by one of the parties against the other to obtain a patent, under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392.]

Demurrer to Bill of Complaint.

Alex. P. Browne and Horatio E. Bellows, for complainant.
Wilmarth H. Thurston, for defendant.

BROWN, District Judge. The bill is brought under section 4915 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3392].

It sets forth proceedings in the Patent Office upon an interference between Dover and Greenwood, an appeal to the Court of Appeals for the District of Columbia, a reversal by said court of the decision of the commissioner, an award of priority to Greenwood, and the issue of letters patent to Greenwood's assignees, D. M. and F. H. Watkins, on June 28, 1904.

It prays that this court may decree that George W. Dover, as assignor, and the George W. Dover Company, as assignee, are entitled to receive letters patent for the invention, as specified in the claim of Dover's application, and for other relief.

The defendant, on demurrer, contends that section 4915 is repealed by section 9 of the Act of February 9, 1893, c. 74, creating the Court of Appeals of the District of Columbia, 27 Stat. 436 [U. S. Comp. St. 1901, p. 3391]. The later act repeals in general terms all acts and parts of acts inconsistent therewith, but contains no express repeal of section 4915.

The defendant urges that the later act is inconsistent with the former. This question was before the court in Bernardin v. Northall (C. C.) 77 Fed. 849, where it was held that there was no such irreconcilable conflict as to work an implied repeal. This decision was followed with approval in McKnight v. Metal Volatilization Co. (C. C.) 128 Fed. 51.

It is evident that, in both cases, the learned judges applied the correct rule of construction, and gave proper effect to both statutes. Reading the statutes together, we find that the determination of appeals, formerly vested in the Supreme Court of the District of Columbia, was thereafter vested in the Court of Appeals for the District of Columbia. The jurisdiction was transferred without change to the new court. It is very clear that the effect was merely to substitute one court for another, and there is no plausibility in the argument that it was thereby intended to destroy the jurisdiction of the Circuit Courts over bills in equity brought under section 4915.

The later statute provided, however, that:

"In addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case, may appeal therefrom to said court of appeals."

It is very clear that this additional remedy by way of appeal was not a substitute for the older remedy by bill in equity.

"The bill in equity provided for by section 4915 is wholly different from the proceeding by appeal from the decision of the commissioner under consideration in this case. The one is the exercise of original, the other of appellate, jurisdiction." Ex parte Hien, 166 U. S. 432, 17 Sup. Ct. 624, 41 L. Ed. 1066.

It is quite true that since the passage of the act establishing the Court of Appeals of the District of Columbia, a patent can be no longer "refused" by the Supreme Court of the District of Columbia, and it may possibly be true that a patent cannot be "refused" by the Commissioner of Patents in the sense of the former act; but it is nevertheless apparent that the change of the tribunal which is to entertain the final appeal was not intended to change the nature of the appeal. The old appeal was transferred to a new court, and a new appeal given to the new court in interference cases.

The merely verbal difficulty which arises upon the precise terms of section 4915, after the passage of the later act, is obviated by the rule of construction which requires that both acts be read together, and reconciled, if possible. It has been the consistent purpose of Congress for many years to provide both appeals, limited to the consideration of the "evidence produced before the Commissioner" (section 4914) and original and independent jurisdiction in equity (section 4915). To prefer a construction that destroys entirely an original

and independent jurisdiction in equity, exercised by the Circuit Courts throughout the country, to a construction which preserves this jurisdiction and also the appellate jurisdiction, would require strong reasons.

If there is a repugnancy between independent parts of the two acts, the later supersedes only so much of the former as cannot stand with it.

Apply this rule to section 4915: "Whenever a patent on application is refused"—this needs no modification. The following clause is a subordinate clause specifying the two ways in which an application is refused: "Either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner." Substitute the new way in which an application is refused, i. e., "by the Court of Appeals of the District of Columbia," and the act is changed only by substituting the new instrument, which makes final action or refusal on appeal, for the old. The scheme of the act remains untouched. There is obviously no conflict between the general scheme of the old act and the new act. The conflict is only between the new act and a clause of the old act specifying certain particulars. The new particulars can be substituted for the old without affecting the general clause, "Whenever a patent on application is refused," which precedes, and the general clause, "the applicant may have remedy by bill in equity," which follows. It is clear, therefore, that there is no irreconcilable inconsistency between the two acts.

It is argued that it was the intention of Congress to substitute an appeal for the bill in equity under section 4915, because there would exist the anomaly of a court of lower jurisdiction, i. e., the Circuit Court, having the right to review the judgment of the Court of Appeals. But this fails to recognize the fact that the Circuit Court does not act as a court of review, but as a court of original and independent judisdiction.

It is urged that the addition of the new appeal in interference cases would increase the burden and expense of litigants. It is very clear, however, that a repeal of original jurisdiction cannot be inferred from the addition of appellate rights. Especially is this true in view of the numerous decisions clearly distinguishing between the appellate jurisdiction and the jurisdiction under section 4915.

The defendants also contend that the decision of the Circuit Court of Appeals constitutes res adjudicata, and precludes the complainants from maintaining their present bill. This point is satisfactorily disposed of in Bernardin v. Northall (C. C.) 77 Fed. 849.

The demurrer will be overruled.

HILDRETH v. DUFF et al.

(Circuit Court, W. D. Pennsylvania. February 1, 1906.)

No. 15.

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—CERTAINTY.

A contract reciting that one party, a candy manufacturer, was desirous of having perfected and manufactured "a certain machine or machines for use in the manufacture of candy," and by which the second agreed to enter his employment and to devote his services to such work, giving the first party the full benefit and enjoyment of any and all inventions and improvements he might make relating to machines or devices pertaining to the first party's business, does not so clearly import an agreement by the employé to assign a patent for an invention made by him relating to candy making, but differing essentially from any machine then known or used by the first party, as to warrant a court in decreeing its specific performance as so construed.

2. CONTRACTS—CONSTRUCTION—AGREEMENT WITH RESPECT TO FUTURE INVENTIONS.

An agreement by an employé to give his employer, who was a candy manufacturer, "the full benefit and enjoyment" of any and all inventions which he might make pertaining to the employer's business, imports an agreement for a shop right or license to use such inventions merely, and does not entitle the employer to an assignment of patents secured by the employé therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 71; vol. 38, Cent. Dig. Patents, §§ 125, 272, 302.]

In Equity. On bill and cross-bill and proofs.

J. Snowden Bell and D. F. Patterson, for complainant.

Kay, Totten & Winter and Dalzell, Scott & Gordon, for respondents.

ACHESON, Circuit Judge. The original bill was brought by Herbert L. Hildreth against Robert P. Duff and Edward A. Kitzmiller, copartners doing business as P. Duff & Sons, to compel them to assign to the complainant letters patent No. 736,313, for a method of pulling candy, granted on August 11, 1903, to Chas. Thibodeau, as assignor to Catherine M. Thibodeau, and by her assigned to the defendants, and also the defendants' interest under an assignment to them by Chas. Thibodeau in an application filed by the latter for letters patent for a candy pulling machine, and to enjoin the defendants from the further use, benefit, enjoyment, leasing, or sale of the inventions, improvements, machines, and devices, covered by said patent or said application, and from prosecuting or bringing suits for the infringement of the method patent. The bill of complaint is based upon the following instrument:

"Whereas Herbert L. Hildreth of Boston, candy manufacturer, is desirous of having perfected and manufactured a certain machine or machines for use in the manufacture of candy, and especially for sizing, shaping, cutting, wrapping and packing, also the pulling of molasses candy, and whereas I, Chas. Thibodeau, being a skilled mechanic, and desirous of entering the employ of said Hildreth for the purpose of constructing, improving and perfecting such machinery: Now, therefore, in consideration of such employment and of the payment of wages to me at the rate of ($3.25) three dollars and twenty-five cents per day, I hereby agree with said Hildreth to enter his employ, and that I will give him my best services, and also the full benefit and enjoyment of any and all inventions and improvements which I have

made or may hereafter make relating to machines or devices pertaining to said Hildreth's business. I also further agree that should said Hildreth not desire to patent any of said inventions or improvements, but to keep the same secret, I will do all in my power to assist him in this, and will not disclose any information as to the same or any of them, except at the request of said Hildreth.

"Signed at Boston, Mass., this 29th day of May, 1897.

"Charles Thibodeau."

At the opening of this discussion, I have to say that the determination in the case of Thibodeau v. Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480, is not controlling here; and I particularly note that the court in that case was not called on to determine the scope of the Thibodeau contract, and did not interpret its scope. The extent to which the actual adjudication went was that the contract was not unconscionable nor against public policy, and that Thibodeau was not entitled to have it delivered up and canceled.

It appears that the foregoing paper, which the complainant seeks to have specially performed, was prepared exclusively by him and his legal adviser, and that Thibodeau knew nothing about its terms until it was presented to him for signature. This is a fact fairly to be considered, if there is any doubt as to the meaning of the paper or it is reasonably open to more than one interpretation. Noonan v. Bradley, 9 Wall. 394, 407, 19 L. Ed. 757. I think this just rule is particularly applicable to the facts of the present case.

At the time the paper was signed, machines for pulling candy, such as that here in question, to take the place of the men who pulled the candy over hooks to whiten it, were not known in the art. No such machine was in use in Hildreth's business nor in course of construction for him. Under the circumstances, neither Hildreth or Thibodeau could have contracted with immediate reference to such a machine. At that time, however, machines performing a different kind of pulling operation were known to and used in the trade. The function of that machine was to pull the candy down to the requisite size to feed the cutting and wrapping machine, doing the work of a girl who was accustomed to pull the candy down to the required size. A pair of such pulling machines were built for Hildreth in March, 1897, about two months before the Thibodeau contract was signed. Thibodeau was familiar with that class of pulling machines, but had no knowledge whatever with respect to any other machine for pulling candy. Therefore it is well within reasonable belief that he understood the words "also for the pulling of molasses candy," especially in view of their associated words, to refer to that class of then known and used pulling machines, as he testifies he did so understand them.

In Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253, the court said:

"The contract which is sought to be specifically executed ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

In the recital of the paper in controversy, which is the key to the meaning of the parties, it is not machines generally, but "a certain

machine or machines," which Hildreth is desirous of having "perfected and manufactured," and it is on such machines that Thibodeau is to be employed for the purpose of "constructing, improving and perfecting." Now, this recital, in view of its specific reference to a certain machine or machines, cannot fairly be construed to cover a machine not then known to the art and radically different from any known machine. The more general words subsequently employed in the body of the paper ought not to be held to have a larger scope than the language of the recital, especially as they expressly relate to machines or devices "pertaining to said Hildreth's business." McFarland v. Stanton Manufacturing Company, 53 N. J. Eq. 649, 650, 33 Atl. 962, 51 Am. St. Rep. 647. Looking at the whole paper, it seems to me that Thibodeau had a right to understand that the contract related to Hildreth's business as then conducted, and that the machines mentioned in the body of the paper were not other than such as had already been made the subject of recitation. At any rate, the interpretation which the complainant seeks to have put on the general terms in the body of this paper is by no means so clearly its import as to meet the requirement laid down, as we have seen, by the United States Supreme Court. Nor can it, I think, be successfully maintained that the terms of this paper are so precise as that neither party could reasonably misunderstand them. The foregoing views lead to a decree adverse to the complainant.

But, furthermore, the complainant's right to the relief sought rests upon the theory that by the contract Thibodeau bound himself to assign his inventions to the complainant. We search, however, the paper in vain for any such stipulation. On the contrary, the engagement of Thibodeau is to give to Hildreth "the full benefit and enjoyment" of all his inventions or improvements relating to machines or devices pertaining to Hildreth's business. Now, by all the authorities, this imports and confers only a shop right or mere license to use an invention. Whiting v. Graves, 3 Ban. & Ard. 222; Wilkins v. Spafford, 3 Ban. & Ard. 274; Hapgood v. Hewitt (C. C.) 11 Fed. 422; Hapgood v. Hewitt, 119 U. S. 226, 233, 7 Sup. Ct. 193, 30 L. Ed. 369; Dalzell v. Dueber Manufacturing Co., 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; 2 Robinson on Patents, § 832. Moreover, the business of Hildreth at the time the contract was made was that of a candy manufacturer. He was a mere user of machines, and not then engaged in the manufacture or sale of machinery. Clearly he bargained only for the "full benefit and enjoyment," that is, the use, of Thibodeau's inventions. Had it been intended that Hildreth should have the ownership of or title to the inventions, this would have been specifically stated in the contract. The secrecy clause is an independent provision and cannot be held to enlarge the express user stipulation. Of course, the view just presented is fatal to the complainant's case.

There still remains the question whether there is such privity between Charles Thibodeau and Catherine, his wife, and the defendants, as would deprive the defendants of an independent defense based upon alleged equities of their own. This question, however, I do not think it necessary to discuss or to consider, in view of the above-stated con-

clusions upon other points, which require the dismissal of the bill. I therefore intimate no opinion on this branch of the case.

It only remains for me to say that I think the defendants are entitled to relief under the prayers of their cross-bill, but I am not now prepared to indicate with precision the extent of that relief. This can be done more properly when counsel present decrees.

Let counsel prepare and submit decrees.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. VOGEMAN.

(District Court, S. D. New York. December 6, 1905.)

SHIPPING—DEMURRAGE—DERRICKS EMPLOYED FOR LOADING CARGO.

Respondent, as agent for certain steamships, *held* not liable for demurrage, because derricks of libelant hired by a shipper to transport locomotives in parts to the steamships and by respondent to hoist the same on board and into the holds at a stipulated price for each were not allowed to deliver the same as rapidly as they could have done, where the parts were received and stowed with reasonable skill and dispatch, and the delay resulted from the character of the cargo and the manner in which it was loaded on the derricks, and it further appeared that libelant furnished a larger number of derricks than could conveniently be discharged at the same time.

[Ed. Note.—Demurrage, see notes to Harrison v. Smith, 14 C. C. A. 657; Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.]

In Admiralty. Suit for demurrage.

Avery F. Cushman, for libelant.

Butler, Notman & Mynderse, for respondents.

ADAMS, District Judge. The original libel in this action, filed to recover alleged demurrage of certain derricks belonging to the libelant from the firm trading under the name of H. Vogeman, the agents of a line of steamships in which were running the Tripoli and Etonian, was excepted to because it failed to allege any contract binding upon the respondents or the breach of any duty owing by them to the libelant. The exceptions were sustained—127 Fed. 770—and the libelant amended by making some minor changes in the verbiage and by alleging as follows:

"Eighth: That the said merchandise referred to in the second, third, fourth, fifth and sixth paragraphs of the libel herein consisted of twenty locomotives and the merchandise referred to in the seventh paragraph consisted of two locomotives. That the said vessels took the said twenty locomotives from Jersey City, New Jersey, and transported the same to the said steamship 'Tripoli' at the instance of the Baldwin Locomotive Works and transported under like conditions the said two locomotives to the Steamship 'Etonian.' That the lighterage only to the vessels' side was for the account of the said Baldwin Locomotive Works and that the said vessels were under the control of the respondent thereafter as the respondent by a contract duly made with the libelant, employed the libelant, by means of the derricks and hoisting apparatus which were attached to each of the said vessels above named to hoist the said twenty locomotives to the deck and into the hold of the said steamship 'Tripoli' within a reasonable time after the said vessels arrived alongside, and agreed to pay the sum of $30 for each locomotive so hoisted.

That the libelant performed the said work and received its pay for the hoisting from the respondent; that the respondent had full control of the said steamships and of the receiving of the said cargo thereon and neglected and refused to receive the said locomotives or permit the libelant to hoist the same on the deck and into the hold of said steamships within a reasonable time after the arrival of said boats alongside and after he was notified that the libelant was ready to hoist the said cargo on the deck and into the hold of the said steamships. That the respondent was duly notified by the libelant that it would hold him responsible for each and every day's delay beyond a reasonable time that each vessel was delayed by reason of his refusal to permit the libelant to hoist said cargo onto the deck and into the hold of said steamships pursuant to its said employment, and that the said derricks were severally detained by the respondent over and above the proper and reasonable time to complete the work of hoisting the said locomotives upon the deck and into the hold of the steamships and thus discharge their cargoes for the following periods:

"The derrick 'Edgar,' from April 11th to April 25, 1901, the date of discharge, both dates inclusive, a period of fifteen days; the derrick 'Chief' from April 13th to April 16th, 1901, the date of discharge, both dates inclusive, and from April 22nd to April 26th, 1901, the date of discharge, both dates inclusive, a period of nine days; the derrick 'Atlas' from the 20th of April to the 22nd of April, 1901, the date of discharge, both dates inclusive, a period of three days; the derrick 'W. H. Morse' the 21st and 22nd of April, 1901, the date of discharge, both dates inclusive, a period of two days; the derrick 'Alfred' May 14th, 1901, the date of discharge, a period of one day."

The libel was subsequently amended by making some further minor changes in the language and alleging that by the custom of the Port of New York and by the Rules of the Maritime Association of the port regulating lighterage, all of which were well known to the respondents, the libelant was entitled to charge the respondents and receive from them demurrage for the detention of the lighters (derricks) beyond a reasonable time.

Upon the libel as amended the action was brought to trial and it appeared that the lighters or derricks did suffer some delay and the question to be determined is were the respondents in fault therefor so as to make them liable in damages.

The locomotives were in parts and came by rail to Jersey City from Philadelphia. When they reached Jersey City the lighters did not receive quick despatch but were somewhat delayed. This was caused by the manner in which the goods were loaded, that is, the manner in which the parts were distributed. The respondents employed the libelant to hoist the locomotives from the lighters into their steamers at $30 each. The sums due therefor have been paid. No contract, however, was made concerning the time within which the loading should take place and there is no liability by reason of any express contract. On the question of implied contract, no doubt the goods could have been handled more expeditiously if they had been properly packed or furnished to the steamers in a different way, but it has not been made apparent how the respondents are liable in such respect. They did not need the constant services of the libelant's vessels. Their duty was simply to take the goods in a reasonable manner and this they apparently did. They were not in a position to take the goods all at once. It was necessary to provide spaces for them which required arrangement of the parts when they were delivered. Instead

of giving the respondents an opportunity of adjusting the matter in a convenient and economical manner, the libelant sent the vessels to them practically all at once and afforded them no chance of providing for their reception. The steamers could only be laden properly by the receipt of the parts of the locomotives when they were needed in the loading and as the lighters were loaded apparently without regard to the steamers' convenience, what delay there was resulted from no fault on their part.

The respondents naturally expected that the parts of the locomotives would be delivered to them gradually and in proper order. I do not see how under the circumstances they can properly be charged with default. The testimony shows that they received the goods and stowed them with reasonable skill and despatch. They could not be expected to provide on the steamers for the immediate receipt of all goods, in view of the fact that it was necessary that the heavier parts should be stowed on the bottom. It was evidently a mistake to send several derricks at the same time to the steamers, when one would have been sufficient to do all the hoisting required and the other derricks as such were useless. But I do not see how there can be any proper recovery for the use of the vessels as lighters in the absence of any unnecessary detention on the respondent's part. It appears that the goods were taken as fast as they could be cared for by the steamers and there is no evidence to sustain a charge of neglect in this or in any other respect. What delay there was, was doubtless attributable to the manner in which the lighters were loaded and that was a matter with which the respondents had nothing to do. Their testimony is to the effect that the Locomotive Works agreed to supply the parts of the locomotives in such a way as the respondents wanted them.

The libel will be dismissed.

GEORGE D. EMERY CO. v. TWEEDIE TRADING CO.

TWEEDIE TRADING CO. v. GEORGE D. EMERY CO.

(District Court, S. D. New York. December 19, 1905.)

1. ADMIRALTY—SET-OFF—MATTERS ARISING OUT OF INDEPENDENT TRANSACTIONS.
Matters arising out of independent transactions not connected with the transaction upon which the suit was brought cannot be pleaded as a set-off in admiralty.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 327.]

2. SAME—CROSS-LIBEL—MATTERS CONSTITUTING COUNTERCLAIM.
New and distinct matters, not included in the original libel, but arising out of separate transactions, cannot be made the subject-matter of a cross-libel in admiralty, which must be confined to matters arising out of the same maritime transaction for which the original action was brought.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 330.]

In Admiralty. On exceptions to answer and cross-libel.

Convers & Kirlin and John M. Woolsey, for George D. Emery Co.

Wheeler, Cortis & Haight, for Tweedie Trading Co.

ADAMS, District Judge. The original action herein was brought by the George D. Emery Company against the Tweedie Trading Company to recover a balance of hire of the steamship Osceola for a half month from April 3, 1905, amounting to, less conceded deductions, $1,209.35.

The respondent in its answer after some denials and claims, alleged:

"Seventh. Further answering the libel herein the respondent alleges that the Steamship Osceola arrived at the port of New York on or about the 10th day of April, 1905, and was there detained at quarantine for one day and nineteen and one-half hours by reason of the sickness of the crew of said steamer, which constituted 'a deficiency of men,' and the respondent is entitled to deduct from the hire the time so lost, which at the rate agreed upon in the charter party amounted to $272.61. The respondent further disbursed for account of said steamer at the port of New York the sum of $95.46. These sums were disbursed at the request of the master of said steamer and were made while the hire of said steamer was suspended under the provision of the charter party, and were properly chargeable to the owners.

"Eighth. Further answering the libel herein, the respondent alleges that it advanced and disbursed to the master of said steamer the sum of $1300.44 for necessary supplies for said steamer. These sums were advanced and disbursed at the request of the master of said steamer and constitute a lien on said steamer and are properly chargeable to the owners thereof.

"Ninth. Further answering the libel herein the respondent alleges that on or about the 9th day of December, 1903, a charter party was entered into between the libelant and respondent, whereby the libelant agreed to load on the steamer, Myrtledene a full and complete cargo of mahogany logs at Belize for transportation to Boston.

"The libelant wrongfully failed to perform the obligations imposed upon it by said charter and failed and refused to load the cargo contracted for, by reason of which breach of the charter the respondent has sustained damages to the amount of Three thousand dollars ($3000), payment of which has been demanded and refused. The respondent performed all the obligations and stipulations of said charter party on its part to be performed."

The respondent also filed a cross libel seeking to recover thereby the sums $272.61 and $95.46, alleged in the 7th paragraph of the answer and the further sum of $3,000 for damages for breach of charter of the Myrtledene as above stated.

The libellant thereupon filed the following exceptions to the answer:

"First. It excepts to the following allegation contained in the seventh article of the answer:

" 'The respondent further disbursed for account of said steamer at the port of New York, the sum of $95.46. These sums were disbursed at the request of the master of the said steamer and were made while the hire of the said steamer was suspended under the provision of the charter party, and were properly chargeable to the owners.'

"On the ground that it is impertinent, and irrelevant in an action between the George D. Emery Company, which was the charterer of the Steamship Osceola, and the Tweedie Trading Company, the sub-charterer.

"Second. It excepts to all the allegations contained in the eighth article of the answer on the ground that it is impertinent and irrelevant, in an action between the George D. Emery Company, which was the charterer of the steamship Osceola, and the Tweedie Trading Company, the sub-charterer.

"Third. It excepts to the allegations in the ninth article of the answer on the ground that they are not a part of the controversy for which the libel was brought, and hence cannot properly be appealed as matter of set-off thereto."

The libellant also filed exceptions to the cross libel as follows:

"First. Because the matters alleged in the second and third articles of the so-called cross-libel are not matters involved in the original libel, and therefore not properly to be included in any cross-libel filed thereto.

"Second. Because the matters alleged in the fourth, fifth and sixth articles of the so-called cross-libel have already been pleaded in the answer to the original libel of the George D. Emery Company against the Tweedie Trading Company, and do not constitute a claim for affirmative relief, and, hence, are not properly pleaded as part of a cross-libel."

It is admitted by the cross libellant that, as under the rules of the court, a cross libel can only be brought where the claim is in the nature of a counterclaim, that the first exception is good and should be sustained. The remaining exceptions will now be considered.

To the Answer.

1st and 2d. The difficulty about these exceptions is, that they proceed upon the theory that the Emery Company was simply the charterer of the ship and the Tweedie Company the sub-charterer. In fact, as appears by the contract, the Emery Company was the chartered owner. It was provided:

"It is understood that where the word 'owners' appears in this charter it refers to George D. Emery Co. and where word 'charterers' or 'sub-charterers' appears it refers to Tweedie Trading Co.

"I. That the owner shall provide and pay for all provisions, wages, and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine room, and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service."

Under these circumstances, it does not seem that any further discussion is required. The Emery Company was required to pay these charges and if the Tweedie Company paid them it was manifestly for the account of the former, from whom it is entitled to reimbursement in this action.

Exceptions overruled.

3d. The question is raised here as to the right of the Tweedie Company to set off the damages it claims to have sustained by reason of the Myrtledene. The argument of the Tweedie Company in this connection is that an independent transaction may be set off and The C. B. Sanford (D. C.) 22 Fed. 863, cited in support thereof. That authority does undoubtedly support the claim but it has not been followed. The better doctrine is, that such set-offs do not fall within the jurisdiction of the court. Willard v. Dorr, Fed. Cas. No. 17,680; American Steel Barge Co. v. Chesapeake & O. Coal Agency Co., 116 Fed. 857, 54 C. C. A. 207; Davidson v. Green (D. C.) 127 Fed. 999; Hastorf v. Degnon-McLean Contracting Co. (D. C.) 128 Fed. 982.

Exception sustained.

To the Cross Libel.

The undisposed of exception to the cross libel presents the question of what can be set up in this way. The Tweedie Company urges the hardship it will be subjected to if not permitted to proceed with its claim with respect to the Myrtledene, and the Emery Company claims

that the rules of law prevailing in this court only allow the prosecution of claims arising out of the same maritime transaction for which the original libel was brought. The latter claim seems to be the sound one. Mr. Justice Clifford, in writing for the Supreme Court, in The Dove, 91 U. S. 381, 385, 23 L. Ed. 354, said:

"Whether the controversy pending is a suit in equity or in admirality, a cross-libel or libel is a bill or libel brought by a defendant in the suit against the plaintiff in the same suit or against other defendants in the original suit or against both, touching the matters in question in the original bill or libel. It is brought in the admirality to obtain full and complete relief to all parties as to the matters charged in the original libel; and in equity the cross bill is sometimes used to obtain a discovery of facts.

"New and distinct matters, not included in the original bill or libel, should not be embraced in the cross suit, as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject-matter of a new original bill or libel. Matters auxiliary to the case of action set forth in the original libel or bill may be included in the cross-suit, and no others, as the cross-suit is, in general, incidental to, and dependent upon, the original suit. Ayers v. Carter, 17 How. 595 [15 L. Ed. 179]; Field v. Schieffelin, 7 Johns. Ch. 252; Shields v. Barrow, 17 How. 145 [15 L. Ed. 158]."

Of course, it is not intended hereby to limit the authority of the court to inquire into all the breaches of any maritime contract which may be the subject of action and all the damages suffered thereby, however peculiar they may be and whatever issues they involve. The Electron (D. C.) 48 Fed. 689.

Exception sustained.

Ex parte WONG SANG.

Ex parte WONG DEN.

(District Court, D. Massachusetts. November 9, 1905.)

Nos. 1,743, 1,744.

ALIENS—CHINESE EXCLUSION—CONCLUSIVENESS OF DECISION.

The decision of the appropriate immigration officers denying Chinese persons entry into the United States, which right was claimed on the ground that they were minors, and their fathers, respectively, were lawful residents of the United States, if not appealed from and no abuse of discretion is shown, is conclusive, and cannot be reviewed by the courts.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Aliens, §§ 95, 103.

Citizenship of the Chinese, see notes to Gee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

Habeas Corpus.

Harvey H. Pratt, for petitioners.

William H. Garland, Asst. U. S. Atty., for Richard H. Farley.

DODGE, District Judge. Richard H. Farley, who has been summoned to show cause why writs of habeas corpus should not issue as prayed for in these petitions, admits that Wong Goon Ark and Wong Ten Hong, referred to in the petitions, are in his custody as the representative of the steamship which brought them from Liverpool to Boston, and justifies his detention of them by the order of the United States

immigration officers at the port of Boston, which is more fully referred to below. They are detained under said order for the purpose of sending them back to the port from whence they came.

At the hearing upon the order to show cause it was admitted on the respondent's behalf that the petitioners, Wong Sang and Wong Den, are Chinese persons, both of them merchants, within the meaning of the Chinese exclusion acts, and both lawfully resident in Boston.

It was also agreed by the petitioners and the respondent, Farley, that Wong Ten Hong and Wong Goon Ark, the Chinese persons named in said petitions and therein alleged to be the sons of said petitioners, respectively, each born in the village of Kai Sing Lee in the province of Hoi Ping, arrived at the Port of Boston, from Liverpool, Eng., on the steamer Cymric, on the 8th day of October, 1905; that on said 8th day of October, and on the 9th day of October, both 1905, the said Wong Ten Hong and Wong Goon Ark were given a hearing by the proper immigration officer for said Port of Boston, touching their right to be allowed to land in the United States; that on the 12th day of October, 1905, both said persons were refused landing, and at the same time the said Wong Ten Hong and Wong Goon Ark were notified, informed, and instructed that they had a right within two days from the date of the order of said immigration officer, namely within two days from said 12th day of October, to appeal to the Secretary of Commerce and Labor at Washington; that an appeal was so taken by each of them, the said Wong Ten Hong and Wong Goon Ark, they being each represented by counsel, who subsequently, on the 26th day of October, 1905, withdrew said appeals and each of them, by the authority of them, the said Wong Ten Hong and Wong Goon Ark; also that in all the matters and things touching the applications of said Wong Ten Hong and Wong Goon Ark to land in the United States the said immigration officers for said Port of Boston acted in all respects according to the rules of the Department regulating the Chinese inspection service; that there was no abuse of the authority vested in and exercised by them; and that said Wong Ten Hong and Wong Goon Ark were advised by said immigration officers fully of their several rights in the premises.

Upon evidence introduced by the respondent I find that the decision of the immigration officer, made on October 12th, as above stated, was made upon the ground that the claim of Wong Ten Hong and Wong Goon Ark that they were the sons of the respective petitioners was held by said officer not sustained by the evidence before him. It was objected by the petitioners that evidence to show the ground upon which the above decision was made was inadmissible, but I admitted the evidence against and subject to said objection.

The petitioners offered to prove that Wong Goon Ark and Wong Ten Hong were the sons of Wong Sang and Wong Den, respectively, and each less than 21 years of age. The petitioners contended that if the court should find that said Wong Goon Ark and Wong Ten Hong were the sons of said petitioners as alleged, and under 21 years of age, then their detention was unlawful, because the petitioners, their fathers, were entitled, as lawful residents within the United States, to the care, custody, and control, and to the company, society, and services of the sons,

and the sons themselves also entitled to the care and support of the petitioners, in the place of the petitioners' residence.

The respondent objected to the admission of the evidence offered, contending that the decision of the immigration officers conclusively established the legality of the detention of the persons named in the petition, upon the facts above stated. This objection I sustained, and declined to hear said evidence.

If the question of admitting or excluding the persons named in the petition turned upon the question whether they were the petitioners' sons, as alleged, or not, that question was one to be decided by the immigration officers. The petitioners themselves are aliens, though lawfully resident in the United States. Wong Goon Ark and Wong Ten Hong, whom they allege to be their sons, are in any event alien immigrants, born in China, of Chinese parents, and to be excluded or admitted into this country, according to the provisions of the laws of the United States regulating the exclusion or admission of such alien immigrants. The decision of the appropriate immigration officers has been adverse to their admission, and, under Act of Aug. 18, 1894, c. 301, 28 Stat. 390 [U. S. Comp. St. 1901, p. 1303], the decision is final, unless reversed on appeal. Even if their claim to admission had been based upon an allegation of citizenship, there could have been no resort to the courts until after an appeal to the Secretary of Commerce and Labor (United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917); and the Secretary's decision upon the question of citizenship, no abuse of discretion on the part of any of the lawfully designated immigration officers being shown, would have been final and conclusive (United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040). No abuse of discretion is claimed in these cases, and the appeals from the decision of the properly designated immigration officers at Boston have been deliberately and advisedly abandoned. The decision of those officers, therefore, is final and conclusive. The court has no right to disregard it or to overrule it, and cannot now try the question whether or not the persons detained are the petitioners' sons. Proof of that fact, if now made, would not, in my opinion, warrant the issuing of the writ as prayed for. The petitions are denied.

THE LANGFOND.

(District Court, S. D. New York. January 2, 1906.)

SHIPPING—DAMAGE TO CARGO—PERILS OF THE SEA.

A quantity of arsenic was stowed in the same hold with olive oil, but where the slant of the deck was downward from the arsenic toward the oil, and with a dunnage of about four inches. It was shown that the method of stowing the arsenic was usual, and that there was apparently no danger to it under ordinary circumstances. It was also shown that the voyage across the Atlantic was very rough, and that the vessel rolled and pitched to an unusual extent, and when she arrived at New York some of the arsenic was found to have been injured from leakage of the oil. *Held*, that under such evidence the damage must be attributed to perils of the sea, for which the vessel was not liable.

[Ed. Note.—Loss by perils of the sea, see notes to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118].

In Admiralty. Action for damage to cargo.

MacFarland, Taylor & Costello, for libellant.
Hunt, Hill & Betts, for claimant.

ADAMS, District Judge. This action was brought by the Binney and Smith Company to recover the damages it sustained through contact between a part of 414 kegs of arsenic and some unrefined olive oil stowed in the same hold of the steamer Langfond, on a voyage between Barcelona, and other ports in Spain, and New York. The bill of lading, dated the 11th day of May, 1904, acknowledges the receipt of the arsenic in apparent good order and condition. The vessel sailed from Lisbon on the 29th of May and reached New York on the 13th day of June. Upon discharging cargo, it was found that 86 kegs of arsenic were saturated with or injured by the olive oil. The libellant alleges bad stowage in placing the arsenic and oil in the same compartment, that is, in holds 3 and 4 of the vessel, these holds not being separated by a partition or otherwise and practically but one compartment. The claimant alleges that the goods were properly stowed and dunnaged and that the damage happened through perils of the seas, storms and stress of weather of unusual severity.

It appears that the arsenic was stowed in the after part of No. 4 hold with a dunnage of about 4 inches, which is regarded as ample for all usual contingencies. There was a slant in the deck forward, so that a part of the floor of No. 3 was several inches lower than a part of the floor of No. 4. The oil which leaked was stowed in No. 3 hold and naturally ran forward, except in heavy weather, when the steamer was being thrown about.

The testimony clearly shows that the method of stowing the arsenic was usual and there was apparently no danger to it under ordinary circumstances. At the end of the voyage, what oil there was on the floor—and some remained because of its being clogged with coal dust and other dirt, rendering it too thick to pass off through the bilges—was lower than the lowest part of the arsenic.

The method of stowing is not severely criticised, but the place

selected is. The great preponderance of the testimony shows, however, that the place was a usual one and it appears that the master was limited in his choice of places as a large part of the vessel was designed for the transportation of edible goods and it would be obviously improper to stow a poison of this character in their close vicinity. Moreover, the arsenic was taken in at the first loading port when it was necessary to secure a full immersion of the propeller by cargo of a weighty character. The oil and olives in brine had to be kept near the pumps amidships, on account of their known liability to leak. A situation almost immediately over the propeller was therefore selected for the arsenic and the goods subsequently received arranged to supply the other places, having in view the dangerous character of the arsenic, as well as the necessity for keeping it dry. It would not have been exposed to any danger, if the voyage had been of a usual character. It was not, however, of such character but the weather was of great severity. It appears that the vessel rolled and pitched in an extraordinary manner. The master said he remembered the trip particularly on account of the heavy rolling of the ship. He further said:

"A. Well, on the 3rd day of June the sea was driving heavily and rolling; we put up the sails, easing out. It was fresh enough until 8 P. M. on the 4th, it was a regular storm with rain and the sails were made fast and the ship is (was) working heavily; the sea was swelling and raising up from the westward and the ship diving heavily; continual storms with rain, still diving and the sea both from W., W. S. W., and N. W. till 4 P. M. The 5th the storm was taken off, but still the sea kept on with heavy rolling.

"Q. * * * On the 6th at midday it was a little dull; but in the afternoon it raised up again to the storm with rain; the whistle was in continual use; it kept on continually until the 7th when the sea started from the N. and wind from the N. N. E.; kept on with high sea, shipping some spray and water.

* * * * * * *

"On the 7th in the afternoon the sea was taking off and the air was getting lighter and midnight became calm and we made fast the sails; after midnight it (was) breezing up again from S. E., which was raising a moderate gale with squalls. It kept on in the afternoon of the 8th; the ship was rolling heavily; wind veering round S., S. W., W.; hour by hour it was coming round till N. N. W. and N., and raising up a heavy sea. We set the sails, preventing rolling from the northerly sea. At 5 P. M. on the 9th one sail, the schooner sail, was split, and the gaff broken, from the heavy rolling of the ship. Midnight or the morning of the 10th, the sea and wind takes off and keep on larboard breeze until reaching Nantucket Shore Light Ship. While off the Light Ship, in sounding the holds there was shown oil in the pumps in Nos. 1 and 3 or in No. 3 and 4.

* * * * * * *

"A. In that time of year it is the worst kind I had ever had experience of; what more I cannot tell.

"Q. What can you say as to whether such weather as you encountered was sufficient to have thrown the oil casks out of stowage if they were properly stowed? A. Well, the rolling of the ship was sometimes so heavy that we had a hard job to keep ourselves fast with the general cargo, which proves how the rolling of the ship made the sails split and the gaff come down, which proves that the general cargo or any cargo can shift in the holds even if stowed in the very best manner whatever possible.

* * * * * * *

"Q. Well, how did the oil get on the arsenic? A. By the ship lifting up at the bow and it ran back and forth, that is what I think. * * *

Cross examination:

"Q. How old was this sail that split? A. I could not tell.
"Q. As old as the steamer? A. No.
"Q. Steamer sails get pretty old, don't they? A. It was a new sail, I think, but not quite. It passed through the sail-makers at home the year before.
"Q. Has this vessel bilge keels? A. Yes.
"Q. Nothing was carried away from the ship? A. Not except the gaff.
"Q. Nothing else? A. No.
"Q. What was the trouble with the gaff? A. It broke in the middle from the strain of the sail that was smashing.
"Q. What sort of gaff was it? A. Pitch pine gaff.
"Q. Did you examine it after it was broken? A. Yes.
"Q. Was there a knot there? A. There was a little piece of dark wood in it.
"Q. It was an imperfect stick? A. Yes."

This testimony was corroborated by the chief officer who made entries in the log to the same effect and said the oil could not be better stowed; that he caused the bilges to be cleaned out before sailing; that the rolling of the ship would move anything no matter how well stowed.

While due allowance must be made for the natural tendency to exaggeration on the part of these officers, there seems to be no way of accounting for the damage to the arsenic except by crediting their accounts to the extent of establishing a peril of the seas. It was shown that 9 of the barrels of oil were broken, which had the effect of freeing a much larger quantity of the contents than usual and was doubtless the cause of the damage here.

The libel will be dismissed.

FIDELITY & DEPOSIT CO. OF MARYLAND v. FIDELITY TRUST CO. et al.

(Circuit Court, D. New Jersey. January 25, 1906.)

1. EQUITY—BILL—NECESSARY PARTIES.

Where the receivers of an insolvent insurance society assigned to complainant absolutely whatever rights the society or its receivers had against defendant depositaries of the society's funds arising out of embezzlements by the society's treasurer, neither the society nor its receivers were necessarily parties to a bill by complainant against such depositaries, though one of the receivers was entitled to one-quarter of whatever complainant collected on the assigned claims.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 214, 215; vol. 19, Cent. Dig. Equity, §§ 248–251.]

2. SAME—MULTIFARIOUSNESS.

Where the grounds of a suit in equity are in some respects identical or in some way connected, the bill joining causes of action against separate defendants will not be objectionable for multifariousness, though it also shows that one defendant is liable in a different way or to a different extent than the other.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 371–379.]

3. SAME.

In a suit against certain depositaries of the funds of an insolvent association, arising out of embezzlements by the association's treasurer, com-

plainant was interested in all of the alleged fraudulent transactions, all of which were of the same character and grew out of the treasurer's manipulation of the society's deposits with the two defendant depositaries. In some of the transactions it was alleged that both depositaries participated and were jointly liable, and it was further charged that the illegal matters were so interwoven that an accounting was necessary of all the different accounts of the society in both depositaries, and that defendants knowingly participated with the treasurer in the misappropriation of certain of the funds. *Held*, that the bill was not objectionable for multifariousness.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 348, 357, 371–379.]

4. SAME—ADEQUATE REMEDY AT LAW.

The bill was also not objectionable, in that complainant had an adequate remedy at law.

5. ASSIGNMENTS—RIGHTS OF ASSIGNEE—PRINCIPAL AND SURETY—CRIMINAL CONDUCT.

Complainant surety company, after paying its liability on the bond of the treasurer of an insurance society, arising out of the treasurer's embezzlement of the funds of the society, received an assignment from the society's receivers of all the rights of the receivers and the society against defendants, who were depositaries of the society's funds, under which assignments complainant sued to enforce a liability alleged to arise out of improper payments made by such depositaries. *Held*, that as complainant claimed under the assignments, and not as surety, it was no defense that the loss to the society was caused by the treasurer's criminal conduct for which complainant was liable as surety.

In Equity. On demurrer of Essex County National Bank.

Gans & Haman and James E. Howell, for complainants.

John R. Hardin, for defendant Essex County Nat. Bank.

CROSS, District Judge. The bill of complaint in this cause is filed by the Fidelity & Deposit Company of Maryland, against Fidelity Trust Company, the Essex County National Bank, and Anna J. Wilson, executrix of the last will of William B. Wilson, deceased, defendants, and prays for a discovery and an accounting, and for a decree that each of the defendants may be directed to pay to the complainant the amounts for which they may severally be found liable. There is also a prayer for general relief. Among the facts set forth in the bill of complaint, which is somewhat voluminous, the more important as related to the demurrant, are these: A beneficial order known as the "Supreme Council of the Order Chosen Friends" was incorporated under the laws of the state of Indiana some time prior to the year 1895. This corporation did business in the states of Indiana, Maryland, and New Jersey. On or about December, 1900, the corporation became insolvent, and a receiver was appointed of its assets by one of the courts of Indiana, and subsequently ancilliary proceedings were taken in the state of Maryland and New Jersey, by virtue of which proceedings receivers were also appointed in those states. Before the insolvency of said corporation it transacted a large amount of business in the state of New Jersey, and in connection therewith had large deposits of money at various times with the defendants, the Fidelity Trust Company and Essex County National Bank. William B. Wilson, now deceased, and whose executrix is a defendant, was

its supreme treasurer. The Order of Chosen Friends, in the conduct of its business, established various funds for which separate bank accounts were opened. One of the principal banks with which said order deposited its funds was the Essex County National Bank, and the funds there deposited went into and constituted what was known as the "relief fund," and the account was known as the "relief fund account," which account could only be drawn upon by check signed by the three principal officers of the order, to wit, the supreme councillor, the supreme treasurer, and the supreme recorder. Subsequently the order authorized the opening of an account with the Fidelity Trust Company (formerly the Fidelity Title & Deposit Company), which account was known as the "general fund account," and which was constituted by deposit from time to time of 10 per cent. of the moneys deposited in the Essex County National Bank and other banks to the account known as the "relief fund." Checks on the "general fund account" were also required to be signed by the three officers above named. In 1896 another bank account was opened with the Fidelity Trust Company, called the "special fund account." This account was designed to be made up of monthly payments of $400, taken from the "general fund account," by checks bearing the three signatures above mentioned, which fund was intended to pay the expense of the meetings of the supreme council of the order. Still another account was opened by Wilson with the Fidelity Trust Company in the name of William B. Wilson, supreme treasurer. In this last-mentioned account were deposited sums of money belonging to the order, and which the bill charges the Fidelity Trust Company knew belonged to it, and which it also knew could only be drawn out by checks signed by the three officials above named, but which moneys it is alleged as a matter of fact were drawn out by the consent of the Fidelity Trust Company by checks signed only by William B. Wilson, supreme treasurer. It is further alleged that Wilson deposited large amounts of properly drawn checks of the order, as also checks drawn by different persons, to this account, with the object of drawing them out upon his own check as supreme treasurer, for the purpose of abstracting and embezzling the same, and that large amounts of such funds were drawn out by him by checks signed, "William B. Wilson, Supreme Treasurer," and made payable to his own order, which checks were thereafter deposited by him in his personal account in the Essex County National Bank, and which were subsequently drawn out by him and used for his own purpose. The bill of complaint charges that said bank knew that these checks were in fact the funds of the order; that the supreme treasurer's account was an account of the order; that Wilson had no authority to draw on such account personally, or deposit such checks to his own personal account, but was bound to deposit them to the credit of the order; and that the bank also knew that funds of the order on deposit with any bank or trust company could only be lawfully drawn by the signature of the three officers as above stated. The bill then alleges that the Essex County National Bank and the Fidelity Trust Company, two of the defendants, participated with Wilson in the misappropriation

of the funds of the order to a large amount, and charges that they are jointly and severally liable to repay the same to the said order or its assigns. The bill also alleges that the demurrant, its officers, and directors had full and ample notice of the provisions, constitutions, and by-laws of the order, providing that none of its funds could be drawn out except by checks signed by the three officials above named, and, further, that they received from said order a written notice to the effect that no moneys belonging to the said order could be drawn from said bank except upon checks signed by said officials. Then follow somewhat similar allegations with reference to the knowledge possessed by the Fidelity Trust Company. The bill also states that the Maryland receivers of the insolvent Order of Chosen Friends brought suit against Wilson's surety, the complainant herein, in which suit a consent judgment was entered in a Maryland court for $23,000 and costs; that in a settlement agreement between the receivers and the surety company it was provided that the receivers of the order in the various jurisdictions should assign to the complainant herein whatever claims the Order of Chosen Friends had against the defendants herein; that such assignments were subsequently made and copies are appended to the bill; that the settlement of the suit was approved by the various courts appointing the receivers of the order, and that it is under and by virtue of those assignments that this suit has been instituted. No attempt has been made to give a summary of the entire bill, but only and briefly its main features in so far as they attempt to charge the bank and connect it with the accounts of Wilson and the trust company. It thus appears that the bill seeks to charge the Fidelity Trust Company with liability for moneys wrongfully misappropriated and paid out by Wilson, in addition to those for which it seeks to hold the trust company and the bank jointly. There is no allegation of wrongdoing upon the part of the officials of the bank with reference to the payments made from the only fund of the order deposited with it, to wit, the "relief fund." That the payments from this fund were all made regularly by three signature checks is admitted. The charge of joint liability of the two defendants just named consists according to the bill of complaint, in this: that the Fidelity Company, with knowledge that it had no right to do so, permitted Wilson to draw checks as supreme treasurer to his own order, which checks, after deposit in said bank to his personal account, it paid, while the liability of the bank is predicated upon the fact that it knew that these funds belonged to the Order of Chosen Friends, that they were being wrongfully drawn by the check of the supreme treasurer alone, and that with the knowledge it possessed it participated with the trust company and Wilson in the embezzlement of these funds; that is to say, that the negligence and wrongdoing of the trust company and of the bank, enabled Wilson to abstract for his own use the funds of the order. The Fidelity Trust Company has answered the bill of the complaint. The Essex County National Bank has demurred, and assigns several grounds therefor.

1. The first ground of demurrer is that the Supreme Council of the

Order of Chosen Friends and its receivers in the three states above referred to are necessary parties to the bill. I think this ground of demurrer is not well taken. The assignments made by the receivers to the complainant by direction of the several courts appointing the receivers are absolute on their face, and conveyed to the complainant whatever rights the Order of Chosen Friends or its receivers had in and to their claims against the defendants. The settlement agreement, it is true, provided that one-quarter of whatever amount should be recovered by the complainant in this suit or otherwise, from the defendants, should go to the receivers in Maryland, but that is merely an executory agreement creating a right in the receiver of the order in Maryland to demand and have of the complainant one-quarter of whatever it may collect or receive on account of the assigned claims. As said above, the assignments made in pursuance of the agreement of settlement are absolute on their face. The Maryland receiver of the order and the order itself are therefore not essential or necessary parties. They may be proper parties, but that is the utmost that can be claimed. In this connection, it may also be added that the parties are not citizens of this state or within this jurisdiction.

2. The chief ground of demurrer is that the bill is multifarious. As an abstract proposition, it is impossible to say in what multifariousness consists. Each bill of complaint must be tested in this respect by itself. No rule applicable to all cases can be laid down. Certain principles have been established, and the circumstances of each case must be tested as nearly as may be by them. A multiplicity of suits is to be avoided where possible, but at the same time independent parties should not be put to the expense and trouble of litigating matters in which they have no interest in common with other defendants. Where the grounds of the suit are, however, in some respects identical or in some way connected, this condition will obviate an objection on the ground of multifariousness, notwithstanding the bill may show that one defendant is liable in a different way or to a greater extent than another. In the case of Brown v. Guarantee Trust Safe Deposit Company, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468, Justice Lamar, in speaking for the court (on page 412 of 128 U. S., page 130 of 9 Sup. Ct., 32 L. Ed. 468) says:

"The case against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. In the latter case the objection of multifariousness cannot be allowed to prevail" citing cases. "It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters involved, which are connected with the others"—citing cases.

This case has been frequently cited and followed in the federal courts. In the case of Illinois Central R. R. Co. v. Caffrey (C. C.) 128 Fed. 770, Thayer, J., says:

"A bill will not be held demurrable for multifariousness because a large number of persons having no connection with each other are joined as defendants, where the cause of action against each is the same, and the joinder will save a multiplicity of suits and promote the convenience of the court and of the parties."

In that case the bill, which was filed by a railroad company against several defendants, who were engaged in business separately as ticket brokers in an alleged unlawful sale of railroad tickets, was sustained. Judge Sanborn, speaking for the Eighth Circuit Court of Appeals, in Kelley et al. v. Boettcher, 85 Fed. 55, 64, 29 C. C. A. 14, 23, says:

"There is no fatal misjoinder of causes of actions in equity in any bill which presents a common point of litigation, the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit"—citing a large number of cases, among them Brown v. Safe Deposit Company, supra.

Again, in Curran et al. v. Campion et al., 85 Fed. 67, 29 C. C. A. 26, the same judge, sitting in the same Court of Appeals, in addition to what was just quoted from his opinion in Kelley v. Boettcher, says, on the matter of multifariousness:

"It is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient if each party has an interest in some material matter involved, which are connected with the others."

See, also, United States v. Flournoy Live Stock, etc., Company (C. C.) 69 Fed. 887, 890, 891.

In Jones v. Slauson et al. (C. C.) 33 Fed. 632, a bill had been filed by an assignee in bankruptcy to set aside three fraudulent conveyances made by the bankrupt to separate defendants. It was claimed that these conveyances were separate transactions. Judge Lacombe, on page 634 says:

"The propositions that a bill may be filed against several persons relative to matters of the same nature, forming a connected series of acts, all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly, in each act, and that unconnected parties may be joined in a suit where there is one issue in the case, have been affirmed and reaffirmed in the courts of this state, and that, too, in suits brought as this is, to reach property of a debtor conveyed in fraud of his creditors, in diverse ways, at different times, and to separate parties."

And he subsequently adds, "This is generally accepted as the practice in the federal courts"—citing cases. In the New York & New Haven Railroad Company v. Schuyler et al., 17 N. Y. 592, it appears that the president of the railroad had issued a large number of fraudulent certificates of its stock. In a suit for the surrender and cancellation of these by the company it was held that the different owners of the fraudulent stock, although they had not acted together in the matter, were proper defendants to the suit, and an objection on the ground of multifariousness was overruled. See, also, Norris v. Hassler (C. C.) 22 Fed. 401; Lehigh Valley R. R. Co. v. McFarlan, 31 N. J. Eq. 730, 758; Illinois Central R. R. Co. v. Caffrey et al. (C. C.) 128 Fed. 770.

It appears to me that under the principle established by these decisions this suit can be maintained against these defendants, and that the objection raised by the demurrant on the ground of multifariousness must be overruled. The complainant is interested in the alleged illegal transactions, and in all of them, and they are all of the same

character and grew out of the alleged fraud and embezzlement of the treasurer of the order by the manipulation of its deposits in and between the two corporate defendants. As to some of the matters involved, it is true the Fidelity Trust Company may be alone responsible, but as to others it is alleged that it and the demurrant participated in them, and that they are jointly liable therefor, and that their joint liability grew out of the same alleged unwarranted and improper use of illegal checks drawn by the treasurer of the order, and which were so drawn illegally and improperly by him to the knowledge of both the defendants, and which checks, drawn upon the Fidelity Trust Company and paid by it, were deposited by the treasurer in his own private account in the Essex County National Bank, and that the bank knew they were funds of the order which were being illegally drawn and appropriated by its treasurer to his own use. It is further substantially charged in the bill that these illegal matters are so interwoven that it is necessary that an account be taken of all the different accounts of the order in the trust company and in the bank, in order to ascertain the rights of the complainant in the premises not only, but also those of the defendants, as to each other, and the complainant, and that this is necessary because the embezzlement of Wilson, the treasurer, consisted in a system of transfers of funds of the order from one account to another, in the trust company and bank, and also of deposits from time to time made by Wilson of his own moneys, to the various accounts, by which his alleged defalcations were at times somewhat lessened. It is true that no conspiracy or confederacy is charged between the trust company, the bank, and Wilson, but it is charged that they knowingly participated with Wilson in the misappropriation of certain of the funds of the order, and that they are jointly liable for their repayment.

While the statements of the bill above referred to appear in it in different forms and at different places, they may, for the most part, be found collected in the thirty-second paragraph thereof, in the following language:

"That these deposits and transfers from one account to another were all made as a part of one fraudulent scheme of Wilson's to embezzle the funds of the order, and to avoid detection. That in this way parts of the money which it has been charged the defendants from time to time enabled said Wilson to misappropriate were thus returned to other accounts of the order. That, furthermore, in some few instances Wilson made deposits of funds of his own in different accounts of the order for the purpose of partially offsetting the funds thus misappropriated by him. That in these various ways the net loss of the Order of Chosen Friends by reason of Wilson's embezzlement was less than the total amount of the various sums for which it has hereinbefore been charged the defendant corporations were liable in the first instance. That in order to determine exactly the liability of each of the defendant corporations to the said Order of Chosen Friends, or its assigns, it will be necessary to state a full and complete account between the said order and said Wilson with reference to and including the dealings of said Wilson with all the various bank accounts of said order with the two corporation defendants so that said defendants may be held liable for all sums misappropriated by Wilson through their participation, and may be credited with funds thus misappropriated, but afterwards returned, so that their net liability may be fixed at the actual amount misappropriated through their participation and not returned."

These charges cannot be ignored, as they would have to be if the objection of multifariousness were sustained.

3. The next objection urged is that it appears by the bill of complaint that the complainant has a complete remedy at law against the demurrant as to the matter therein alleged. If we admit that the complainant has a remedy at law against the defendant as to said matters, such admission would not be fatal to the maintenance of this suit, since it must further appear that such remedy would be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. I think enough has been shown in the preceding paragraph as to the nature of the transactions between these parties, complainant and defendants, to show that the accounts between them are complicated and intricate, sufficiently so at least to warrant the assertion that it would be well nigh impossible for a jury sitting in the ordinary way in a trial at law to remember, consider, and digest the necessary evidence relating thereto. It is not unreasonable to assume that the most patient, intelligent, and fair-minded jury would, under the circumstances, fail to do justice between the parties. Kirby v. Railroad Co., 120 U. S. 130, 134, 7 Sup. Ct. 430, 30 L. Ed. 569. There may be a legal remedy, and yet, if a more complete remedy can be had in equity, it is a sufficient ground for jurisdiction. Wylie v. Coxe, 15 How. 415, 419, 14 L. Ed. 753; McMullen Lumber Co. v. Strother (C. C. A.) 136 Fed. 295, 303, 304; Fechteler et al. v. Palm Bros. & Co., 133 Fed. 463, 66 C. C. A. 336; Fenno v. Primrose et al. (C. C.) 116 Fed. 49; Gunn v. Brinkley Car Works, 66 Fed. 382, 13 C. C. A. 529; Cranford v. Watters, 61 N. J. Eq. 284, 48 Atl. 316. In the last case mentioned many authorities are collected and ably and elaborately discussed by Vice Chancellor Pitney.

Applying the principles established by the cases referred to, I have no hesitancy in saying that the remedy at law open to the complainant is inadequate in this case. I do not believe that justice could be done between the parties in an action at law as adequately, certainly, or efficiently as by a proceeding in equity. It seems to me that the bill can be satisfactorily and surely grounded upon the fact that an accounting is called for not only, but a complicated, accounting, and one in which discovery is necessary. Furthermore, an attempt is made by the bill to follow and recover trust funds which have been misappropriated, and to which the complainant claims to have an equitable title. It is charged that, so far as the fund kept to the account of Wilson as supreme treasurer is concerned, the complainant is seeking to follow the proceeds of an account which equitably belonged to the Order of Chosen Friends, but which was designated in the books of the bank as belonging to William B. Wilson, supreme treasurer. In such case the Supreme Court of the United States has held that there is no adequate remedy at law. In the case of the National Bank v. Life Insurance Co., 104 U. S. 54, 26 L. Ed. 693, it appears that the agent of the life insurance company opened an account with the bank in his name as agent, in which account he deposited the funds of the insurance company. He afterwards incurred personal debts to the bank, which the bank deducted from the ac-

count kept by the debtor as agent. The insurance company filed a bill in equity to recover the amount of the agent's bank account without any allowance for the personal debt of the agent. The court said (on page 66):

"It is objected that the remedy of the complainant below, if any existed, is at law, and not in equity. But the contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillion, as was decided by this court in National Bank v. Insurance Company, 103 U. S. 783, 26 L. Ed. 459, and, conversely, for the balance due from the bank, no action at law upon the account could be maintained by the insurance company. But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account."

See, also, Union Stock Yards Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724.

4. What has already been said disposes, indirectly at least, of all the grounds of demurrer, except the sixth, seventh, and eighth, which are quite similar and may be considered together. They are based upon the theory that the loss to the Order of Chosen Friends was caused by the criminal acts of Wilson, for whom the complainant became liable as surety to the order, and the contention is that Wilson's surety ought not to be allowed to recover against the defendant bank for any loss growing out of Wilson's misconduct. A sufficient answer to this is that the complainant did not in any way participate in the treasurer's wrongdoing, nor was it a party thereto, or cognizant thereof, nor is it claiming through him. It is also set up that the plaintiff cannot enforce any claim which Wilson himself would have been barred from enforcing on account of his criminal conduct. Of course, neither Wilson himself nor any assignee of his would have any right of recovery against either of the defendants, but the complainant is not suing in Wilson's right. It does not claim through him, but through the Order of Chosen Friends. It appears to me that, if it were necessary, the surety in this case would undoubtedly be subrogated in equity to the rights of the Order of Chosen Friends, to the extent of its payment, but it is unnecessary to consider that question, since it holds by direct assignment all the rights of the order in the premises. It surely cannot be that, if the corporate defendants knowingly aided Wilson in illegally abstracting the moneys of the order, the order would not have its right of action against them. This being so, why should not the complainant have the same right of action by assignment from the order, regardless of how or why it acquired such assignment? The order had a clear right, it just as clearly assigned it to the complainant, and I see nothing in reason, or public policy, or otherwise, that estops or prohibits the complainant from asserting it in a court of equity.

The demurrer will be overruled, with costs.

SHEWALTER v. CITY OF LEXINGTON et al.

(Circuit Court, W. D. Missouri, W. D. January 15, 1906.)

No. 2,959.

1. FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—FEDERAL QUESTION.

The fact that a suit in a federal court involves a federal question is not sufficient to confer jurisdiction unless the amount involved exceeds $2,000.

[Ed. Note.—Jurisdiction of Circuit Courts as determined by the amount in controversy, see note to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

2. SAME—CLOUD ON TITLE—LIENS.

Where a bill in a federal court to set aside certain assessment certificates for a street improvement alleged that complainant was in possession of the land in controversy through his tenant, and the contractor holding the certificates was not claiming a lien on the street or parkway, a complainant was not entitled to sustain the jurisdiction of the court by claiming that the improvement ordinance which vacated a 75-foot street had the effect to immediately vest the title to the middle of the street in the adjoining owners, and that the subsequent act of the city in appropriating a part of the property for a street and parkway without condemnation and compensation to complaint was illegal.

3. SAME.

Where suit was brought in a federal court to quiet title to certain property as against certain street improvement certificates amounting to less than $2,000, the amount of the certificates, and not the value of the land, constituted the subject-matter of the action, and was therefor insufficient to confer jurisdiction.

J. D. Shewalter, for complainant.

Edward C. Gates, Scarritt, Griffith & Jones, for defendants.

PHILIPS, District Judge. It will clarify the question of jurisdiction raised by the demurrer to briefly state the origin of this controversy. The complainant owns certain lots of ground, fronting 65 feet on Main street in the city of Lexington, Mo. As laid off and platted, this street was 75 feet in width. The city, which is one of the third class under the divisional classification of the statute, by ordinance, narrowed the roadway of this street to 24 feet, designating the balance of the street as a "park area." While the bill of complaint alleges that the ordinance first vacated the original street, and afterwards undertook to open it by a 24-foot roadway, it discloses the fact that the same ordinance, and necessarily, as an integral part thereof, provided for the paving, guttering, etc., of the 24 feet as a roadway, and for parking the residue of the 75 feet. While the pleader has not set out the ordinance, it may not be strained to infer that the ordinance, as pleaded, viewed as an entirety, indicates the legislative intent to reconstruct, rather than to abandon any part of the street hitherto dedicated to public use. Pursuant to the ordinance passed by the city, the defendant Brindle did the contract work of grading, paving, and curbing the street and parkway, for which work certificates, under the statute, were issued to him by the city.

The bill of complaint assails the validity of this tax certificate on

various grounds; and alleges that said Brindle threatens to enforce the payment of said tax certificate against the complainant's lots as a lien thereon under the statute. The bill prays for an annulment of any title or claim asserted by the defendants, or either of them, to the real estate in question "arising by and under the passage of the aforesaid resolutions, ordinances, contracts, and the issuing of said tax bill, and the asserted claim of title and right to the property of your orator arising thereunder"; that the resolution, ordinances, and the contract for the paving, etc., and the issuing to the contractor a lien for the alleged improvements, and the cloud cast upon the strip of ground thereby by the defendants' acts, be annulled; and that the complainant be decreed the owner of the property, free from any claims upon the part of the defendants, or either of them, and that he be declared entitled to the peaceable, quiet enjoyment of the property.

The separate demurrers filed by the defendants, as urged at the hearing, present the single question of jurisdiction, on the ground that the amount in dispute does not exceed $2,000, exclusive of interest and costs. It must be conceded that under the judiciary act to confer jurisdiction on this court over this controversy it is indispensable that the bill should show affirmatively that the amount in dispute exceeds $2,000, exclusive of interest and costs. The fact that the suit may involve a federal question is not sufficient to confer jurisdiction unless the amount exceeds $2,000. Fishback v. W. Tel. Co., 161 U. S. 99, 100, loc. cit. 16 Sup. Ct. 506, 40 L. Ed. 630. It is apparent on the face of the bill, from the cost per square yard of the paving, etc., that the amount assessed against complainant's lots is far below the sum of $2,000. The allegation of the bill, relied upon by the complainant as to the jurisdictional amount, is as follows:

"That the matter in dispute, which is the title to certain real estate, exceeds the sum or value of $2,000, which real estate is situated within the territorial jurisdiction of this honorable court, and by these proceedings your orator seeks to quiet the title to the said real estate, remove a cloud from the title thereof, and to decree the title to be in your orator, as against the defendants herein, who, as hereinafter alleged more fully, are setting up a claim and lien to the said real estate, and are threatening to sell the same and acquire the title thereto."

From the foregoing allegation the bill does not contain all the requirements of the statute. But waiving this, does the actual matter in controversy between these parties, the grievance complained of by the complainant, and the claim made by the respondents, involve the title to the lots in question in the sense of the jurisdictional amount in suit? Evidently the pleader had in mind to give color of jurisdiction to the court outside of the amount of the certificates for the work done, by claiming that the first part of the ordinance in question, vacating the 75-foot street thereby, under the statute of the state, which provides where a street is vacated or abandoned by such a city the title to so much of it as abuts on the lot or lots of the adjoining landowner shall revert to such owner, eo instante vested the title in the owner of the lots to the middle of the street; and that notwithstanding the same legislative act proceeded to limit the roadway of this street to 24 feet, and declared the balance of the 75-foot street to

be a parkway, the city thereby, in effect, without condemnation proceedings and compensation to the complainant, undertook to appropriate a part of his property by building a part of the 24-foot roadway and establishing a parkway thereon. It cannot be said from the averment of the bill whether the valuation placed upon the lot is limited to the lots as they abutted on the 75-foot street, or whether it includes the addition claimed to have been made thereto by the vacation of the street.

Of this contention it may be observed that there can be no pretense of claim that the tax certificates issued by the city were placed upon the streetway, which it claims to have opened, or that Brindle, the contractor, is claiming a lien on the 24-foot street and parkway. Such certificate for that part of the land would be void on its face. Such a contention is furthermore absurd for the reason that the bill alleges that the complainant is in possession of the land in controversy through his tenant. It is hardly conceivable that a tenant of the complainant could be in possession of a street on which the city has constructed a pavement, established a parkway, and built curbing around it, as the bill of complaint alleges. If the city is in possession thereof, using it as a public highway and parkway, without authority of law, and the complainant is the owner in fee thereof, the city is simply a trespasser, and the complainant would have a clear, adequate, complete, and efficient remedy at law by the simple action of ejectment. Furthermore, the defendant Brindle, who simply holds the tax certificate on the lots of the complainant, is not in possession of this public highway of the city, nor asserting any claim thereto or use thereof; and there would be, manifestly, on the face of such a bill or petition, no community of interest between the two defendants involving the title to the street and parkway. Reduced to its sensible analysis, the gravamen of this bill is to get rid of the tax certificate as purported lien upon the complainant's adjacent lots.

The Supreme Court has repeatedly said:

"By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined." Lee v. Watson, 1 Wall. 339, 17 L. Ed. 557.

Or, as expressed by Chief Justice Fuller, in Wheless v. St. Louis et al., 180 U. S. 379, 382, 21 Sup. Ct. 402, 403, 45 L. Ed. 583:

"The 'matter in dispute' within the meaning of the statute is not the principle involved, but the pecuniary consequence to the individual party, dependent on the litigation, as, for instance, in this suit the amount of the assessment levied * * * as against each of the complainants."

Stripped of involved statements and reduced to its last analysis, the validity of the assessments made on the complainant's lots—which is less than $2,000—is the matter in dispute. The lien cannot be enforced for any more. The essence of the suit is to have that assessment declared invalid. This done, the complainant has no controversy, as the burden of his prayer is to be relieved from this tax. In Douglass Co. v. Stone (C. C.) 110 Fed. 812, the suit was to enjoin the enforcement of a tax levied on certain lands under claimed statu-

tory authority. There, as here, the jurisdiction of the federal court as to the amount in dispute was sought to be sustained on the ground that the lien constituted a cloud on the title. The court, on page 814 of the opinion, said:

"It is contended in argument of counsel for the plaintiff that it is not the amount of taxes the collection of which is sought to be enjoined that fixes the jurisdiction of the court, but the value of the land on which the taxes are assessed. This contention is based on the allegation that the object of the suit is to remove a cloud upon the title, and that in such a suit the value of the land fixes the jurisdiction. But the title to the land on which the tax is assessed is not involved. The question is as to the amount of taxes due, if any."

So in McDaniel et al. v. Traylor et al. (C. C.) 123 Fed. 338, 339, the action was brought by certain heirs to set aside judgments rendered by a probate court in favor of different defendants against the estate, which demands were alleged to constitute a lien on the real estate. After discussing the right of the several complainants to maintain joint action, the aggregate of whose interests exceeded the value of $2,000, the court said:

"Nor can the jurisdiction of the court be sustained upon the ground that the value of the real estate on which these judgments are liens, and consequently clouds on complainants' title, exceeds the sum of $2,000 for the value in dispute is not the value of the property on which the judgment is a lien, but the amount of each judgment, or the amount each defendant will have to be paid to release his lien if his judgment is not set aside. * * * What is the object of this suit? Not the title to the land, but to cancel judgments which incidentally are liens on the land. The rule would be different if the cloud on the title consisted of a claim on the part of the defendants which would effect the absolute title of the property, and which could not be discharged by the payment of money. In such a case, the title to the land being involved, its value determines the jurisdiction of the court. This distinction is fully recognized in the principal case relied upon by counsel for complainants. Woodside v. Ciceroni, 35 C. C. A. 177, 93 Fed. 1. The demurrer to the jurisdiction must be sustained and the bill dismissed."

It is true that this case was reversed by the Supreme Court (McDaniel v. Traylor, 196 U. S. 415, 25 Sup. Ct. 369, 49 L. Ed. 533), but the reversal was upon the ground that as the judgments were obtained pursuant to a fraudulent conspiracy among the alleged judgment creditors, if any one of the claims adjudged was good all were good, and the prosecution of one could not be enjoined unless all were enjoined, and therefore the aggregate amount of the judgments constituted the amount in dispute, notwithstanding the amounts of the judgments separately were less than $2,000. But it does not affect the ruling of the Circuit Court that in such case the value of the land is the criterion for determining the jurisdictional amount. On the contrary, it holds that the jurisdiction does not depend on the value of the complainant's interest in the real estate from which the cloud is sought to be removed, but on the aggregate amount of the liens of all the defendants' claims which had been allowed by the probate court against the intestate's estate pursuant to the alleged combination.

The contention of the learned counsel that the value of the land and not the amount of the lien is the matter in dispute, it seems to me, is effectually settled by the Supreme Court in Ogden City v. Arm-

strong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444. Assessments had been illegally made upon complainant's real estate for paving a street. The several property owners affected thereby brought a joint bill, alleging that, under the ordinance assessing the properties of the complainants, the property was about to be exposed for sale to satisfy the assessments, and that it was threatening to continue to sell said real estate annually for 10 years as each installment of said assessment became due, whereby the plaintiffs have been compelled to pay certain amounts in order to prevent a sale of their property, and to prevent a cloud upon their titles; and that certain of their real estate had already been sold to satisfy the alleged illegal assessments. The prayer was that the ordinance and assessments might be declared void, and to restrain the defendants from further proceeding thereunder; that the sales of real estate be set aside, and for general relief. Both the allegations of the bill and the prayer for relief involved the matter of the cloud on the title, and the setting aside the sale of the land, etc., yet, the court dismissed the bill as to those complainants whose respective assessments did not account to the requisite appealable sum, and retained jurisdiction as to the one whose assessment carried on through 10 years would amount to the requisite sum.

In Wheless v. St. Louis et al., supra, involving the validity of an assessment constituting a lien on the abutting property of the complainant on the front foot rule of Missouri, the Circuit Court dismissed the bill on the ground that the amount assessed respectively to the complainants in the bill did not exceed $2,000, etc. Mr. Justice Fuller, who delivered the opinion of the court, held that the matter in dispute was the amount of the assessment made upon the real estate; and, inasmuch as the amount of the assessment against each of the complainants did not exceed the sum of $2,000, etc., he held that the court was without jurisdiction. The court said:

"If a decision on the merits were adverse to the assessment each of the complainants would be relieved from payment of less than $2,000. If the assessment were sustained, neither of them would be compelled to pay so much as that. It is true that the assessment has not been made, but the charge is that it is threatened to be made, and the purpose of the bill is to enjoin proceedings about to be taken to that end. We agree with the Circuit Court that in these circumstances there is no force to the suggested distinction between a case where the assessment has not in fact been made and a case where it has already been made. When made, neither one of these complainants will be called upon to pay a sum equal to the amount of $2,000, nor will any one of the lots be assessed to that amount."

I am unable to perceive the force of the distinction drawn by the learned counsel, pro se, between a prayer to enjoin the enforcement of the assessment, which necessarily includes the effect of a decree annulling the tax certificates, and a suit which omits the special prayer for injunctive relief, but asks that the assessment be declared void and thereby whatever seeming shadow it casts upon the title be removed. It has never occurred to counsel or the courts in the multitude of litigation contesting the validity of such assessments for street improvements, that where the amount assessed was below $2,000 the controversy might be brought into the federal court to determine the

validity of such a tax lien by merely omitting a prayer for injunction, and limiting it to a decree annulling the assessment and declaring the land free from the pretended lien.

The Supreme Court of this state has uniformily held that a suit contesting the validity of such tax bill for street improvements, even where it is alleged that such tax bill casts a cloud on the title to the real estate, does not involve the title to the real estate within the meaning of the Constitution, which gives appellate jurisdiction to the Supreme Court of the state over all controversies affecting the title to real estate. Barber Asphalt Paving Co. v Hezel, 138 Mo. 228, 39 S. W. 781; Smith v. City of Westport, 174 Mo. 394, 74 S. W. 610; Syenite Granite Company v. Bobb, 97 Mo. 46, 11 S. W. 225; Corrigan v. Morris, 97 Mo. 174, 10 S. W. 880. The law disregards the mere nomenclature given to a pleading, but looks rather to its substantive effect. The distinction is palpable between this and that class of cases like qui tam actions, and to remove clouds on title under claim of ownership based on record title, and the like, in which it is held that the amount in dispute, to determine the jurisdiction, is the value of the land, and not the interest asserted thereto by the adverse claimants. See Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895. Such was the nature of the following cases: Peirsoll v. Elliott, 6 Pet. 95, 8 L. Ed. 332; Stark v. Starr, 6 Wall. 409, 18 L. Ed. 925; Jones v. Bolles, 9 Wall. 364, 19 L. Ed. 734; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Lehigh Z. & I. Co. v. N. J. Z. & I. Co. (C. C.) 43 Fed. 545.

It results that the bill must be dismissed for want of jurisdiction, without prejudice.

ROSS v. CORNELL STEAMBOAT CO.

(District Court, D. New Jersey. January 29, 1906.)

COLLISION—TUG WITH TOW AND ANCHORED DREDGE—MUTUAL FAULT.

A tug coming down the Hudson river at night with a heavy tow consisting of a number of loaded scows tandem, the whole extending a quarter of a mile in length, *held* in fault for a collision between her tow and a steam dredge engaged on government work and anchored on the side of the channel where she had been at work during the day, the evidence showing that the tug knew the position of the dredge, and had a tow so large and unwieldy that she could not properly handle it with the strong ebb tide which was running. *Held*, also, that the dredge was in fault for remaining at night where she did in the channel at a place where, by reason of a bend, it was difficult for vessels with long tows to pass in safety.

[Ed. Note.—For cases in point, see vol. 10, Cent Dig. Collision, §§ 87, 88½, 200.]

On Libel, etc.

Bedle, Edwards & Thompson, for libelant.
Amos Van Etten, for respondent.

CROSS, District Judge. The libel in this action is filed to recover damages to steam dredge No. 2, belonging to libelant, which resulted

from a collision between it and a tow in charge of the tug Norwich belonging to the respondent. The accident happened on the 19th of May, 1897, at about 11 o'clock in the evening, at a place known as "Mull's Rock," in the Hudson river between Coxackie and the state dam at Troy. The libelant had a contract with the United States government for the removal of sand and rock which obstructed navigation at the place above mentioned. He had been engaged in the work for three years prior to the year when the accident happened. Work for the year 1897 was commenced about the 1st of April and continued to the time of the accident, at which time the work was nearly completed; some cleaning up of sand and broken rock only remained to be done. At the time of the collision the dredge was anchored at the upper corner of Mull's Rock, and about 150 feet westerly of the center of the channel at that point. There was a scow moored to the starboard side of the dredge. The condition of the channel at the time of the collision was such that vessels would at times slow up and go down to the west of the dredge, but the old channel to the eastward was the one in general use. The channel previous to the work done at Mull's Rock, was such that boats coming down the river were compelled to cross it three times within a comparatively short distance, or to speak more definitely, the channel ran from Castleton Light on the east side of the river along what is known as the "Nine Mile Cross-Over," to a point on the westerly shore where there is a light known as the "Upper Beacon," and from thence along the westerly shore until near a light known as the "Lower Beacon" above Mull's Rock, and thence through what is known as "Mull's Cross-Over," towards Mull's light, after which it turns again toward the westerly shore in the direction of Coeyman's. The channel on the east side of Mull's Rock was from 250 to 300 feet in width. The dredge of the libelant had been accustomed to remain anchored at the place where she quit work, and was on the night of the collision thus anchored by three spuds with an anchor line at her bow and stern. The attendant scow which was by her side nearest Mull's Rock, was uninjured. By the contract with the government, it was provided that the work should "begin in the lower river and continue up stream to completion, as the engineer in charge may direct. * * * The work will be carried on under the direction of the engineer in charge. The orders of the assistant engineer or his agent will be strictly obeyed. Inspectors will be appointed for each locality who will remain constantly with the plant while at work." This is the only portion of the contract which bears upon the question at issue.

On the night of the collision the Norwich was coming down the river in charge of a tow consisting of about 10 or 12 mud scows, heavily loaded. The Norwich was attached to the head scow by a hawser 25 fathoms in length, and the scows were hitched tandem, and as close to each other as was possible. The Norwich was 170 feet in length and the scows were approximately 100 feet in length. There is some diversity in the evidence as to the number of scows in the tow, but accepting the smaller number as correct, and including the length of the Norwich, the hawser connecting her with

the head scow and the length of the scows, it is obvious that the entire length of the Norwich and her tow was about a quarter of a mile, and the captain of the Norwich says that it was one of the heaviest tows that they took. The tide rises and falls at this point of the river about 2 7/10 feet, and it was running strongly ebb at the time of the accident. The scows drew when loaded, from 7 to 13 feet of water, and at low water would have had great difficulty in passing through the channel by Mull's Rock. The river and weather conditions were normal; there was no freshet in the river and the night was clear. At the time when the collision occurred, the dredge was showing a white light upon a staff at least 20 feet above the deck, and a red light exposed on her side toward the channel, and there was the usual watch on deck; another red light was shown on the inshore or westward side of the scow accompanying her. The red lights were seen plainly by several witnesses who were on the Norwich, about three-quarters of a mile above the point where the dredge was anchored. Two or three of these witnesses, however, say they did not see the white light, but the pilot of the Norwich admits that he saw it, and the watch on the dredge, whose duty it was to put up the light nightly, says that it was up and burning, and that it remained burning until the next morning, when he took it down. The evidence satisfies me that the white light was burning in its proper place, and there is no doubt whatever, that the red lights were both shown and seen, as above stated. When the red lights were seen by those on board the Norwich, she gave several sharp whistles, but continued her course, and, in rounding Mull's Rock, kept as far to the eastward, according to the testimony, as the depth of the water would permit. The dredge was, however, struck twice by scows at or near the rear end of the tow; a hole four feet square was knocked in her stern on the port corner, from the effects of which she sank in about five minutes. Her staff with the white light on it remained above water.

The libelant claims that the collision was caused by the unskillful and negligent manner in which the tow was made up and navigated by the tug Norwich, and also because the tug had no proper control over her tow. The respondent on the other hand denies this, and claims that it was the duty of the libelant to remove the dredge at night when it was not working, since it was so near the channel as to be dangerous to navigation; it further claims that notice had been given by the captain of the Norwich to the captain of the dredge, on the morning of the day of the collision, when the Norwich was going up the river, that she was coming down that night with a heavy tow, and that the dredge must be taken out of the way. In response to this, the libelant says that it received no such notice, that the work was government work which was being hurried, and that to remove the dredge at night would have caused delay in resuming the work in the morning, at the exact location where it had stopped the night before, since such location had to be determined by means of ranges, some of which were about 2,500 feet distant, and that under the circumstances he was justified in anchoring for the night where he did. Fur-

thermore, he claims that he was authorized to anchor there, by a letter written to him by the government engineer in charge of the work, dated July 6, 1896, in which the engineer, after referring to complaints that had come to his office as to the position of libelant's anchors and buoys at night, says:

"There is no necessity for obstructing the channel at night either with engines, or buoys, or anchors. Of course, it might make the work a little more expensive to move your machines and anchors at night, but that is only a contingent of the work, and will have to be borne. You will therefore please instruct your superintendent that all machines and anchors, and buoys, unless lighted, must be removed to one side of the channel at night; or more accurately when no work is being done. This is not required to humor the whims of pilots, but to comply with the laws in regard to obstructions to navigation."

The rule of law applicable to the case of a moving vessel with respect to one properly anchored, is laid down in the case of The Virginia Ehrman, 97 U. S. 309, 315, 24 L. Ed. 890, and is as follows:

"Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonorate herself from blame by showing that it was not in her power to prevent the collision by adopting any practicable precautions. Citing cases.

See, also, The Scotia (D. C.) 10 Fed. 684; Seabrook v. Raft of Railroad Cross Ties (D. C.) 40 Fed. 596; The Nettie Sundberg (D. C.) 100 Fed. 886; Merchants & Miners Transportation Co. v. New England Dredging Co., 76 Fed. 877, 22 C. C. A. 597.

Whether the libelant was at fault in anchoring the dredge where he did, will be considered after the question of the respondent's negligence has been dealt with. It will be remembered that the dredge was anchored on the upper and port corner of Mull's Rock, at a place immediately adjacent to and parallel with the main channel of the river; that proper lights were maintained on the dredge which were seen by those in charge of the Norwich and her tow when they were about three-quarters of a mile away. There was also a watch on the deck. The dredge was anchored, and at the time was helpless. All that the pilot of the Norwich did, or pretends to have done, when the lights on the dredge were discovered, was to blow her whistle. She had under her charge one of the heaviest of tows, and while the testimony shows that it was not customary to have a tender accompany a tow, nevertheless, as a matter of fact, the Norwich had one, the Dixon, that night, but it was not used to either warn the watch on the dredge of the approaching tow, or to aid in preventing the collision. The tender had passed down the river just ahead of the Norwich, for the purpose of picking up two scows at some point less than a mile down the river, and consequently was not available to ward off the rear end of the tow, and keep it from colliding with the dredge, nor was it used, as it apparently might have been, to notify the watch on the dredge in passing, that a heavy tow was immediately following, which would endanger the dredge. Had this been done, the crew of the dredge might have gotten up steam and moved the dredge, or taken

other measures to protect it. But aside from this, it seems clear that the tow was too long and heavy to be safely managed and controlled by the Norwich at this point, with the tide at ebb. The Norwich was an old side-wheeled steamer, and had been used for towing upwards of 23 years; she had an engine of a little over 700 horse power, and Captain Du Bois says of his tow, that:

"It was a heavy tow drawing a big draught of water, and will tow along all right as long as you have water enough; that it was the heaviest tow they take down."

And Hayes, who was the first pilot of the Norwich, on the night in question, when asked to describe the course that the boat took the night of the collision, in reply thereto, and after speaking of crossing from one side of the river to the other, adds:

"In the meantime at the Cross-Over at this point, this dredge lay. It was at ebb tide, and towing so the tide carried the tow faster than I could pull it clear of the dredge, and swung it against the dredge which lay on the point of the Cross-Over."

From which it would appear that the condition of the river being, as it was normal, the respondent had a heavier tow than the Norwich could manage. There were no conditions existing which a skillful pilot and master could not, and ought not to have foreseen. They knew the dredge was working there, the depth and width of the channel, draught of the scows, the condition of the tide, and the length and character of the tows. Again, the testimony shows that the pilot of the Norwich steered his vessel diagonally across the river, and as far over toward the eastward shore as the depth of water in the channel would permit. This necessarily tended to expose the port side of the long and heavy tow to the full force of the ebb tide. Upon this point Captain Pratt, a witness for the respondent, who had been engaged in navigation on the Hudson river for 53 years, was asked this question:

"Q. The testimony of the captain of the Norwich was that he kept as close to the dyke on the east side of the river as he could get, without going on the rocks; wouldn't that have a tendency to throw the tail end of his scow, the tail scow, over on the rocks? (Mull's Rock). A. I should say it would, if he done that."

There is no explanation of this testimony, and in the absence of any, it would seem to raise a serious question as to whether the Norwich was properly navigated, as it is obvious that the more nearly the tow was kept in line with the channel and current, the less opportunity would the tide have to act against the broadside of the tow, and bear it down upon the dredge. In addition to this, Captain Du Bois, of the Norwich, referring to the men operating the dredge, says, that "when they were working on the rock, they were right where we had no business to go." This testimony is important, for the reason that the weight of the evidence shows that the dredge at the time she was struck and sunk, was on the point of Mull's Rock, where she had been working. The respondent claims however, in justification of its taking this long and heavy tow down the river that night, that the captain of the Norwich notified the captain of the libelant's dredge on his way up the river, that he was coming down with a heavy tow that night, and that he must remove his dredge. The evidence how-

ever, does not satisfy me that such a notice was given, or rather does not satisfy me that it was understood by any one on board the dredge. It is not claimed that any reply was made, except some of the witnesses say, that a person whom they supposed was the captain (he is now dead) threw up his hands and laughed; but he would naturally have done this in answer to any salutation from those on board of a passing vessel whether he understood what was said or not. When we consider that the Norwich was a side-wheeled steamer, and was passing at some distance from the dredge, that no megaphone or trumpet was used, and that no stop was made by the Norwich, or any verbal answer received, it would be altogether unreasonable to hold that the notice, if given, was understood. If the respondent intended to rely upon any such notice it should have made sure that it was understood.

The testimony shows that this dredge was accustomed to lie at night over the rock at the place where it quit work. An attempt was made by the respondent to show that other dredges at different points on the river were accustomed to draw off from their places of work at night, and anchor outside of the channel; it is sufficient to say in answer that no general custom of that character was proved. Under the evidence I think the Norwich and her tow were negligently managed and controlled on the night in question; but I also think that the dredge was improperly anchored, and that the libelant must be charged with partial responsibility for the accident. It already appears that the dredge was anchored at the upper and port corner of Mull's Rock, at a point immediately adjacent to the main channel of the river. Mr. Van Winkle, who was in charge of the work for the libelant, in his testimony, when referring to tows coming down the river, says:

"That sometimes they would come pretty close to us, sometimes they would rub against us with a heavy tow dragging the bottom, and that sometimes they would run pretty close to us; if they were light, they had plenty of water."

I find nothing in the case which made it impossible for the captain of the dredge to have anchored elsewhere than he did. As already stated, the work was nearly completed, and the water under the dredge where it was anchored, was at this time practically of the same depth that it was in the channel. It was clearly careless under the circumstances, to anchor the dredge at the upper corner of the rock at Mull's Cross-Over, where navigation under the best conditions, even by craft not unwieldy, was more or less hazardous. Since the happening of this collision, the act of March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543] has been passed which provides:

"That it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct passage of other vessels or craft."

The statute just referred to, does not apply to this case, nevertheless, in City of Birmingham, 138 Fed. 555, the Circuit Court of Appeals for the Second Circuit, held at page 560, upon an application for a rehearing, that irrespective of the statute, "the dredge was in fault in anchoring where she did at night, when there was nothing to

prevent her from removing to a position where it would have been impossible for steamers to have reached her." The Milligan (D. C.) 12 Fed. 338; The Clarita, 90 U. S. 1, 14, 23 L. Ed. 146. The channel turned just at the point where the dredge was anchored, and was only from 250 to 300 feet wide; considering these facts, I think the dredge should have been anchored in a more secure place. The government engineer evidently thought so, and I find nothing in his letter which excuses the libelant. There was some dispute between counsel on the argument as to the construction of the letter but adopting any possible construction, it did not warrant, and cannot be held to warrant, the libelant in adopting an unsafe anchorage. This responsibility rested upon him, and the substantial direction of the letter was that the libelant should withdraw its dredge and apparatus at night, notwithstanding any trouble or expense involved, and since he did not do so, he must be held to have assumed the risk of adopting another course.

No controversy has been made over the damages and demurrage proved; they amount to $2,954.68. As I find both parties at fault, a decree will be entered in favor of the libelant, for one-half of the above amount, with interest from September 1, 1897, together with one-half of the costs.

THE CLARA GOODWIN.

THE CLELIA BASSO.

(District Court, E. D. Virginia. January 16, 1906.)

COLLISION—VESSELS LYING AT ANCHOR—DRAGGING OF ANCHOR.

Evidence considered, and *held* to establish, by a preponderance of proof, that a collision which occurred between a barkentine and a schooner while lying at anchor in the night during a high wind and strong tide was caused by the dragging of the barkentine's anchor, there being a direct conflict of evidence, but the testimony of two disinterested and intelligent witnesses from other vessels lying nearby concurring that the barkentine had changed her position of anchorage during the night, and also testimony that, when her anchors were raised in the morning to change her position, one was found to be fouled by the chain and in such condition that it would not hold.

In Admiralty. Suit and cross-libel for collision.

Lewis & Laws, Foster & Foster, and W. L. Williams, for the Clelia Basso.

Hughes & Little, for the Clara Goodwin.

WADDILL, District Judge. On the evening of the 3d day of March, 1904, about 8:30 o'clock, the barkentine Clelia Basso, of 324 tons net register, and the four-masted schooner Clara Goodwin, of 846 tons net register, were at anchor in the Delaware Breakwater, a harbor of refuge on the Atlantic coast, and while thus anchored came into collision, by reason of the anchor of one or the other of the vessels dragging during the storm. The wind at the time was blowing strongly from the northwest, at an increasing velocity during the preceding two hours from about 28 to 45 miles an hour; the tide

running strongly from the southeast. The contentions of the respective vessels are that one was "windrode" and the other "tiderode." The barkentine, with her square-rigged mast, which at the time only drew 9 feet of water, was driven by the wind against the tide, and the schooner, drawing 18 feet of water, was swept by the tide against the wind, whereby the two vessels were driven in opposite directions into collision one with the other.

No question of law is presented for the consideration of the court—the case turning entirely upon the correct determination of the fact as to how the two vessels, anchored as they were, managed to collide under the existing conditions of wind and tide, and which vessel in point of fact dragged its anchor; it being conceded that there would have been no collision but for one or other of the vessels dragging her anchor. The crew of the barkentine and her managing owner, who was on board, were examined, and the captain, mate, and four of the crew of the schooner, and the barkentine also introduced several expert witnesses, who testified as to the impossibility of the collision occurring by reason of the dragging of the anchor of the barkentine. The owner of the schooner examined two other witnesses, one a pilot and second officer of the cruiser Denver, then lying at anchor in the harbor on her trial trip, and the other a pilot from a Delaware river pilot boat, then lying in the harbor out of the weather; the cruiser being immediately in the vicinity of the point of collision, and the pilot boat only a short distance away.

The difficulty of determining just how these two vessels, in the darkness of the night and the prevailing storm, actually came together, is manifest. In fact, it is a matter more or less problematical to determine precisely how any accident actually happened; and, when dealing with one which occurred under the conditions here, it is unusually so. It is frequently next to impossible to determine just how any given accident could occur under the apparent conditions surrounding it; and it is a question upon, and a subject as to which, the average expert delights to theorize. The court was somewhat puzzled to determine how the vessels got together as they did, and was to some extent impressed with the evidence of the experts in this case, who were gentlemen of intelligence and standing, as it was with the evidence of the barkentine's crew, taken a short time after the collision; and while the court had not the advantage of seeing them, as it did the officers and some of the crew of the schooner, it was also impressed with their statements. The officers and crew of each vessel, however, were equally positive that the collision occurred solely from the anchor of the opposing vessel dragging, and the court has to decide this case either upon the theory of the experts, who seek to demonstrate that the collision could not have happened by the barkentine's anchor dragging, or the evidence of witnesses not interested in either vessel, who testified that it did so happen. The witness from the government cruiser testified that he was within 300 yards of the scene of the collision, and he heard the outcry, saw the two vessels when they came together by their lights, and that the schooner had not changed her position from where it

was anchored, while the barkentine had and drifted into the schooner, changing her location some 200 yards. He also testified that the morning after the collision the barkentine had changed her location, placing herself in much closer proximity to the schooner than theretofore, and at a point between his ship and the schooner, whereas she had been on the opposite side previously. The witness from the pilot boat also thoroughly sustains this view, and they both positively testify that the collision occurred by reason of the dragging of the anchor of the barkentine, and that the schooner did not change her place of anchorage. The witness from the pilot boat further testified that on the morning after the collision he took the barkentine further in shore, and that upon raising her starboard anchor he observed that the same was fouled by reason of the anchor chain having become entangled with the fluke of the anchor, and that the barkentine was anchored by the pilot boat with her port anchor. These two witnesses from the government ship and the pilot boat were men familiar with the matters about which they were testifying, and they appeared to be intelligent, and apparently without interest in the controversy, and testified fully and positively as to the circumstances; and the court cannot see its way clear to disregard their version of the collision, and which appears reasonable within itself, particularly when coupled with the fouled condition of the anchor. They were each a member of crews of vessels then lying at anchor in the harbor, and necessarily surrounded by persons who might have given a different account of the transaction, if their statements were not true. They were examined more than a year before this trial, and no step was taken either to contradict them or to show through others in a like position to see and know a different state of facts, and their account of the collision should be accepted. The captain of the schooner and one of his crew testified that about 12 o'clock on the day after the collision, after the pilot boat had moved the barkentine, they had reason to go ashore, and in passing the barkentine observed her starboard anchor hanging in the hawsepipe in the fouled condition above described, and the captain further testified that the anchor in this fouled condition would not have held the barkentine.

With this positive evidence of the fact that the barkentine did change her place of anchorage, and of the condition in which her anchor was found, the conclusion reached by the court is that the fault of the collision should be attributed to the barkentine, and not to the schooner; and a decree may be so entered.

CLARK v. EQUITABLE LIFE ASSUR. SOC.

(Circuit Court, E. D. Pennsylvania. January 30, 1906.)

No. 57.

1. INSURANCE—SALE AND TRANSFER OF LIFE POLICY.
An insured in a life policy, who for a valuable consideration sells and duly assigns the policy, is thereby estopped as against the company issuing the same to attack the validity of the assignment on the ground that the assignee had no insurable interest in his life.
[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 481, 482.]

2. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—LIFE INSURANCE POLICIES.
Policies of life insurance of a bankrupt having an actual value pass to his trustee, and the bankrupt is devested of all interests therein, unless he retains the same under the proviso to Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], by paying the cash surrender value.

At Law. On motion by defendant for judgment notwithstanding the verdict.

See 133 Fed. 816.

Albert B. Weimer, for plaintiff.

Thomas De Witt Cuyler and Burr, Brown & Lloyd, for defendant.

J. B. McPHERSON, District Judge. The question for decision arises upon the following facts: In September, 1893, the plaintiff was the owner of an endowment policy of life insurance for $10,000, issued by the defendant company and payable with accumulated dividends to himself, his executors, administrators, or assigns on October 20, 1903. In case of his death before that date, the policy without dividends was payable to his wife, her executors, administrators, or assigns. The plaintiff desired to raise $1,000 for a business venture, and for this purpose applied to a man named Welliver, who lived in Philadelphia and bought life insurance policies or negotiated loans on their security. Welliver presented the proposition to Herzfelt, who was then, and has been ever since, a resident of New York City, and Herzfelt agreed to buy the policy for $1,650. He had no insurable interest in the plaintiff's life. Accordingly several papers were prepared, by which the policy was assigned absolutely to Herzfelt, and these papers were brought to Philadelphia by Welliver and were executed here by Clark and his wife. They were then taken to New York by Welliver, who delivered them to Herzfelt and received from him $1,650, of which $1,000 was paid to Clark in Philadelphia and was receipted for by him as "purchase price in full, less commission to him [that is, Welliver], for Equitable Life policy No. 266,627, on the life of Charles E. Clark." Thereafter the premiums were kept up by Herzfelt, and in April, 1903, the defendant company paid to him $10,000, less the discount for the period still to elapse before the policy should mature. Shortly before October 10th the plaintiff, claiming that the transaction with Herzfelt had not been a sale of the policy, but a mere pledge as collateral security for a loan of $1,000,

notified the defendant not to pay any more money, and brought a suit in New York, which, however, was afterwards discontinued. The defendant then paid to Herzfelt the accumulated dividends, taking from him a refunding bond as security, and not long afterwards the present suit was brought. The jury found specially that the plaintiff had sold the policy out and out.

In my opinion, there are two reasons why the plaintiff is not entitled to recover. His case rests wholly upon Herzfelt's lack of insurable interest. If the assignment is to be treated as a New York contract—and it contains an express clause to that effect—there is no doubt that it passed an indefeasible title to the whole sum secured by the policy. On the other hand, the Pennsylvania rule would permit Herzfelt to retain only so much as would reimburse him for the money expended with interest thereon, and the formal verdict for the plaintiff is for the balance that would thus be found in his hands. What the rule in the federal courts is may perhaps admit of question, but, even upon the assumption that the Pennsylvania doctrine should be applied, there remain the two objections to which I have referred. The first is based upon the estoppel founded upon the assignment itself. I had occasion to consider this subject several years ago in Hettinger v. United Brethren Mutual Aid Society, 1 Del. Co. R. 466, 4 York Leg. Rec. 39, a case on all fours with the present controversy, and I may be permitted to repeat a portion of the opinion then delivered, as still expressing my views on this question:

"To state the case in other words, having willingly, and for a consideration, transferred the legal title to these policies and clothed the assignees with at least an apparent right to their proceeds, by virtue of which right and title they obtained from the society the money it had agreed to pay, he now asks a court to declare his contract void, not only as against the assignees, but against the society as well, and to say that the latter was not justified in relying upon his contract under seal because he afterwards gave notice that he did not intend to stand by it. To succeed in such a claim, the plaintiff must call to his aid some rule of public policy or some rigid rule of law.

"We have not been referred to any rule of law which compels us to declare the assignments void, and we are of opinion that the plaintiff cannot in this suit ask us to apply the rule of public policy which forbids wagering insurance on human life. It would not be proper to say what the result of applying that rule would be if the plaintiff had proceeded against the assignees, and we do not intimate any opinion on the questions which might then arise; but it seems clear to us that the plaintiff is estopped from invoking the aid of the rule in this suit against the society. The case is analogous to that class, in which the question arises, which of two innocent persons must suffer, and the answer there is plain that, as between such persons, the loss must fall upon him whose act enables the injury to be done. Garrard v. Haddan, 17 Sm. 85. The difference is against the plaintiff, for here he did not innocently cause the injury of which he complains, but with full knowledge of the fact, which he now urges as making his assignments void, viz., the assignees' want of insurable interest, he nevertheless transferred the policies to them and thereby shared in causing the society to pay them the money. In effect, he sent them to the society with his authority under seal to take his place, pay his dues, and receive the proceeds of the policies; and, surely, since the genuineness of the authority is not denied, he cannot be allowed to complain because the society has exactly carried out its provisions.

"If these principles are sound, the plaintiff's notice of July 19, 1877, did not better his position. The assignments were genuine, and had not been

obtained by fraud, and his notice was a mere declaration that he intended to repudiate them, which the society, if it saw proper, might disregard. Other questions might arise, if the assignments had been spurious, and notice of that fact had been given before payment."

I have nothing to add to this language. If it correctly states the law, the plaintiff has sued the wrong defendant. See, also, Insurance Co. v. Hennessy, 99 Fed. 64, 39 C. C. A. 625, and Widaman v. Hubbard (C. C.) 88 Fed. 812.

But there is a second objection, which I think is equally fatal to the plaintiff's right. On August 15, 1900, he was adjudged a bankrupt in this court, and shortly thereafter a trustee of his estate was duly appointed and qualified. Under section 70a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]) the trustee thereupon became vested, as of the date of the adjudication, with the bankrupt's title to all "(5) property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him," and this language undoubtedly includes whatever equity the bankrupt may have had in this policy. The proviso to clause 5 does not affect this conclusion. It is as follows:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

The policy in question was a tontine policy and probably has no cash surrender value, but, even if it had, the bankrupt never availed himself of the privilege given by the proviso, and the policy therefore passed to the trustee as assets of the estate. That policies of life insurance such as this, having an actual value, pass to the trustee, has been directly decided by several of the federal courts. The subject is elaborately discussed by Judge Morris in Re Slingluff (D. C.) 106 Fed. 154, and by Judge Jenkins in the Circuit Court of Appeals for the Seventh Circuit in Re Welling, 113 Fed. 189, 51 C. C. A. 151. See, also, In re Holden, 113 Fed. 141, 51 C. C. A. 97.

For either, or for both of the foregoing reasons, I think that the plaintiff's claim cannot be supported, and that the defendant is entitled to judgment upon the reserved point, notwithstanding the verdict.

GALLICE et al. v. CRILLY.

(Circuit Court, E. D. Pennsylvania. January 31, 1906.)

No. 21.

COMPROMISE AND SETTLEMENT—CONSTRUCTION OF AGREEMENT—LIABILITY OF INDORSER OF SETTLEMENT NOTES.

Pursuant to a tripartite agreement between plaintiffs, defendant, and a third party, which was largely indebted to plaintiffs and also to defendant, the debtor executed a series of notes to defendant payable at intervals, and such notes were indorsed by defendant to plaintiffs in settlement and compromise of their claim; the agreement providing that in case of default in payment of the notes the original debt should be revived, "less any payments made in pursuance of this agreement and any collections by legal proceedings or otherwise made upon any of said notes." *Held*, that the extension of time was a sufficient consideration for defendant's indorsement, and that the agreement could not be construed to release him on default by the makers, which would render his contract of indorsement a nullity.

At Law. Trial to court on case stated.

Beck & Robinson, for plaintiff.

Thomas R. Elcock and John G. Johnson, for defendant.

HOLLAND, District Judge. In this case, the facts were agreed upon by the parties hereto, in a case stated, for the decision and judgment of the court, with the right to either party to take an appeal from the judgment entered.

On the 14th day of April, 1903, Du Vivier & Co. were indebted to Gallice & Co. in the sum of $471,926, and to Francis J. Crilly in the sum of $72,000, and at the time the assets of Du Vivier & Co. were of the value of $250,000. On that date, negotiations were pending for a compromise of the indebtedness of Gallice & Co., and at the request of Francis J. Crilly, Gallice & Co. agreed to an "amicable liquidation and compromise of their indebtedness for the sum of $75,000," $2,500 to be paid in cash, and 29 promissory notes, bearing date the 14th day of April, 1903, and each for $2,500, with interest at 3 per cent., and payable respectively on June 14, 1903, and on the fourteenth day of each of the 28 months next ensuing, to Francis J. Crilly, and by him indorsed to Gallice & Co. In accordance with the provision of a tripartite agreement entered into by these parties none of these notes were negotiated or discounted prior to their maturity. Article 4 of their agreement is as follows:

"The parties of the second part hereby agree upon the due payment by the parties of the first and third parts of all of the said notes and their due performance of the covenants and agreements herein contained, to make, execute and deliver to the parties of the first part a general release of the said indebtedness of four hundred and seventy-one thousand nine hundred and twenty-six dollars ($471,926.00); but in case of default in the payment of any of the said notes, the whole of the said debt, with interest, less any payments made in pursuance of this agreement and any collections by legal proceedings or otherwise made upon any of the said notes, shall become due and payable forthwith."

The extension of time was a sufficient consideration to hold Francis J. Crilly as indorser on these notes (Carpenter v. Bank, 106 Pa. 177);

but it is contended by him that the nonpayment by Du Vivier & Co. of the notes on which he was indorser released him under clause 4 of the agreement, and threw the plaintiff back on their original claim against Du Vivier & Co. To put such a construction upon these articles of agreement would be to hold that Crilly's indorsement was made for no purpose whatever. It is unreasonable to suppose that it was the intention of the parties to practically nullify the legal effect of Crilly's indorsement of the notes by the articles of agreement. The real intention of the transaction was to compromise his entire debt for $75,000, and, if not paid, to collect it by legal proceedings against both Du Vivier & Co. and Crilly; but in case the notes were not paid at maturity, and the plaintiffs failed to collect from either or both, then the original debt to be revived, "less any payments made in pursuance of the agreement and any collections by legal proceedings or otherwise made upon any of the notes."

The court is of the opinion, upon the facts stated, that, under the terms of the agreement, the nonpayment of the said notes by Du Vivier & Co. at the time of their maturity did not release the defendant from his liability as indorser.

Judgment will therefore be entered for the plaintiffs, Henry Gallice and Octave Gallice, copartners, trading under the firm name of Gallice & Co., and against Francis J. Crilly, the defendant, for the amount of the notes, with interest, with the right to either party to take an appeal from such judgment.

GALLICE et al. v. CRILLY.

(Circuit Court, E. D. Pennsylvania. January 31, 1906.)

No. 34.

See 134 Fed. 983.

Beck & Robinson, for plaintiffs.
Thomas R. Elcock and John G. Johnson, for defendant.

HOLLAND, District Judge. The decision just rendered in No. 21 of the same sessions (143 Fed. 178) disposes of the issues here, and judgment will be entered in favor of the plaintiffs, Henry Gallice and Octave Gallice, copartners, trading under the firm name of Gallice & Co., and against Francis J. Crilly, the defendant, for the amount of the note, with interest, with the right to either party to take an appeal from such judgment.

HOBBS v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. February 1, 1906.)

No. 32.

RAILROADS—INJURY OF PERSONS ON PREMISES—PENNSYLVANIA STATUTE.

Act Pa. April 4, 1868 (P. L. 58), which provides that "when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, * * * of which company such person is not an employé, the right of action and recovery * * * against the company shall be such only as would exist if such person were an employé," does not apply to the case of a plaintiff who was a stevedore's employé engaged in discharging a vessel, and who was struck and injured by an engine, while standing with others on or near a track owned by defendant railroad company, after the close of his day's work, waiting merely to give in his time to his employer; such person not being engaged or employed on or about the defendant's premises, within the meaning of the statute, as construed by the Supreme Court of the state.

At Law. On motion by defendant for judgment upon reserved point, notwithstanding the verdict.

A. L. Cameron and Thos. Raeburn White, for plaintiff.

John Hampton Barnes, for defendant.

J. B. McPHERSON, District Judge. The first section of the Pennsylvania Act of April 4, 1868 (P. L. 58) is as follows:

"That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé: Provided, that this section shall not apply to passengers."

This section is relied upon to defeat the plaintiff's recovery, and it becomes necessary, therefore, to determine upon this motion whether, under the conceded facts of the case, he was, at the time of the injury, "engaged or employed on or about the roads, works, depots and premises of a railroad company." The questions touching the defendant's negligence, and his own contributory negligence, have been determined in his favor by the verdict, and I think there was sufficient evidence upon both questions to require them to be submitted to a jury. Concerning the plaintiff's occupation at the time when he was hurt, the facts are these: He was a laboring stevedore and had been working all night in the hold of a ship that was lying at the end of a pier in the Delaware river at Girard Point. His work consisted in loading iron ore into buckets; these being hoisted by a crane and dumped into cars belonging to the defendant, which were standing upon a track alongside the ship. About 6 o'clock, his work being done, he left the vessel in order to go home. On the way, he stopped at a small building on the defendant's property and close to its tracks, which the master stevedore had been allowed to use for several years as an office. Its principal use was apparently to furnish a place where

the men could report, after their work was done, and have a note made of their time. It was merely for this purpose—that is, to give in his time—that the plaintiff went to the building with several other laborers who were bound on a similar errand. While he was standing in line waiting his turn, he was struck by an engine, and lost both legs.

These being the facts, I am of the opinion that the Pennsylvania statute does not apply. The plaintiff was in no proper sense "engaged or employed" about the premises of the defendant. His work was done, and he was going to his home, walking over the railroad company's land as he was permitted to do, and I think it is impossible to suppose that the momentary and trifling act of giving in his time constituted an employment, in the sense contemplated by the statute. Mr. Justice Mitchell has reviewed and classified the Pennsylvania decisions in Spisak v. B. & O. R. R. Co., 152 Pa. 281, 25 Atl. 497. He divides them into two classes, which are thus described, on page 285 of 152 Pa., and page 498 of 25 Atl.:

"In the first, the place of the accident is clearly and for general purposes the 'roads, works, depots or premises' of the railroad company. In such cases, it is sufficient if the person injured is lawfully 'engaged or employed on or about' them, and is not a passenger. To this class belong Kirby v. Railroad Co., 76 Pa. 506, already referred to; Ricard v. Railroad Co., 89 Pa. 193, where the owner of goods was unloading them from the cars at the railroad station; and Railroad Co. v. Colvin, 118 Pa. 230, 12 Atl. 337, where the injury was received while hauling goods for shipment, and in what was 'practically a part of the yard.' The other class is where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad company. In this class, the nature of the employment at which the party injured was engaged at the time becomes material. If it is business connected with the railroad, in the sense that it is ordinarily the duty of railroad employés, then, while the party is engaged at it, the statute treats him as a quasi employé, and puts his rights upon the same basis. If, however, the work has no relation to railroad work, as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all. In the former category belong Mulherrin v. Railroad Co., 81 Pa. 366, and Cummings v. Railroad Co., 92 Pa. 82, where the plaintiff, though an employé of the refining company, was, when injured, separating cars, which was the duty of the trainmen of the railroad. In the latter category belong Richter v. Railroad Co., 104 Pa. 511, and Christman v. Railroad Co., 141 Pa. 604, 21 Atl. 738."

See, also, Vannatta v. Railroad Co., 154 Pa. 262, 26 Atl. 384, 35 Am. St. Rep. 823, and Noll v. Railroad Co., 163 Pa. 504, 30 Atl. 157.

Clearly, as it seems to me, the work, if it can be called such, which the plaintiff was doing at the time of his injury, had no relation at all to railroad work, and was connected with the road only by the irrelevant and immaterial circumstance of locality.

The defendant's motion for judgment is refused, and judgment may be entered for the plaintiff upon the verdict.

In re ROYEA'S ESTATE.

(District Court, W. D. Washington, N. D. January 31, 1906.)

No. 2,923.

BANKRUPTCY—PREFERRED CLAIMS—TRUSTS—FOLLOWING TRUST FUNDS.

Bankr. Act July 1, 1898, c. 541, § 70, subd. "a," 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], declares that a bankrupt's trustee shall be vested by operation of law with the title of the bankrupt to the property not exempt, which prior to the filing of the petition could have been transferred or which might have been levied on and sold under judicial process against him. *Held*, that where petitioner intrusted certain money to the bankrupt for safe keeping only, and he deposited it to the credit of his general bank account, which at all times exceeded the amount so intrusted to him and came into the hands of his trustee in bankruptcy, plaintiff was entitled to enforce a preferred claim on such bank balance in the hands of the trustee, though the actual money delivered to the bankrupt could not be identified.

In Bankruptcy. Hearing on petition for review of an order made by the referee allowing a claim to a sum of money which the bankrupt had on deposit in a bank with other money at the time of the initiation of bankruptcy proceedings, on the ground that the amount claimed was held by the bankrupt as trustee for the petitioner.

Piles, Donworth, Howe & Farrell, for petitioner.

Palmer, Graves, Brown & Murphy, for trustee.

HANFORD, District Judge. It appears from the record that at the time of the adjudication the bankrupt had on deposit in a bank $390.70, which has since come into the possession of the trustee of his estate. The deposit included $120, which the petitioner had theretofore intrusted to the bankrupt for safe-keeping. There is no controversy as to the fact that the bankrupt did receive the sum mentioned, which belonged to the petitioner, nor as to the circumstances attending the transaction. It was the mutual understanding of the parties that the money was not loaned to the bankrupt, but intrusted to him to be returned when the petitioner should require it. The specific money was not required to be returned, but the petitioner was to be satisfied upon receiving an equivalent amount in any money. The bankrupt did not keep the money separately, but made a deposit thereof in a bank in which he had other money on deposit, so that it became mingled with other money held by the bank subject to his check, and the balance to his credit exceeded the amount received from the petitioner, at all times continuously from the date of the deposit until it was withdrawn by the trustee, who now has it in custody. The petitioner prays to have the sum which he intrusted to the bankrupt paid to him out of the money which the trustee of the bankrupt's estate drew from the bank, on the ground that his rights are superior to the rights of general creditors, and the referee decided the question in the case in his favor, on the ground that in the administration of bankrupt's estate the principles of equity are to be applied, rather than the strict rules of law.

The main argument in opposition to the petition is that, trust money must be earmarked or separately kept in order to entitle the cestui que trust to reclaim it, in opposition to creditors of an insolvent debtor, and that where a bankrupt has mingled trust funds with his own, so that the identity of the trust money is lost, the beneficiaries of the trust must share pari passu with creditors. This argument is supported by decisions in adjudged cases, and by several text-books. See Hosmer v. Jewett, Fed. Cas. No. 6,713; In re Richard (D. C.) 104 Fed. 792; Collier on Bankruptcy (4th Ed.) p. 512; Loveland's Law and Proceedings in Bankruptcy (2d Ed.) p. 412. Nevertheless, I concur in the opinion filed by the referee in this case, and for the following reasons: Subdivision "a" of section 70 of the present bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) prescribes the rule to be applied in the determination of questions as to what property vests in the trustee of a bankrupt's estate. The rule of the statute is that the trustee shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to property, not exempt, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

Consideration of this rule leads to the inquiry whether the bankrupt, after he had become insolvent and immediately before the petition was filed, could have transferred the balance to his credit in the bank, so as to have defeated the petitioner in a suit in equity to reclaim his part of it, or whether an attaching or execution creditor, by levying upon the balance in the bank under judicial process against the bankrupt, could have divested the petitioner of his beneficial interest in the fund? To this inquiry equity gives a negative answer. In the opinion of the Supreme Court, by Mr. Justice Matthews, in the case of National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693, the English and American authorities are exhaustively reviewed, and the decision as condensed in the syllabus was that:

"As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property."

In many of the reported cases the cestui que trust failed to prove that the fund or property sought to be impressed with the trust, in fact, included trust money or acquisitions by reinvestment or exchange of trust money or property, and on that ground adverse decisions were rendered, without combating the doctrine of the Supreme Court, as expounded in the opinion by Mr. Justice Matthews above cited. For cases in point, see Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Frelinghuysen v. Nugent (C. C.) 36 Fed. 229; Spokane Co. v. Clark (C. C.) 61 Fed. 538, affirmed in Same v. First Nat. Bank, 68 Fed. 979, 16 C. C. A. 81; In re Marsh (D. C.) 116 Fed. 396. In this case, although the money cannot be specifically identified, the fund is

clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim an amount equivalent to the amount intrusted is clear. San Diego County v. Cal. Nat. Bank (C. C.) 52 Fed. 59; Massey v. Fisher (C. C.) 62 Fed. 958; City of Spokane v. First Nat. Bank of Spokane, 68 Fed. 982, 16 C. C. A. 85; Brandenburg on Bankruptcy (3d Ed.) p. 768.

Let an order be entered affirming the decision of the referee.

TWEEDIE TRADING CO. v. GLASGOW STEAM SHIPPING CO., Limited.

(District Court, S. D. New York. December 22, 1905.)

SHIPPING—CONSTRUCTION OF CHARTER PARTY—QUESTION OF INTENT.

The question whether Halifax or St. John was within the intention of the parties to a charter party for a voyage from New York to a port or ports in Brazil or River Plate, "via port or ports en route," so as to entitle the charterer to proceed by way of such ports, *held* a question of fact not determinable on the pleadings, but open to testimony.

In Admiralty. Suit to recover charter hire. On exceptions to cross-libel.

Convers & Kirlin and John M. Woolsey, for exception.
Moen & Kilbreth, opposed.

ADAMS, District Judge. A charter party was entered into between the Glasgow Steam Shipping Company, Limited, and the Tweedie Trading Company, dated the 13th day of November, 1903, of the steamship Kelvinbank, wherein it was provided:

"Witnesseth, That the said owners agree to let, and the said charterers agree to hire the said steamship from the time of delivery, for one trip from port or ports in United States to port or ports in Brazil & or River Plate via port or ports enroute Steamer to be placed at the disposal of the Charterers at New York * * *"

The Glasgow Company, claiming that certain sums, said to amount to $2337.68, consisting of unpaid hire, $1,837.68, and an unpaid balance of $500, for coal, were due, brought an action to recover the same.

The respondent duly answered, denying, for certain reasons, that anything was due to the libelant and simultaneously filed a cross-libel to recover damages, said to amount to $6,000, based upon a refusal on the part of the steamer to proceed via Halifax and or St. John, as ordered by the Tweedie Company.

The Glasgow Company thereupon filed an exception, stating that the alleged cross-libel did not state facts sufficient to constitute a cause of action.

The question presented is, whether the contract authorized the Tweedie Company to send the vessel to the River Plate via Halifax and or St. John.

The Tweedie Company urges that all argument based on the form of the charter party or the deletion or insertion of any words is beside the point because it is said:

"The charter party is not annexed to or made a part of the pleading here attacked and so far as these exceptions are concerned is not in the record. Only certain of its provisions are set forth in the libel and these are all of it which is properly before the court."

The fact is, however, that the charter party is annexed to and made a part of the original libel herein, which is incorporated by reference in the cross-libel, so that the charter party may be considered as fully and properly before the court, notwithstanding the fact that merely portions of it are quoted in the cross-libel.

In the original form of the charter party the following words were stricken out:

"And passengers so far as accommodations will allow in such lawful trades, between safe port and or ports in British North America, and or United States of America, and or West Indies, and or Central America, and or Caribbean Sea, and or Gulf of Mexico, and or South America, and or Europe, and or Africa, and or Asia, and or Australia, excluding River St. Lawrence from October 1st to May 1st (White Sea, Black Sea, and the Baltic out of season), Magdalena River, and"

It does not seem that much, if any, force should be given to the deletion. The printed form was obviously intended for a time charter but used here as a voyage charter, the termini being fixed geographically. The omitted part was very general and if regarded as in any way within the contemplation of the parties, does not aid in the construction.

What the intention of the parties may have been with respect to the controverted ports, is not clear from the contract as pleaded. At first view, it seems rather singular that Halifax or St. John could have been in view when the contract was made but such may have been the case by reason of its geographical position, north-eastward from New York but actually nearer to Pernambuco than New York, the former being the easternmost point of the coast of South America, on the way to the River Plate from the north.

The question seems to be one of fact not determinable upon the pleadings and therefore open to testimony.

The exception is overruled.

THE CHARLES SPEAR.

THE SUSQUEHANNA.

(District Court, S. D. New York. December 27, 1905.)

MARITIME LIENS—LIFE PRESERVERS FURNISHED VESSELS—LIEN BY AGREEMENT AND BY STATUTE OF NEW JERSEY.

One who furnished life preservers for vessels in a New Jersey port, in reliance on a statement by the owner that the vessels were sufficient security, is entitled to a lien by contract, and also under the New Jersey statute, which gives a lien for any equipment furnished a vessel under contract with the owner.

[Ed. Note.—Maritime liens created by state laws, see note to The Electron, 21 C. C. A. 21.]

In Admiralty. Suits to enforce liens for the price of life preservers furnished the libeled vessels.

Lindsay, Kremer, Kalish & Palmer, for libelant.
Alexander & Ash, for claimants.

ADAMS, District Judge. These actions were brought by the Armstrong Cork Company, a corporation of the state of Pennsylvania, to recover the value of 2,000 life preservers furnished to the barges Charles Spear and Susquehanna in June, 1905. There is no substantial dispute about the goods having been furnished, but the claimants allege that they were not supplied upon the credit of the barges but to the Myers Excursion and Transportation Company and upon its credit.

It appears that the libelant sold 2,000 life preservers, 596 of which were delivered on board of the Susquehanna, at the foot of 32nd street in the borough of Brooklyn, and 404 in Jersey City. The 1,000 for the Spear were delivered in Jersey City. The reasonable value of the whole lot was $1,644.70.

The testimony shows that the libelant had before sold goods of the same character to the Myers Company for which the payment was slow. When this transaction was in question, the libelant directed its selling agent to investigate the responsibility of the Myers Company. He was informed by the vice president of that company that the barges were sufficient security for the amount of the bill. This was duly reported to the executive officer of the libelant, who relied upon the security of the barges in making the sale, and it follows that a lien existed by agreement. Such being the case and the credit of the vessels being in contemplation, the statute of New Jersey also applies so far as the goods furnished there are concerned. This statute, appearing in General Statutes of New Jersey, 1966, provides:

"That whenever a debt shall be contracted by the master, owner, agent or consignee of any ship or vessel within this state for either of the following purposes:

(1) On account of any work done, or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel;

(2) * * *

(3) * * *

Such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and continue to be a lien on the same until paid, and shall be preferred to all other liens thereon except mariner's wages."

There will be a decree for the libelant against the Spear for $800, and against the Susquehanna for $844.70, with interest.

THE EUGENE F. MORAN. THE CHARLES E. MATTHEWS. THE SCOWS 15D AND 18D.

(District Court, S. D. New York. January 8, 1906.)

1. COLLISION—FAILURE TO LIGHT TOW—LIABILITY.
   It is the duty of the master of a tug, and also of the men on scows in tow of such tug, to see that the lights required by law to be carried by the tow are in place and lighted when under way in the night, and all the vessels are in fault for a collision resulting from or contributed to by the failure to carry such lights.
   [Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 105-123.]

2. SAME—APPORTIONMENT OF DAMAGES—TUG AND TOW.
   Where two tugs and two scows in tow of one of the tugs were all in fault for a collision, each vessel is liable for an equal share of the damages resulting.
   [Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collisions, § 298.]

In Admiralty. Suit for collision.

Carpenter, Park & Symmers, for Du Bois Sons Company, owner of scows 15D and 18D.

Wing, Putnam & Burlingham, for owners of steam tug Eugene F. Moran.

Robinson, Biddle & Ward, for owners of the steam tug Charles E. Matthews.

Butler, Notman & Mynderse, for N. Y. Cent. & H. R. R. Co., owner of Car Float No. 1.

HOLT, District Judge. These are suits brought to recover damages for a collision. The New York Central Car Float No. 1 was lashed alongside of and being towed by the steam tug Charles E. Matthews up the North river. The two scows, 15D and 18D, owned by the Du Bois Sons Company, were being towed tandem on a hawser by the tug Eugene F. Moran. The car float came in collision with scow 15D, causing injury to both the scow and the car float. At the conclusion of the trial, I decided that the Matthews and the Moran were both in fault, and that there were no lights on either of the scows; and I reserved the case for consideration as to whether the absence of lights on the scows was a fault for which the scows were responsible, or the Moran, or both.

I think that both the Moran and the scows were in fault for not having up lights on the scows. Counsel for the scows claims that it was the duty of the tug to have the lights put up on the tow before starting, and that at the time of the collision the start had not taken place; but in my opinion the tug and tow had started and were under way, and the authorities establish that, under those circumstances, it was the duty of the master of the tug and the men on the scows to see to it that the lights required by law to be carried on the tow were in place and lighted. The Lyndhurst (D. C.) 92 Fed. 681; The Nettie L. Tice (D. C.) 110 Fed. 461. The result is that the Matthews, the Moran and the two scows were in fault, and the car float was not in fault, for this collision. The question then arises as to the appor-

tionment of damages. The authorities are quite conflicting upon this subject. There are a number of authorities which hold that, in cases where one vessel is towing another, the tug and tow are to be considered as one vessel. The Niobe, 13 P. D. 556 (1891) App. Cas. 401; The Englishman and the Australian, L. R. 1894 Prob. 239; The Anerly (D. C.) 58 Fed. 794; The Komuk (D. C.) 120 Fed. 841. Other authorities hold that in such cases each vessel in each flotilla is to be treated as a distinct entity, and each vessel in fault equally liable for any damage with the other vessels in fault. The Brothers, 2 Biss. 104, Fed. Cas. No. 1,969; The Peshtigo (D. C.) 25 Fed. 488; The Lyndhurst (D. C.) 92 Fed. 681; The Nettie L. Tice (D. C.) 110 Fed. 461; The Doris Eckhoff (D. C.) 41 Fed. 156; The Maling (D. C.) 110 Fed. 227; The S. A. McCaulley (D. C.) 116 Fed. 107.

I am entirely unable to reconcile these decisions. Neither rule, in certain cases, will work out complete justice. In my opinion, the rule which holds that each vessel in fault is to share equally with every other vessel in fault is upheld by the greater weight of authority, particularly in this country, and has the advantage of greater simplicity of application.

My conclusion is that the damage caused to the car float should be borne in equal one-quarter shares by the Matthews, the Moran and the two scows, and that the damage caused to the scow 15D should be borne in the same proportion; that is, the scow itself should bear one-quarter of the loss, and the Matthews, the Moran, and the other scow should each bear one-quarter. As the scow 18D belongs to the same owners as the scow 15D, the decree in the case of the Du Bois Sons Company should be for one-quarter of the damage against the Matthews and one-quarter against the Moran. The decree should provide, as usual, that if the value of any of the vessels held liable is insufficient to pay the amount decreed there shall be a remedy over against the others for the deficiency. The New York Central & Hudson River Railroad Company should have costs, divided in the same way, against the claimants in its suit, and the Du Bois Sons Company should recover half its costs against the claimants in its suit. The decree should be settled on notice.

BOARD OF TRADE OF CITY OF CHICAGO v. McDEARMOTT COMMISSION CO. et al.

(Circuit Court, W. D. Missouri, W. D. February 2, 1906.)

No. 3,069.

1. EXCHANGES—QUOTATIONS—POSTING—PUBLICATION.

Where complainant board of trade collected price quotations which it furnished to certain telegraph companies under contract that they would transmit the same only to those who would contract and pay therefor for their own legitimate use and the use of their patrons, the fact that complainant permitted such quotations to be immediately and continuously posted on the boards of another exchange known as the "Open Board of Trade of Chicago," and on other boards of customers to

which the public had access, did not constitute such a publication of the quotations as authorized their free use by the public.

[Ed. Note.—Quotation of prices and transactions on exchanges, see note to Sullivan v. Postal Tel. Cable Co., 61 C. C. A. 2.]

2. SAME—CONTINUOUS QUOTATIONS.

Where the contract between complainant board of trade and telegraph companies, with reference to the dissemination of plaintiff's quotations, referred only to "continuous quotations," which the contract defined as "quotations wherein the price on any commodity shall be quoted oftener than at intervals of ten minutes," complainant was only entitled to restrain defendants from obtaining and using quotations which were continuous.

In Equity.

Henry S. Robbins and Kimbrough Stone, for complainant.
Harkless, Crysler & Histed, for defendants.

REED, District Judge. The defendant A. M. McDearmott Commission Company is a corporation organized under the laws of the state of Missouri, and engaged in the business of buying and selling grain, provisions, stocks, bonds, and other commodities at Kansas City and other places in said state and in other states, and this suit is to restrain said corporation, its officers and agents, from using in its several places of business and distributing to others, the quotations or statements of prices of sales of grain, provisions, and other products upon the floors of the complainant's board of trade rooms in the city of Chicago, which quotations are there made by the complainant from actual sales upon its said floors, and are furnished by it to certain telegraph companies who contract with the complainant that they will furnish or transmit such continuous quotations only to those who will contract and pay therefor for their own legitimate use, and the use of their patrons, and who thus acquire the right to receive and use the same for such lawful purpose.

The bill of complaint is essentially the same as those in the cases of Board of Trade v. Christie Grain & Stock Company, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, and L. A. Kinsey Company v. Board of Trade, Id. The manner in which the quotations are gathered by the complainant, and the terms upon which they are delivered by it to the telegraph companies, to be furnished by them to those who will subscribe therefor, is stated in the opinion in those cases. By that opinion it is established that the complainant has a property right in the quotations so collected by it; that it may rightly restrict the use thereof for lawful purposes, without discrimination, to those who will contract and pay for such use; and that it is entitled to be protected in such rights. The defendant commission company concedes this, and admits that it has not contracted with the complainant or either of the telegraph companies for the receipt or use of such quotations, has not offered to do so, and that it has no contract right thereto; but it contends that the preliminary proofs show, without dispute, that the complainant, by its contract with the telegraph companies, authorizes subscribers, for such quotations to post the same upon blackboards, and otherwise openly display the same in their respective places of business, in such manner that the public has access thereto and knows of such

quotations within a few seconds after they are collected and placed by the complainant upon its boards in said rooms in the city of Chicago; that the complainant itself transmits such quotations by wire as soon as they are collected, to what is called the "Open Board of Trade of Chicago," to be there posted upon the boards of that company, and that they are so placed with the knowledge and consent of the complainant simultaneously with their being posted by it upon its own boards, and that by so doing such quotations become public property; that such facts distinguish this case from those in Board of Trade v. Christie Grain & Stock Co., supra, and require a determination of it different from the determination in those cases.

It is true that the defendant's proofs show that the quotations are posted in exchanges, boards of trade, brokers' offices, and other like places, as above stated, with complainant's knowledge and consent, and that the complainant itself transmits such quotations by wire as soon as it gathers them to such open board of trade in Chicago and perhaps to other like places. It does not appear, however, that they are sent by complainant or the telegraph companies to, or posted in, any place with complainant's knowledge or consent, where the right to so receive and post them has not been previously acquired by contract with the complainant or the telegraph companies with its consent. It is clear from the proofs that such quotations cannot be taken from the rooms in which they are so displayed by subscribers and transmitted elsewhere in time to be available, without a breach of the contract for their use by such subscribers, or by reason of some systematic plan for an immediate appropriation of the same by others, as soon as they are so posted in such places. The defendant's proofs show that it receives continuous quotations, or some of them, at least, from a telegraph operator who takes them from blackboards in places in Kansas City, Mo., to which the public has access, and where they are posted or displayed by the subscribers, immediately after being so posted; and the complainant's proofs show that they are posted in some of the defendant's places of business in places other than Kansas City, Mo., within five minutes after they are posted upon the complainant's boards in Chicago. The defendant admits this, but has not seen fit to disclose how it is enabled to do so. As defendant does not get these quotations under any contract therefor with the complainant or the telegraph companies, its appropriation thereof is unlawful (Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031), unless the posting of them by those who subscribe therefor, in their places of business, with the complainant's knowledge and consent, renders them public property, and liable to be appropriated by any one without contract or payment therefor.

It is quite apparent that the purpose of such posting is for the benefit of those who subscribe for and have the lawful right to use such quotations, and their patrons, and to invite further trade, and not for the benefit of competitors or the general public. The merchant displays his goods in windows and upon the streets to attract attention and to invite trade; but this does not authorize his competitors or others to appropriate the property so displayed without com-

pensation, nor does it in any way deprive the owner of his right of protection to all of his property rights therein. That such a posting or publication of the continuous quotations, as shown by defendants' proofs, does not deprive the complainant of its right to restrict their use to those who contract and pay therefor, is held in Board of Trade v. Hadden-Krull Company et al. (C. C.) 109 Fed. 705; Board of Trade v. Christie Grain & Stock Company et al. (C. C.) 116 Fed. 944; National Tel. News Company et al. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; and Illinois Commission Company et al. v. Cleveland Tel. Company et al., 119 Fed. 301, 56 C. C. A. 205. These and other similar cases are cited with approval in Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, where the same question now urged by the defendants was urged upon the Supreme Court upon facts quite similar, if not identical, in Kinsey Company v. Board of Trade.

The present case upon its facts, cannot be distinguished in principle from those cases; and it must therefore be held to be ruled by the opinion therein, and that complainant is entitled to a temporary injunction. The contract between the complainant and the telegraph companies and the contracts required of the subscribers for quotations refer, however, only to what are known as the "continuous quotations," which by the contract are defined to mean "quotations wherein the price of any commodity shall be quoted oftener than at intervals of ten minutes."

The defendants will therefore be restrained from using only such "continuous quotations," and it is ordered accordingly.

DISSTON et al. v. McCLAIN, Revenue Collector.

(Circuit Court, E. D. Pennsylvania. February 2, 1906.)

No. 38.

INTERNAL REVENUE—LEGACY TAXES—WILLS—CONSTRUCTION.

Testator bequeathed the residue of his estate to trustees to invest and from the income to pay to A. $15,000 a year during her natural life, in quarterly installments. *Held*, that such bequest should be considered, for internal revenue taxation imposed by Act Cong. June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308], as a legacy arising from personal property to which defendant was entitled to immediate possession, and not as a legacy of a series of sums payable out of the income of decedent's estate.

Michael J. Ryan, for plaintiff.

Jasper Y. Brinton and J. Whitaker Thompson, for defendant.

HOLLAND, District Judge. In this demurrer to plaintiff's statement of claim, the defendant alleges that under the provisions of sections 29 and 30 of the act of June 13, 1898 (30 Stat. 464, 465, c. 448 [U. S. Comp. St. 1901, pp. 2307, 2308]), entitled "An act to provide ways and means to meet war expenditures and for other purposes,"

and the several acts amending the same, the taxes paid by the plaintiffs under protest were lawfully assessed and collected by the defendant prior to taking effect of Act April 12, 1902, c. 500, 32 Stat. 96 [U. S. Comp. St. Supp. 1905, p. 444].

Horace C. Disston, a resident of Philadelphia, died June 13, 1900, and his will was probated June 19, 1900, in which the plaintiffs in this case were appointed his executors, and wherein he directed, inter alia, as follows:

"Item. All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind and wheresoever situated I give, devise and bequeath unto my brother William Disston, my friend George McGowan and the Tacony Saving Fund, Safe Deposit, Title & Trust Company. In trust, nevertheless, for the following uses and purposes: To keep the same invested in such securities as I may have or to invest the same as they may determine and from the income arising from all of my said estate to pay first to my beloved friend Rachel Asch the sum of fifteen thousand dollars per year during all the term of her natural life—such payment to be made to her by them in quarterly installments of three thousand seven hundred and fifty dollars each, and the first installment to be paid to her three months after my decease, and thereafter quarterly as aforesaid."

The collector of internal revenue assessed and collected a tax from the plaintiffs on so much of the value of this life estate as was payable for life out of the income of the personal property of the deceased, upon the theory that this bequest to her is a legacy arising from personal property under the terms of the act of 1898, and to which she was entitled to the immediate possession and enjoyment. On the other hand, the plaintiffs contend that this bequest to Rachel Asch is a legacy of a series of sums, payable out of the income of the decedent's estate, and as such, the amount she actually received, prior to the repeal of the war revenue act, is alone taxable. This income for life is exactly similar to the income devised for a certain period in the case of Vanderbilt v. Eidman, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, in which case it was conceded that such a legacy is taxable as one presently in possession and enjoyment. This case rules the one at bar.

The annuity tables used in computing the value of this life estate were those lawfully adopted by the Commissioner of Internal Revenue, under date of December 16, 1898, as appears in treasury decisions Nos. 20,442 and 20,443. These tables were used to compute the value of the life estates in the leading case of Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, and were accepted without question.

The demurrer to the plaintiffs' claim is sustained.

UNION BANK OF RICHMOND v. OXFORD & C. L. R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1906.)

No. 581.

SALE—WARRANTY OF VALIDITY OF BONDS—RIGHT TO RECOVER CONSIDERATION PAID.

An officer of defendant railroad company was authorized by its directors to sell certain bonds which had been issued to it by a town to aid in the construction of its road, and pursuant to such authority sold them to the president of plaintiff bank acting on its behalf. Prior to and during the negotiations, such officer expressly stated in writing to the purchaser that the bonds were valid and had been so adjudged by a court of the state, and the purchase was made in reliance on such representation. The bonds were in fact void for want of power in the town to issue them, and were subsequently so adjudged. *Held*, that the statement of their validity made as an inducement to the sale was an express warranty that they had a valid legal existence as securities which was binding on defendant, and that plaintiff was entitled to recover from defendant thereon the consideration paid therefor.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 732, 1126.]

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

Wm. L. Royall (A. S. Lanier, on the brief), for plaintiff in error.

T. B. Womack and A. B. Graham (Graham & Devin, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

PRITCHARD, Circuit Judge. In the year 1891, the Legislature of North Carolina chartered the Oxford & Coast Line Railroad Company, and, among other things, the act authorized the town of Oxford to issue bonds in aid of the construction of the said railroad. The town subscribed $40,000 and agreed to issue its bonds for that amount. Subsequently it failed to issue them, and the railroad applied to the state court for a mandamus to compel it to issue the same. A compromise was reached in that suit, whereby the town of Oxford agreed to issue $20,000 of its bonds for the purposes hereinbefore mentioned, and this compromise was embodied in a judgment of the court. In pursuance of this judgment, the town issued 20 bonds in the denomination of $1,000 each, interest payable August 1st and February 1st, each year, and delivered the same to the Oxford & Coast Line Railroad Company. The directors of the railroad company authorized A. W. Graham, its second vice president and chairman of its committee of construction, to hypothecate the bonds for a loan or to sell the same. On August 26, 1892, Vice President Graham wrote A. L. Boulware, president of the First National Bank of Richmond, asking a loan of $4,000 upon the bonds. In this letter he said: "The validity of the bonds has already been passed upon by the superior court at the July term, 1892." The First National Bank loaned the railroad company $4,000 on eight of the bonds. On August 29, 1892, Graham again wrote

Boulware another letter in which he said: "The bonds spoken of are valid, and would be a good investment for any one seeking securities of the kind."

It appears from the record that on September 6, 1892, Graham visited Richmond and saw Boulware, who had some negotiations with him looking to a purchase of all or a part of the bonds mentioned for an undisclosed principal, though no definite conclusion was reached. Graham went to Baltimore, and endeavored to sell the bonds there, but did not succeed in doing so. On September 9th, he wrote to Boulware of his efforts in this behalf and asked him to telegraph what he would do. On September 10th, Boulware telegraphed him that he would take all of the bonds at a price to net the railroad company 95 per cent. The offer was accepted, and the other bonds were forwarded to Richmond. Boulware was a director in the plaintiff in error's bank and was negotiating the purchase of 16 of the bonds for it. The bank took 16 of the bonds and paid the money to the railroad ocmpany, and the same was used in the construction of its road. The town paid the first coupon on the bonds falling due February 1, 1893, but, when the second one came due, August 1, 1893, it defaulted. The bank instituted an action against the town of Oxford in the state court for the amount then due on coupons. The court decided in favor of the town. The bank appealed, and the Supreme Court of the state reversed the judgment and sent the case back for a new trial. 116 N. C. 339, 21 S. E. 410. During the progress of the second trial the town raised the question that, when the act authorizing the issuance of the bonds passed the Legislature of North Carolina, it was not read in the House of Representatives on three different days, as the Constitution of the state required, but passed its second and third reading on the same day, and the yeas and nays were not entered on the journal on the second and third readings, as required by the Constitution. The court overruled the defense and rendered judgment against the town, but, on appeal, this judgment was reversed and the case was remanded for a new trial. 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487. The bank then took a nonsuit in the state court and instituted action against the town on the overdue coupons in the Circuit Court of the United States for the Eastern District of North Carolina. 90 Fed. 7. The defendant interposed the same defense in that suit, but the Circuit Court overruled it, and rendered judgment against the town. On writ of error to this court the judgment was reversed, upon the ground that the failure to comply with the Constitution of the state in passing the act rendered the bonds void. Board of Com'rs of Oxford v. Union Bank of Richmond, 96 Fed. 293, 37 C. C. A. 493. Application was made to the Supreme Court of the United States for a writ of certiorari in that case, but it was denied. 22 Sup. Ct. 940, 46 L. Ed. 766. Thereupon, in July, 1903, the bank demanded of the railroad company a return of the money paid for the bonds. The demand was refused, and the bank brought this action against the defendant in error to recover the money paid by it for the bonds. The case was tried in the Circuit Court in December, 1904. The defendant in error pleaded the statute of limitations, and also defended on the merits. There was a trial by jury of the issues submitted.

The issue as to whether the action was barred by the statute of limitations was found in favor of the plaintiff in error. But, under the instructions given by the court, the jury found that the railroad company made neither an implied or an express warranty in selling the bonds, and judgment was rendered in favor of the defendant in error.

It will be seen from an inspection of the record that all questions involving the validity of the securities of the town of Oxford have been settled in its favor by both the state and federal courts, and we are now called upon to decide whether the plaintiff in error, upon the facts stated in the record, has a good cause of action against the defendant in error, the determination of which depends upon whether the defendant in error warranted the validity of the bonds in question. And, second, whether the action is barred by the statute of limitations. It is not sought to recover upon the contract contained in the bonds which have been decided to be void for want of power in the town of Oxford to issue the same, but this action is based on an express warranty. In order to maintain the present action, it is not necessary to establish the validity of the contract between the town of Oxford and the railroad company, but, among other things, it is incumbent on the plaintiff in error to disaffirm such contract as being unlawful and therefore void.

It appears from the record that the town of Oxford, in pursuance of an act of the Legislature of North Carolina agreed to issue $40,000 of its bonds to aid in the construction of the Oxford & Coast Line Railroad from Oxford to a point on the Durham & Northern Railroad. It further appears that there was a controversy between the town of Oxford and the railroad company relative to the issuance of the bonds which resulted in a suit being brought by the railroad company against the town in the state court, which was finally settled by a compromise judgment rendered in favor of the railroad company and against the town, in which it was provided that the town should issue and deliver to the railroad company 20 bonds in the denomination of $1,000 each, which it afterwards delivered. The recitals contained in the bonds to the effect that the same were issued in pursuance of the "powers and authority granted by the state of North Carolina as provided in chapter 49 of the Code of North Carolina of 1883, and in pursuance of the authority granted in section 30 of the charter of the said town of Oxford which is embraced in the Private Laws of 1885 (Laws 1885, p. 746, c. 21), as passed by the General Assembly of said state and in pursuance of the authority granted by chapter 315, p. 269, of the laws of 1891, passed by the General Assembly of North Carolina, ratified the 5th day of March, 1891, entitled an 'Act to incorporate the Oxford & Coast Line Railroad Company.' And in pursuance of an election held in said town of Oxford on the 27th of April, 1891, and of a settlement and adjustment of a controversy and litigation in which the Oxford & Coast Line Railroad Company et al. were plaintiffs and the board of commissioners of Oxford and the mayor of said town were defendants, adopted by the said board of commissioners July 25, 1892, and the judgment and decree of his Honor H. G. Connor, judge presiding in said action at July term, 1892, of Granville superior court." On the 26th day of August, 1892, A. W. Graham,

chairman of the construction committee and second vice president of the Oxford & Coast Line Railroad Company, wrote a letter to A. L. Boulware, president of the First National Bank of Richmond, stating that the town of Oxford had issued $20,000 in 30-year bonds with interest at 6 per cent. in aid of the construction of the railroad which he represented and on which he requested a loan of $4,000. In this letter, among other things, he said: "The validity of the bonds has already been passed upon by the superior court at the July term, 1892." The bank made the loan to the railroad company on eight of the bonds. On August 29th, Graham again wrote Boulware a letter, in which he stated: "The bonds spoken of are valid and would be a good investment to any one seeking securities of the kind." In pursuance of the negotiations which were begun at that time, Boulware purchased for his undisclosed principal the bonds on which this action is based. The plaintiff in error now seeks to recover from the defendant in error the amount paid for the bonds as money had and received, upon the ground that there was both an express and an implied warranty of the same by the defendant in error through its agent and representative at the time the bonds were purchased.

In this view of the case, it is necessary that we should determine whether the bonds were purchased under such circumstances as to justify either of the contentions of the plaintiff in error as to warranty. In view of the facts in this case, we deem it only pertinent to determine whether the statements made by the defendant in error through its agent were of such a character as to amount to an express warranty.

In the case of Reese v. Bates, 94 Va. 330, 26 S. E. 869, the court said:

"Every man is presumed to intend the consequence of his own act. When therefore a vendor negotiating a sale makes an affirmation of quality as an assurance of fact which is relied on by the buyer, it constitutes a warranty, for the vendor will be presumed to have so intended. So we find, in Smith v. Justice, 13 Wis. 600, the vendor having made such a representation of facts in order to induce a sale, and that representation being relied on by the defendant, it was held to be a warranty, and he was not allowed to avoid the effect of his representations by proof that he did not intend to warrant."

The Court of Appeals, in the case of Reese v. Bates, supra, in discussing the authority of an agent acting in the capacity in which Graham acted on the occasion in question, says:

"From these authorities it appears that there are warranties which an agent to sell may make as one of the incidents of that employment, and of the power to make which the court will take judicial notice. They are such warranties as are usual. For example, a general agent to sell horses may warrant the soundness of a horse; for this is a warranty usually given in such transactions."

This rule applies with equal force to an agent who has authority to sell bonds, and it necessarily follows that Graham, being employed to sell the securities of the railroad company, possessed authority to represent that the same were valid. The railroad company was therefore bound by the express representations of its agent, to wit, that the bonds were valid. The representations by Graham cannot

be treated as an idle statement and made for no particular purpose, but must be considered in view of the circumstances surrounding the transaction at the time they were made. To say that such representations were made for any other purpose than as an inducement to the bank to part with its money would be to assume that a banking institution, doing business in a neighboring state, would be willing to invest its money in the purchase of securities of a town in North Carolina, without taking the precaution to make inquiry as to the validity of such securities, and that it would be willing to make such an investment without any representation as to the validity of the same. The more reasonable and logical construction is that the bank was induced to make the purchase by the express warranty of Graham as to the validity of the bonds.

In the case of Hobart v. Young, 21 Atl. 613, 12 L. R. A. 696, 697, the Supreme Court of Vermont, in discussing this question, said:

"An important question is whether the words 'sound and kind,' contained in the bill of sale, constitute an express warranty as matter of law. The law of warranty has undergone much change since Chandelor v. Lopus, Cro. Jac., 4, decided in Exchequer Chamber in 1803. It was there held that an affirmation that the thing sold was a bezoar-stone was no warranty; for it was said, every one in selling his wares will affirm that they are good, or that the horse he sells is sound; yet, if he does not warrant them to be so, it is no cause of action. But latterly courts have manifested a strong disposition to construe liberally in favor of the purchaser what the seller affirms about the kind and quality of his goods, and have been disposed to treat such affirmations as warranties when the language will bear that construction, and it is fairly inferable that the purchaser so understood it. Stone v. Denny, 4 Metc. (Mass.) 155; Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595. And now any affirmation as to the kind or quality of the thing sold not uttered as matter of communication, opinion, or belief made by the seller pending the treaty of sale, for the purpose of assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty."

This is very much in point and clearly indicates a disposition on the part of the courts to depart from the rule laid down in Chandelor v. Lopus, Cro. Jac. 4, which lapse of time and the development of our commercial system have demonstrated to be impracticable and antagonistic to the well-settled principle of the law that every wrong has a remedy, and that no one can be deprived of his property without being afforded a means of redress. The trend of judicial sentiment in this country is to the effect that one shall not be permitted to enjoy the benefit of another's property without compensating him for the same. To hold otherwise would be to place a premium upon subterfuge and technicality, a thing which the law never regards with favor.

It may be insisted, and no doubt will be, that to hold in favor of the plaintiff in error in this instance will be to deprive the railroad company of the contribution which was intended to be made by the town of Oxford in the first instance. As the matter now stands, that will be so, but, in such case, the railroad company will only be deprived of a gratuity, while, on the other hand, if we should hold that the bank is not entitled to recover the money which it was induced to advance to the railroad company, it will be damaged to the extent

of the amount involved. However, these are matters which we cannot consider in passing upon the rights of individuals.

In the case of Meyer v. Richards, 163 U. S. 386, 16 Sup. Ct. 1148, 41 L. Ed. 199, the state of Louisiana had issued several bonds under an act known as "No. 174" and designated as "consolidated bonds." A number of these bonds were in the hands of the public and some were held by the treasurer of the state as the property of the state. The constitutional convention of Louisiana adopted an ordinance declaring the "consolidated bonds" that were in the treasury of the state null and void. Subsequently the treasurer purloined 13 of these bonds and disposed of the same, which finally passed into the possession of Richards, an innocent purchaser, who sold the same to Meyer.

It appears that both parties to this transaction acted in good faith. Some time after Meyer bought the bonds the state authorities discovered that a fraud had been practiced by the state treasurer in disposing of the bonds in the manner described, and refused to pay interest on the same. Meyer then brought suit against Richards for a return of the money that he had paid for the bonds, and the Supreme Court of the United States, in a very able and exhaustive opinion delivered by Mr. Justice White, decided that Richards must return the money that Meyer had paid him. The conclusion reached, being that, under the civil law in such cases, there is a warranty of the validity of the bonds, and that at common law there is a warranty in all such cases that the thing sold has an existence, and in that case, the bonds being void under the organic law, the same had no actual existence. That, inasmuch as the bonds had no actual existence, the seller was bound both by the civil and common law to return the money which had been paid to him by Meyer. In that case there was no question as to the validity of the law under which the bonds were issued, nor was there any question as to the binding obligation of the state, or anything in the face of the bonds sold to Meyer to indicate that the same belonged to the particular class of bonds which had been declared void by the ordinance of the convention. If Meyer had known at the time of the purchase of the bonds that the same belonged to the class that had been declared void, then the doctrine of caveat emptor would have applied, and Richards could not have been held to have warranted the validity of the bonds upon the principle of the common law that where one sells a thing he warrants the actual existence of the thing sold. In this case there is an express warranty as to the validity of the bonds, and it appears from the record that the plaintiff in error was induced to part with its money on account of such warranty.

It is insisted by the defendant in error that the case of Otis et al. v. Cullum, 92 U. S. 449, 23 L. Ed. 496, should govern; but, when we consider the facts in that case, it is easy to distinguish it from the one at bar. In that case the Legislature of Kansas passed two acts in which the city of Topeka was authorized to issue bonds for certain specified purposes; the amount in each case to be within the limits prescribed. One hundred of the bonds in the denomination of $1,000 each, payable to the party named or bearer, were executed and delivered to that party, and subsequently became the property of the

First National Bank of Topeka. That bank afterwards placed the bonds on the market and disposed of the same. Eighteen of these bonds were sold to the plaintiff in error for the sum of $12,852, and the residue to another party. There was a default in the payment of interest. The other party brought suit. It was held that the Legislature had no power to pass the acts, and the bonds were void. Suit was then brought to recover from the receiver the amount paid to the bank for the 18 bonds so purchased by the plaintiff in error. Mr. Justice Swayne, who delivered the opinion of the court, in discussing the questions involved, said:

"Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable ex delicto for bad faith, and ex contractu there is an implied warranty on his part that they belong to him, and that they are not forgéries. Where there is no express stipulation there is no liability beyond this. If the buyer desires special protection he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him."

There was nothing in the case of Otis et al. v. Cullum, to show an express stipulation as to the validity of the bonds. Hence, it is easy to distinguish that case from the one now before us. In that case it was not contended by the plaintiff in error that it had been induced to part with its money on the representations made by the defendant. However, in the case of Meyer v. Richards, it is held that at common law where a party offers a security which, at the time, he believes to be valid and induces another to purchase the same, who has no notice of any defect, and it afterwards develops that the security disposed of is void and has no existence, the party who parts with his money may recover the same upon an implied warranty. But in this case the question of an implied warranty is not involved, but the cause of action depends solely upon the question as to whether there is an express warranty.

It is insisted that the bank was charged with notice of any defects in the acts authorizing the issuance of the bonds and of the want of power on the part of the town of Oxford to issue the same, and therefore the plaintiff in error is not entitled to recover in this action. Such contention would undoubtedly be true if this were an action against the town of Oxford, but the action is not based on the validity of the bonds, but, as already stated, is instituted upon the theory that the securities are worthless, and that the railroad company procured the money of the bank by virtue of the representations made by its agent and representative that the same were valid and would be a good investment, and the further representation that the validity of the bonds had been established by a judgment of the superior court. Here, was an express warranty on the part of the railroad company that the bonds in question were valid and binding obligations, and the

representation was of such character as to induce the plaintiff in error to part with its money.

In the case of Central Transportation Co. v. Pullman's Car Co., 139 U. S. 60, 61, 11 Sup. Ct. 488, 35 L. Ed. 55, Mr. Justice Gray, who delivered the opinion of the court, among other things, said:

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain an action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained on the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm but to disaffirm the unlawful contract. The ground and limits of the rule concerning the remedy in the case of a contract ultra vires, which has been partly performed, and under which property has been passed, can hardly be summed up better than they were by Mr. Justice Miller, in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it'; and that, 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.'" Penn. R. R. Co. v. St. Louis & C. R. R., 118 U. S. 317, 6 Sup. Ct. 1094, 30 L. Ed. 83.

That the bank parted with its money, and that the defendant in error received the same and used it in the construction of its road cannot be denied, nor can it be reasonably insisted that the plaintiff in error was not induced to part with its money by the representations of the railroad company that the securities were valid. If the representative of the bank had examined the legislative journals of the state, he would have found that the act authorizing the issuance of the bonds in question had passed that body just as other acts, and that the regularity of its passage was certified by the officers charged with that duty; and, if a critical examination of the reports of the Supreme Court of the state had been made, no decision could have been found, at that time, affecting in the slightest degree the validity of the statute authorizing the issuance of the bonds. It is therefore reasonable to assume that the bank relied solely upon the representations that were made by the railroad company. But in this class of cases one is not held to that degree of diligence in order to justify a recovery, as he would be in cases where he deals directly with a corporation which has issued its bonds.

The defendant in error seeks to have a review of the action of the court in submitting to the jury the issue as to the statute of limitations, but that question is not before us for consideration. However, we are of opinion that the plaintiff in error's cause of action did not accrue until after the final determination of the litigation in the Circuit Court of the United States and the refusal of the Supreme Court to grant a writ of certiorari. Under these circumstances, we are satisfied that the finding of the jury as to the statute of limitations in favor

of plaintiff in error was proper, and we would not be inclined to disturb such finding on that account, even if that question were before us for our consideration.

The stipulation as to the validity of the bonds being in writing, and no evidence being introduced by defendant, and there being no dispute as to the facts, it devolved on the court to determine as a matter of law whether the plaintiff was entitled to recover. We therefore think the court erred in refusing to instruct the jury to find a verdict in favor of the plaintiff as requested in instruction No. 1, of the plaintiff's prayers for instructions.

The judgment of the Circuit Court is reversed, and the case remanded to that court with instructions to set aside the verdict and award a new trial, and to proceed thereafter in conformity with the views herein expressed.

Reversed.

CHAPMAN v. YELLOW POPLAR LUMBER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 612.

1. APPEAL—MATTERS REVIEWABLE—INTERLOCUTORY ORDER.

While an interlocutory order dissolving an injunction is appealable under Act March 3, 1891, c. 517, § 7, 26 Stat. 828, creating the Circuit Courts of Appeals, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666 [U. S. Comp. St. 1901, p. 550], and on such appeal the court has power to dispose of the whole case, a failure to appeal therefrom does not deprive the complainant of the right to a review of other matters determined by the order, not relating to the injunction, on an appeal from a final decree.

2. ACTION—JOINDER OF CAUSES—LEGAL AND EQUITABLE.

A bill in a federal court, which sought to compel a reconveyance of property conveyed by complainant to defendants and also to recover damages for breach of the contract under which the conveyance was made, stated two causes of action, one in equity and one at law, and it was not error for the court to require complainant to separate the same by filing a declaration at law for the recovery of his damages.

3. EQUITY—SUPPLEMENTAL BILL—ENFORCEMENT OF COMPROMISE AGREEMENT.

Complainant brought a suit in equity against a corporation and certain individuals to obtain a reconveyance of standing trees to which he had an equitable title, which he had conveyed to the individual defendants for the benefit of the corporation. Pending the suit a compromise agreement was made between complainant and the corporation, by which the latter agreed to "forthwith" cause a reconveyance to be made of certain of the trees, and of the remainder on payment of a sum for which they stood as security; it was also stipulated that the cause should stand continued to await the final determination of an action at law pending between the parties for the purpose of enabling complainant, if necessary, to enforce the latter conveyance. Such conveyance was subsequently made, but no conveyance was made of the trees, which were to be reconveyed forthwith; but, on the contrary, the corporation caused certain of them to be cut and converted the same to its own use. *Held*, that the compromise agreement had the effect of a consent decree, and under its terms complainant had the right, by a supplemental bill in the original cause, not only to require such conveyance, but also an account-

ing for the trees so converted as ancillary relief, especially in view of the fact that his title to the trees was equitable and would not sustain an action at law for the conversion.

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

J. F. Bullitt (Bullitt & Kelly, on the brief), for appellant.

John N. Baldwin, for appellees.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

KELLER, District Judge. The two assignments of error relied on relate to two different decrees entered in this cause; the first having been entered December 11, 1893. The errors complained of in that decree are (a) in dissolving the attachment theretofore issued; (b) in discharging the receiver and requiring him to turn the property in his hands over to the defendants M. T. Green, F. J. O'Connell, and Yellow Poplar Lumber Company, etc.; (c) in awarding costs in favor of said defendants upon the question of the receivership; (d) in requiring the plaintiff "to replead therein by filing a declaration or declarations at law for the purpose of prosecuting his claim for damages herein for alleged breach of contract by defendants, and for other legal damages, and complainant is given until the 1st day of March, 1894, to file said declaration." Of these matters, all except the last have admittedly been settled by a compromise agreement entered into between the parties on August 16, 1895, and we will now proceed to consider the error in said decree alleged to exist by reason of the direction of the court that the plaintiff recast his pleadings by filing a declaration or declarations at law for the recovery of the damages alleged by him in his bill to have been suffered by reason of an alleged breach of contract, etc.

In order to understand the situation which was then confronting the court, it is perhaps necessary to make a brief statement of the condition of this suit at the time the decree complained of was entered. Chapman in 1893 had brought a suit in equity against the Yellow Poplar Lumber Company and others, reciting in his bill three certain agreements entered into on February 9, 1893, between himself and Green & O'Connell, representatives and agents of the Yellow Poplar Lumber Company. By the first of these agreements (Exhibit 100) Chapman bound himself to deliver to Green & O'Connell, at certain points mentioned in said agreement 50,000,000 feet of timber that he owned or controlled "being a portion of 42,000 [trees] that are bought in the style of Albert Pack, trustee, and also 32,000 trees that are owned and controlled by S. F. Chapman as an individual." This agreement contained a proviso as follows:

"Provided that, should the trees above referred to fall short of said fifty million feet, then said Chapman agrees to make up the shortage in a manner satisfactory to said Green and said O'Connell."

The agreement contained further provisions as to the prices to be paid for logs, etc., and provided for the execution by Green & O'Con-

nell of two notes for $5,000 each to Chapman, the proceeds of which notes were to be used by Chapman to pay off certain claims in the way of purchase money due to C. D. Cushing, a former partner of Chapman, and also to secure the release of a certain bill of sale on Chapman's interest in the said 42,000 trees, made by him to Geo. W. Peck. The principal of said advance of $10,000 was to be repaid to Green & O'Connell by a deduction of 10 per cent. of the monthly payments due by them for logs under the contract. Chapman agreed to deliver 10,000,000 feet, or more, of the said timber each year, and in case he failed or neglected to carry out the contract it became the right and duty of Green & O'Connell to do so, charging expenses to Chapman and paying him the difference, if any, between the cost and the contract prices. By the second of said writings (Exhibit 101) Chapman sold and conveyed to Green & O'Connell "all my present or future right, title, and interest" in the 42,000 Albert Pack trees, "all also in 32,000 trees controlled by me individually." By the third of said writings Green & O'Connell agreed that, if the said Chapman performed his part of the first agreement faithfully, they would reconvey to him all their interest in the trees covered by the second agreement. These three agreements read together, clearly show that the agreement, Exhibit 101, was simply intended as a mortgage or assignment of Chapman's interest in the trees from which he was to make his deliveries under the principal contract, for the security of Green & O'Connell, and that, in the event Chapman failed to perform his contract, they might do so without any question as to their right to cut these trees. It is admitted in the record that Green & O'Connell were officers and agents of the corporation defendant, Yellow Poplar Lumber Company, and that these contracts were made for its benefit, and that it assumed the obligations thereof.

In September, 1893, Chapman filed his bill in the Circuit Court of Wise county, Va., against Green, O'Connell, Yellow Poplar Lumber Company, S. Bitely, J. C. Kerr, and any unknown parties having interest in the subject-matter of the suit, charging that the three defendants first named had failed to carry out their contract in making payments to him for logs delivered on the heads of streams, and had finally refused to make any settlement with him; that without such settlement and payments he was unable to carry on said contract; that if these defendants had carried out their part of said contract he could and would have made a profit of at least $100,000; that Exhibit 101 above referred to was merely a mortgage, and that Green & O'Connell (and their principal, the Yellow Poplar Lumber Company), having failed to carry out the contract, ought to be required to reconvey the timber to him, Chapman; that he (plaintiff) was entitled to one-third of $2,500, certain profits made in stores of defendants; and that upon an accounting for work done under the contract, defendants were largely indebted to him, etc. Thereupon he prayed that the property of the first three defendants in Virginia be attached, that a receiver be appointed to take charge of the logs and other personal property mentioned in the bill, that he be given a decree for the various sums alleged to be due him, that a commissioner be appointed to make and state an account between the

parties, and that Green & O'Connell be directed to reconvey to him the said trees. The attachment prayed for was issued and levied on certain trees which were owned by Yellow Poplar Lumber Company in Dickenson and Buchanan counties, Va., and a receiver was appointed. Thereafter a petition for removal was filed, and the cause (without objection on the part of plaintiff) was removed to the Circuit Court of the United States for the Western District of Virginia.

On October 4, 1893, the plaintiff filed a petition in the cause, which was treated as an amended and supplemental bill, upon the prayer of which a receiver was appointed by the court and an injunction awarded restraining Green & O'Connell, the Yellow Poplar Lumber Company, their officers, agents, servants, and employés, from removing any of the cut logs or other personal property placed in the custody of the receiver, and from interfering in any way with the receiver in the performance of his duties. The defendants thereafter demurred to the bill, one of the grounds of demurrer being stated to be that the bill contained both legal and equitable causes of action. In December, 1893, the cause came on to be heard before the late Judge John Paul, in chambers, at Harrisonburg, and on December 11, 1893, Judge Paul passed on order dissolving the injunction, discharging the receiver, releasing the attachment (except as to certain standing trees deemed by him sufficient in value to protect the plaintiff), referring the case to a master for the purpose of ascertaining the state of the accounts between the parties, and containing a clause as follows:

"And the defendants having demurred to the bill on the ground, inter alia, that there is a misjoinder of legal and equitable causes of action therein and moved the court to require a repleader by complainant, the court doth adjudge, order, and decree that the plaintiff be, and he is hereby, required to replead herein by filing a declaration or declarations at law for the purpose of prosecuting his claim for damages herein, for alleged breach of contract by the defendants, and for any other legal demands."

From the whole of this order Chapman prayed and was allowed an appeal, but never perfected the appeal asked for, and, being advised that said order, being interlocutory, was not then appealable, filed his declaration at law, claiming $100,000 damages on account of the profits which he would have made had he been allowed to carry out the contract. This suit eventually resulted in a judgment in favor of the defendants. We are now called upon to say whether there was error in that part of Judge Paul's order quoted above, and, if so, whether there was reversible error.

Before passing upon that question, however, we may say that the order of December 11, 1893, although interlocutory, was unquestionably appealable, by reason of the fact that it dissolved the injunction awarded in the order of October 4, 1893, see Act March 3, 1891, c. 517, § 7, 26 Stat. 828, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666 [U. S. Comp. St. 1901, p. 550]. And it is well settled that on an appeal from an interlocutory order the court has power to hear the whole case and dispose of it. Clark v. McGhee, 87 Fed. 789, 31 C. C. A. 321; Mayor of Knoxville v. Africa, 77 Fed.

502, 23 C. C. A. 252; Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 545, 19 C. C. A. 25; Consol. Piedmont Cable Co. v. Pacific Cable Ry. Co., 58 Fed. 226, 7 C. C. A. 195; Smith v. Vulcan Iron Works, 165 U. S., 518, 17 Sup. Ct. 407, 41 L. Ed. 810.

However, while we think the interlocutory order of December 11, 1893, by reason of the fact that, inter alia, it dissolved an injunction, might have been appealed from, we by no means hold that plaintiff has lost his rights by failing to appeal. It is true that as to the injunction his right is gone, but as to the matter here complained of it is in the same condition as though the decree had contained no reference to an injunction. What, then, was the order of the court? Judge Paul ordered what he called a "repleader." We do not think that it was technically a judgment of repleader, as that term is applicable to a case where issue has been joined on an immaterial point. Mr. Minor, in his exhaustive Institutes (volume 4, pp. 857, 858) says:

"A motion for a repleader is appropriate where the unsuccessful party, on examination of the pleadings, conceives that the issue joined and decided was on an immaterial point, not proper to determine the action. In such a case, therefore, the court not knowing for whom to give judgment, will award a repleader, that is, will order the parties to plead de novo, for the purpose of obtaining a better issue."

Moreover, a judgment of repleader does not lie after a demurrer (Perkins v. Burbank, 2 Mass. 81), unless, perhaps, where the answer and replication are bad (Potter v. Titcomb, 7 Me. 302). This order, although in the form of an order to file a declaration or declarations at law on the law side of the court, was, in effect, a permission so to do, with the alternative of having that feature of his bill dismissed or ignored. See Fletcher v. Burt, 126 Fed. 619, 63 C. C. A. 201. This is the manifest purpose and effect of the order complained of. The bill had been attacked by a demurrer (not copied into the record), and the court offers to the plaintiff the option of filing a declaration on the law side of the court, or of having what the court decided to be a legal cause of action stricken from the bill. Therefore, to determine whether the court was in error, we must determine whether the bill as it stood at the time could have been sustained in a court of equity, and we have no hesitation in saying that it could not.

In the first place, we think it was open to the objection stated in the order to have been specifically raised by the demurrer, namely, that it sought to combine in the same bill distinct and separate legal and equitable causes of action. It is somewhat difficult to tell from the allegations of plaintiff's bill whether he was seeking herein to recover lost profits or damages for the alleged breach of the contract. The prayer of the bill throws no light upon the question. The averments of the bill in that regard are as follows:

"Your orator further says that if the said company, said Green & O'Connell, had complied with their contract aforesaid, and had not refused to carry out the same, he could and would have made a clear net profit thereon of $100,000.00; that the place at which the said logs were to have been delivered to the said company is in the heart of the Cumberland Mountains,

several hundred miles from any point at which there is a general market for such logs, and that there is no general market whatsoever for the said logs at or near the place where the same were to be delivered as aforesaid, and that the difference between the prices which the said company and the said Green & O'Connell agreed to give your orator for said logs, and the price for which your orator could now sell the same, if, indeed, he could find a purchaser at any price amounts to a vast sum, to wit, the sum of $100,000.00; and that the damage resulting to your orator by reason of said failure of the Yellow Poplar Lumber Company and said Green & O'Connell to comply with and carry out said contract amounts to that sum."

If we are to understand that, as to this feature, the suit was for damages as such, for breach of the contract, the case is very similar to that of La Mothe Manufg. Co. v. National Tube Works Co., Fed. Cas. No. 8,033, wherein the complainant prayed for an injunction, the cancellation of an agreement and damages for alleged breaches of the agreement. The late Mr. Justice Blatchford, in his opinion said:

"The present complaint must be recast into two cases, one at law and one in equity. Dill Rem. Causes, 41, and cases there cited. In Fisk v. Railroad Co., Fed. Cas. No. 4,829, the plaintiff in a removed suit divided it into a legal action and an equitable action in this court, and the practice was approved. See Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Thompson v. Railroad Co., 6 Wall. 134, 18 L. Ed. 765; Montejo v. Owen, Fed. Cas. No. 9,722."

In giving his reasons for this action, Judge Blatchford says:

"It is urged for the plaintiffs that, as the court has jurisdiction to grant the equitable relief asked for, it would retain the jurisdiction, to award in equity the damages claimed; that, on proof of a breach of the agreement and of damages sustained thereby, the equitable relief asked for would be granted; and that therefore there is no necessity for repleading. There is 'a plain, adequate, and complete remedy' at law in respect to the damages claimed, and to allow them to be recovered in equity and to deprive the defendants of a trial by jury in respect to them would violate the provisions of section 723 of the Revised Statutes [U. S. Comp. St. 1901, p. 583]."

See, also, Fletcher v. Burt (C. C. A., 6th Circuit) 126 Fed. 619, 63 C. C. A. 201.

But, if we treat the bill as praying for a recovery of the profits eo nomine, which plaintiff would have made had the defendants faithfully carried out the contract with him, the situation is not helped any—on the contrary, rendered all the more difficult—because, in such a case the relief sought is inconsistent. In that view the bill seeks the reconveyance of the very trees by the cutting of which the contract with defendants was to have been performed, and likewise seeks to recover the profits which plaintiff claims would have been made by the cutting and delivery of the logs from these trees. In other words, as put by the plaintiff, he seeks to recover a "clear net profit" of $100,000, which he avers he would have made, had he been allowed to carry out the contract, which carrying out of the contract would have involved the cutting of all the trees conveyed (and possibly more), and at the same time seeks to recover (by reconveyance) the trees out of the cutting of which such alleged profit would have been made. He seeks to recover his entire profit on the contract as though it had been carried out, and at the same time (and

in the same suit, seeks the reconveyance of the same timber which, if cut, would have yielded the profit, and from which, if reconveyed to him, he might by a new contract make another $100,000 profit. These causes of action were clearly inconsistent, and the court was right in holding that they could not be joined in a bill in equity. So joined there was no equity in the bill. If Chapman was entitled to recover from the defendants all the profit he would have made, had he completed the contract in accordance with its terms, then clearly he would not be entitled to recover possession of the trees out of the cutting and delivery of which such profit would have been made, and which had been conveyed to the defendants for the very purpose of securing the completion of the contract.

Putting the matter in another way: If Chapman was entitled to recover all the profits he would have made upon a full carrying out of the contract, it would only be by reason of a breach of such contract by defendants, and it would be a purely legal cause of action, which, if he were successful, would be a full and absolute satisfaction for his entire claim. The truth was that there were two causes of action separate from each other, one a suit for damages (not profits) for breach of the contract, and the other for reconveyance of the title to the trees and an accounting, and the court did not err in its order of December 11, 1893. The plaintiff has had a full determination of his right before a jury upon a question which it is peculiarly the province of a jury to pass upon. There is no merit in the first assignment of error.

The second assignment of error relates to the decree entered July 19, 1904, and assigns error in the following particulars:

"(a) In sustaining the exceptions, or any of the exceptions to the report of Master Commissioner H. Peyton Gray, in the said cause, and in overruling in all respects the said report, and in overruling the said report in any respect whatever.

"(b) In dissolving the injunction theretofore, to wit, October 10, 1900, granted in said cause.

"(c) In dismissing the said cause and refusing to grant any and all of the relief prayed for by complainant.

"(d) In adjudging that the Yellow Poplar Lumber Company recover of the said Chapman any costs whatsoever in the said cause."

On August 16, 1895, and after Chapman had recovered a judgment in the law action, but before the final determination of said action on appeal, an agreement of compromise was entered into between Chapman and the Yellow Poplar Lumber Company, by which, among other things, it was agreed:

"That the Yellow Poplar Lumber Company shall forthwith release and cause to be reconveyed to said Chapman all the standing trees conveyed or mortgaged by said Chapman to Green & O'Connell, except the 'Pack trees'; and it is further agreed that as soon as said Chapman settles said balance of $5,050, either by paying the same or by crediting it on said judgment after the same shall have become final, said company shall release and cause to be reconveyed to said Chapman the said Pack trees, but until the said balance of $5,050 is settled as aforesaid the said company shall retain its interest in said Pack trees as security therefor."

A number of other matters were covered by the compromise agreement, none of which, however, are material to this inquiry, ex-

cept a stipulation that the equity cause was to be revived against the representatives of Green (who had meantime died), and was then to be continued to await the final determination of the law cause, for the purpose (in the event of the reversal of the judgment in the law cause) of enabling Chapman to insist on the alleged error of the court in directing said lawsuit to be brought, and for the further purpose of compelling, if necessary, the reconveyance by O'Connell and the representatives of Green of the said timber. The cause was accordingly revived and continued. The law judgment in favor of Chapman was reversed, and he paid to the Yellow Poplar Lumber Company the $5,050 recited as due it in the compromise agreement, and received a reconveyance of the "Pack" trees; but he never received any reconveyance of the other standing trees, which under the agreement of compromise were to have been "forthwith" released and caused to be reconveyed.

On December 23, 1899, Chapman filed his bill of revivor and supplemental bill setting up the material matters of the agreement of compromise and the failure on the part of the Yellow Poplar Lumber Company to have the said standing trees reconveyed; alleging that since the date of said agreement the defendant company has cut and converted to its own use an unknown number of the trees, which should under the agreement, have been reconveyed; reviving the cause against the personal representatives of Green; praying that O'Connell and the representatives of Green may be required to reconvey such of the trees as are still left standing, that a reference may be had to a commissioner to ascertain the number and dimension of the trees cut and converted to its use by the Yellow Poplar Lumber Company since the date of said compromise, and that complainant may have decree against said company for the reasonable value of said trees so cut by it less the amount of the purchase money owed by complainant for such trees, etc. To this bill an answer was filed by the Yellow Poplar Lumber Company which was clearly insufficient, but no exceptions appear to have been taken by plaintiff to said answer; the decree of May 17, 1900, showing that he replied generally thereto.

That decree referred the cause to H. Peyton Gray, master commissioner, with directions to ascertain and report: (1) The number of trees that were standing on the ground in Wise, Dickenson, and Buchanan counties in September, 1893, which complainant owned or controlled and had conveyed or mortgaged to M. T. Green and F. J. O'Connell, and how many of said trees, if any, were thereafter in any manner purchased or handled by the Yellow Poplar Lumber Company, or otherwise converted to its own use. (2) The time when such trees were converted, if any were so converted, and the reasonable value at such time and at different periods up to date. (3) Any other matter which either of the parties hereto may desire to have said master hear evidence and report upon. The master on May 10, 1901, filed a full report finding on all questions of fact referred to him, and fully discussing the questions of law incidentally arising upon the hearing, which report is found in the record, to which report excep-

tions were filed by both parties. The master, upon the evidence before him, found that the Yellow Poplar Lumber Company, after having made its agreement with plaintiff to "forthwith release and cause to be reconveyed to said Chapman all the standing trees conveyed or mortgaged by said Chapman to Green & O'Connell, except the trees known as the 'Pack,'" not only did not forthwith cause this to be done, but, while not directly purchasing any of these trees, that it furnished money for the purchase of logs from these trees and for the payment by the persons cutting the timber of the purchase price to Stephen Bitely and other original owners of the trees known by said company to have been embraced in the 32,000 trees "owned and controlled" by said Chapman in 1893, and conveyed or mortgaged to Green & O'Connell, and agreed to be "forthwith" released and reconveyed by the compromise agreement of August 16, 1895. The court, by its final decree of July 19, 1904, sustained all the exceptions of the defendants to the report of the master, and overruled said report in all respects.

The learned judge below filed in the case an opinion or memorandum, giving the reasoning upon which he based his action overruling the report of the master, from which it appears that he based his decree upon the proposition that the allegations of the amended and supplemental bill and the terms of the compromise agreement of August 16, 1895, will not support the claim of plaintiff to the relief prayed for, other than for the release and reconveyance of the trees mentioned therein, and hence that the report of the master is overruled, not upon any consideration as to the insufficiency of the facts found to support the allegations of the said amended and supplemental bill, nor yet upon any finding by the court that the evidence given before the said master was insufficient to warrant the findings of fact by the said master, but that, as to any claim by plaintiff on account of the alleged conversion of trees (or its equivalent) by the Yellow Poplar Lumber Company, no recovery can be had under said amended and supplemental bill. As illustrating the view of the learned judge below, we quote the first two paragraphs of his memorandum or opinion filed in the cause:

"First. That the amended and supplemental bill filed herein on the 10th day of October, 1900, in so far as it seeks to recover against the defendant the Yellow Poplar Lumber Company for the alleged conversion by said company of the trees referred to in said bill—that is, the difference between what the complainant was to have paid the parties with whom he had contracted for said trees, and what they were worth when subsequently cut, some years later, by reason of the increased value of said trees, and which complainant insists is the damage resulting to him by reason of the alleged failure to convey said trees—cannot be maintained; such cause of action being totally different from the relief sought in the original bill."

"Second. That under the compromise agreement entered into between the parties on the 11th [sic] day of August, 1895, the sole purpose for which an amended and supplemental bill can be maintained for the revival of the cause against Green & O'Connell is with the view of having the trees in question released and reconveyed to the complainant; that such agreement does not authorize the institution and maintenance of an amended and supplemental bill of the character filed, further than to secure the release and

reconveyance of any interest that said Green & O'Connell or the Yellow Poplar Lumber Company may have had in the trees in question."

The above extracts will sufficiently illustrate the view taken by the learned district judge with reference to the subject-matter of the amended and supplemental bill, and will suffice to show that the decree complained of was rendered without regard to the findings of fact by the master and without consideration of the evidence upon which said findings were based. We think the court erred in thus holding, and will briefly give our reasons for our views.

1. While it is true that the original bill does not pray for the relief prayed for and refused in the amended and supplemental bill, it is only true because this matter arose pending the suit, by the fault, as alleged, of the defendant, and the relief herein prayed for is purely incidental and ancillary, to enable the plaintiff to secure that full measure of relief which a reconveyance of these trees at the time the bill was filed, or even at the date of the agreement of August 16, 1895, would have afforded him. The voluntary agreement of August 16, 1895, to "forthwith" release these trees and cause them to be reconveyed, had, in so far as it went, all the validity and force of a decree to that effect, and it must be admitted that, had such a decree been passed, and the defendant the Yellow Poplar Lumber Company, instead of forthwith carrying the same into effect, had violated the decree by converting to its use certain of these trees, or by intriguing with others for the purchase of logs cut therefrom before a reconveyance to plaintiff, such an amended and supplemental bill would clearly have lain, because nothing short of it would give that measure of relief contemplated by the decree itself.

2. The contention that under the terms of the compromise agreement the equity cause was continued (so far as this matter is concerned) only for the purpose "of compelling said O'Connell and the representatives or heirs of said Green to reconvey said timber" is a conclusion with which, in view of the fact that the agreement was made with the Yellow Poplar Lumber Company, whose conduct, it is alleged, has been such as to emasculate the vitality from this provision for relief, we cannot agree. This provision must be properly interpreted, and, so interpreted, it must and does include all that is essential to its validity. It was not contemplated that a bill would have to be filed to secure the reconveyance of these trees. That reconveyance the Yellow Poplar Lumber Company agreed to cause to be made forthwith, and, as before stated, that agreement had all the force and solemnity of a consent decree. As to the sufficiency of this amended and supplemental bill, it may be said that no demurrer was interposed to it, and, if the bill was insufficient, it should have been demurred to. But we have no doubt of the legal sufficiency of the bill, and no doubt of the jurisdiction of the court to entertain it in this suit. Indeed, the matter appears to us to be peculiarly a subject for cognizance by way of a supplemental bill, as arising pending the suit, by the act of the principal defendant and affecting the sufficiency of the relief prayed for in the original bill. 4 Minor's Inst. p. 1262 (1131), and authorities there cited.

Having this view, it is perhaps unnecessary to advert to the fact that there is a very grave question as to whether Chapman could have sustained an action at law, on account of the fact that such title as he had was purely equitable. In Northern Pacific Railroad Co. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513, the court said:

"A mere equitable claim, which a court of equity may enforce, will not sustain an action at law for the recovery of land or anything severed therefrom."

That was an action in trover to recover certain logs cut from plaintiff's land.

Other reasons might be advanced to show the propriety of the filing of this supplemental bill, but we deem the foregoing sufficient. In view of the fact that apparently the court below did not consider the report of the master at all, but overruled it upon the ground that under no circumstances could the relief prayed for in the amended and supplemental bill be granted, we content ourselves with a simple reversal of the decree entered July 19, 1904, and remand the case to the Circuit Court of the United States for the Western District of Virginia for such further proceedings, not inconsistent with this opinion, as may be necessary and proper in the premises.

Reversed and remanded.

DOWAGIAC MFG. CO. v. LOCHREN et al., Judges.

(Circuit Court of Appeals, Eighth Circuit. January 31, 1906.)

No. 60.

1. EVIDENCE—PRODUCTION—COURT OF ANOTHER DISTRICT SHOULD COMPEL, WHETHER MATERIAL OR IMMATERIAL.

   It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit.

   It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent, irrelevant, or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its production.

2. SAME—THIS RULE PREVAILS ALIKE IN SUITS IN EQUITY AND IN ACTIONS AT LAW.

   The rule of practice above stated prevails in the taking of testimony before a commissioner or examiner, under rules 67 and 68 in equity, in the taking of testimony before a master empowered to determine the admissibility of evidence under rules 74, 77, 78, 79, and 82 in equity, and in the taking of evidence in actions at law under sections 863, 868, and 869, Rev. St. [1 U. S. Comp. St. 1901, pp. 661, 664, 665].

(Syllabus by the Court.)

Petition for Writ of Mandamus.

Fred L. Chappell, for petitioner.

Louis K. Hull, for respondents.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. A petition for a writ of mandamus to direct the acting judges of the Circuit Court for the District of Minnesota to issue a subpœna duces tecum and to direct certain witnesses to testify in an accounting before a master appointed by the United States Circuit Court for the District of Kentucky in the case of the Dowagiac Manufacturing Company v. Brennan & Co. and others, which was pending in the Kentucky court, has been presented to this court. A decree that Brennan & Co. have infringed the patent of the complainant, and that the latter is entitled to an accounting and to a recovery of damages, had been rendered, a special master had been appointed empowered to determine the admissibility of evidence and to take the accounting, and he was engaged in the District of Minnesota in taking the testimony of C. C. Webber, the secretary of Deere & Webber, a corporation which had purchased the infringing drill of Brennan & Company and had sold it through its agents throughout Minnesota and the adjoining states. Deere & Webber was not a party to the suit. Webber testified that Deere & Webber had sold the infringing machine, through agents, in many of the towns in this territory; that the records of his corporation would disclose accurately the places in which it had sold the grain drills and the agents who made the sales. He was then asked to give the names of the towns in which, and the names of the agents through whom, Deere & Webber had sold the infringing drill so far as he knew them, and to refer to the records of the corporation and to furnish therefrom a list of those he did not remember. Counsel for the witness objected, upon the ground that the evidence sought was incompetent, irrelevant, and immaterial, and that the information was privileged, because the disclosure of the names of the agents, the number of the infringing drills which Deere & Webber had sold, and the prices which it had obtained for them would constitute a breach of the confidence reposed in the witness by the corporation, would expose its transactions to competitors, and would work irreparable injury to its business. The master overruled this objection. The witness declined to answer under the advice of his counsel. The question whether he should disclose the information was certified to the United States Circuit Court for the District of Minnesota, and that court decided that the evidence sought was not privileged, but that the witness should not be required to answer because the testimony desired was immaterial.

Thereupon the Dowagiac Manufacturing Company produced evidence to the effect that at many towns in Minnesota, North Dakota, and South Dakota the infringing drill had been sold by Deere & Webber in competition with its patented drill, and closed its case upon the accounting. During the subsequent taking of testimony for the defense, several agents of Deere & Webber, at the request of that corporation or of Mr. Webber, testified to the quantities of the infringing grain drills which they had sold at various places within the territory in question and the prices which they had obtained for them. In rebuttal the complainant applied to the Circuit Court for the District of Minnesota for a subpœna duces tecum addressed to

Mr. Webber to require him to produce the books and records of Deere & Webber pertaining to the sales of the infringing machine, and, at the hearing upon the application, Mr. George P. Schulz, who was one of the bookkeepers of Deere & Webber, appeared in answer to a subpœna, and testified that he was able to give the information which the complainant desired upon this subject, and would do so if he was directed so to do by proper authority; but under the advice of counsel he refused to disclose the evidence. At the close of the argument the Circuit Court refused to direct the witness to disclose the information sought by complainant's counsel and refused to issue the subpœna duces tecum.

The only reason why the acting judges of the Circuit Court declined to compel the production of the testimony which counsel for complainant sought was that, in their opinion, that evidence was not material to the questions at issue in the court in Kentucky in which the suit was commenced and was pending. Is this the real question at issue, when, in a case pending in another jurisdiction, an application is made to an auxiliary court, or to one of its judges, to elicit evidence within the jurisdiction of the latter? Ample provision to compel the production of evidence is granted to the judges of the United States courts by sections 863, 868, 869, and 870, Rev. St. (1 U. S. Comp. St. 1901, pp. 661, 664, 665), and by rules 67, 74, 75, 76, 77, and 78 in equity.

The examination in this case was proceeding before a special master, to whom the case had been referred, to take the evidence and to report the facts. He was the officer of the Circuit Court of the Kentucky district. He was empowered to hear and decide for that court, and subject to its review, upon proper exceptions, all questions relating to the admission of testimony, and his decision of these questions was, until reversed by that court, its decision. Rule 77 in equity; Bate Refrigerating Co. v. Gillette (C. C.) 28 Fed. 673, 674. He had determined that the evidence which complainant sought to secure was material and relevant, so that the case presented to the court below was much stronger than the ordinary application to an auxiliary court to compel the production of evidence before an examiner appointed to take testimony, under rule 67 in equity, without authority to rule upon its admissibility. We turn therefore to a consideration of the rule in the latter class of cases with the assurance that, if it is the duty of the auxiliary court or judge in such cases to decline to consider or determine the competency or materiality of evidence sought, and to compel the production and transmission of all that may possibly be material, and leave the question of its admissibility to the primary court, such must have been the duty of the judges below in the case under consideration.

In Blease v. Garlington, 92 U. S. 1, 7, 8, 23 L. Ed. 521, the Supreme Court ruled that in suits in equity all the evidence sought by either party, whether it was received or rejected by the trial court, should be elicited, and in case of an appeal, presented to the Supreme Court, to the end that, if that court were of the opinion that the evidence rejected below should have been received, it might consider it and

render a final decree without remanding the suit to procure the rejected evidence. It said that, "since the amendment of rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. * * * So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us." The preparation of a suit in equity for review in the Circuit Court of Appeals is governed by the same practice. It is the province and the duty of the Circuit Court to elicit and transmit to the appellate court, not only the evidence it deems competent, relevant, and material, but also that which it deems incompetent, irrelevant, and immaterial, to the end that, if the reviewing court is of the opinion that the evidence deemed inadmissible by the Circuit Court should have been received, it may at once consider it and render a final decree without the delay of remanding the case to procure the rejected evidence. To this general rule there are two exceptions. They are that it is the duty of the court or chancellor eliciting the evidence to consider and determine the claim of privilege of a witness or other party and to refuse to compel him to produce evidence in violation of it, and that, if it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its production, it may refuse to do so.

It is a necessary corollary of this rule of practice, established by the decision in Blease v. Garlington, that it is the duty of an auxiliary court to elicit and cause to be transmitted to the primary court not only such evidence as it deems competent and material, but also that which it deems incompetent or immaterial, unless the witness or the evidence is privileged or it clearly and affirmatively appears that the evidence cannot possibly be material or relevant. In no other way can the general rule of practice be made effectual, for, if the auxiliary court refuses to compel the production of the testimony because it deems it immaterial or incompetent, and the appellate court should be of a different opinion, the latter court cannot consider the rejected evidence and render a final decree without remanding for further proof, because the rejected evidence has not been elicited and cannot be presented to it. Moreover, this practice is more logical, rational, and convenient than that which requires the auxiliary judge or court to determine the admissibility of the evidence which either party seeks to secure, because the court in which the suit is pending and in which all the pleadings and evidence must be gathered together is far more competent to decide questions of this nature than a distant judge or court that has but a fragment of the case, and, more than all, because the law imposes upon the primary court the absolute duty to consider and decide all these questions of the admissibility of evidence and to determine the final result in the suit, a duty that the court of original jurisdiction is no more able than the Supreme

Court to fairly and wisely discharge unless all the evidence deemed competent or material by any of the parties to the suit has been produced and presented for its consideration. These considerations have led us to this conclusion: It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its production. Fayerweather v. Ritch (C. C.) 89 Fed. 529; Parisian Comb Co. v. Eschwege (C. C.) 92 Fed. 721; Perry v. Rubber Tire Wheel Co. (C. C.) 138 Fed. 836; Butte & B. Consol. Min. Co. v. Montana Ore P. Co. (C. C.) 139 Fed. 843; Appleton v. Ecaubert (C. C.) 45 Fed. 281, 282; Adee v. J. L. Mott Iron Works (C. C.) 46 Fed. 39; Lloyd v. Pennie (C. C.) 50 Fed. 4, 11; Thomson-Houston Electric Co. v. Jeffrey Mfg. Co. (C. C.) 83 Fed. 614, 618; Maxim Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co. (C. C.) 103 Fed. 39; Matter of Whitlock, 51 Hun, 354, 3 N. Y. Supp. 855; Matter of Randall, 90 App. Div. 192, 85 N. Y. Supp. 1089; Strong v. Randall, 177 N. Y. 400, 69 N. E. 721.

There are three cases (Ex parte Peck, 3 Blatchf. 113, 19 Fed. Cas. 72, No. 10,885, In re Judson, 3 Blatchf. 148, 14 Fed. Cas. 4, No. 7,563, and In re Allis [C. C.] 44 Fed. 215) in which the rule of practice established in Blease v. Garlington was not called to the attention of the judges, wherein it is held that the question of the materiality and competency of the evidence sought may be considered by the auxiliary court in determining whether or not the production of it should be compelled. But the consensus of opinion among the courts and judges that have considered the rule of practice in Blease v. Garlington is in accord with the conclusion which has been announced.

In Lloyd v. Pennie (C. C.) 50 Fed. 4, 11, 12, Judge Morrow ruled that a witness should be required to produce before an examiner, who was taking testimony in a suit in equity pending in the same district, letters which were claimed to be privileged. After quoting from Blease v. Garlington, he said:

"As the present case may be reviewed on appeal, it is the duty of the court, in accordance with the practice in equity, as stated by the Supreme Court, to direct that the defendant produce the letters as demanded."

In Fayerweather v. Ritch (C. C.) 89 Fed. 529, a motion was made, while the taking of testimony was proceeding, to strike out certain testimony as irrelevant and to discontinue the examination of witnesses upon the subject of this testimony. Judge Lacombe said that in his opinion the testimony was irrelevant, but that complainant's counsel thought otherwise and might, on appeal, be able to persuade the appellate court to take his view, so that under the rule in Blease v. Garlington the motion must be denied and the testimony must be taken.

Parisian Comb Co. v. Eschwege (C. C.) 92 Fed. 721, is another case in which Judge Lacombe compelled a witness to testify to facts which in his opinion were neither essential to the case of the complainant nor relevant or material to the issues. "Nevertheless," he said, "this court is not the final arbiter as to whether the testimony is or is not material and, in view of the object intended by the amendment to the sixty-seventh rule, it should obtain and preserve the answers for the benefit of the appellate tribunal." To the same effect is the opinion of Judge Townsend in Maxim Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co. (C. C.) 103 Fed. 36, 38.

And in Perry v. Rubber Tire Wheel Co. (C. C.) 138 Fed. 836, and Butte & B. Consol. Min. Co. v. Montana Ore P. Co. (C. C.) 139 Fed. 843, the fact appears that the circuit judges of the Second Circuit are of the opinion that this rule in equity must also prevail in the taking of testimony in actions at law under section 863 (U. S. Comp. St. 1901, p. 661), where an application is made to an auxiliary court to compel the production of evidence. Judge Townsend said in the former case:

"It is thought that the rule laid down in Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521, should be applied in the taking of such depositions. There is some uncertainty as to the practice in such cases, but the duty of this court is merely to see that the witness is properly protected in his constitutional rights, and that the process of the court is not abused. Wertheim v. Railroad (C. C.) 15 Fed. 716. The question as to the admissibility of the evidence is to be tested by the laws of the forum. Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104. The general rule is that the witness should be required to answer all questions which may possibly be material. Matter of Whitlock, 51 Hun, 354, 3 N. Y. Supp. 855; Matter of Randall, 90 App. Div. 192, 85 N. Y. Supp. 1089; Strong v. Randall, 177 N. Y. 400, 69 N. E. 721."

In the Matter of Randall, 90 App. Div. 192, 197, 85 N .Y. Supp. 1089, a commission had been issued out of a court in the state of Ohio in which the action was pending to take the testimony of the secretary and treasurer of a corporation in the state of New York. The officer appeared in response to a subpœna duces tecum, but refused to answer many questions upon the ground that the evidence sought was incompetent and immaterial. The court said:

"We are not, however, called upon to pass upon the competency of the evidence sought to be elicited from the witness, or its admissibility upon the trial of the action. That will become a matter for determination by the Ohio court when the commission shall be returned to it. For present purposes it is sufficient if it appear that such testimony may become competent, and, so far as the examination is not entirely irrelevant to the subject-matter of the action, the court will not, nor is it called upon to, pass upon the strict legality and competency of the evidence sought to be elicited."

—And it directed the witness to answer. This decision was sustained by the Court of Appeals of New York in 177 N. Y. 400, 69 N. E. 721, and it portrays the general and the rational rule of practice upon this subject.

The considerations and decisions to which we have now adverted leave no doubt that, if the complainant had sought to secure the evidence in controversy before an examiner or a commissioner under rule 67 in equity, it would have been the duty of the court below to have compelled its production. That duty was rather more than less

imperative in the case before us, because the officer of the primary court to whom that court had lawfully delegated the power to determine in the first instance the admissibility of this evidence had decided that it should be received, and because without the production of the testimony sought the court of original jurisdiction could not fairly and justly determine the issues in the case pending before it, if its opinion should, upon due consideration, accord with that of its master.

Neither Deere & Webber nor any of its officers or employés was privileged to withhold any information contained in its books or records or any information within their knowledge which might possibly be competent, relevant, or material to the issues presented in the accounting. Wertheim v. Railway Co. (C. C.) 15 Fed. 716; Johnson Steel-Rail Co. v. North Branch Steel Co. (C. C.) 48 Fed. 191, 193. The pleadings and evidence in the suit are not presented to this court. They were not produced in the court below. The evidence which counsel for complainant sought to elicit comprises the names of the places where Deere & Webber sold the infringing grain drills which they had bought from the defendant, Brennan & Co., the number of the drills which they sold at each of these places, and the prices at which they had disposed of them. It is plain that this evidence would have a tendency to indicate the number of drills sold by the defendants to Deere & Webber and the extent to which the sales of the infringing device had excluded the patented machine from the market or had restricted its sales. This testimony may be irrelevant or immaterial, but that question is to be determined not by this court, nor by the auxiliary court, but by the primary court in which all the pleadings and all the evidence will be assembled, and where it can be most wisely and effectually disposed of. The defendants elicited testimony of this nature from agents of Deere & Webber who came at the request of that corporation, or of Mr. Webber, one of its officers. It cannot be said that it clearly and affirmatively appears that the evidence now sought cannot possibly be material to any issue that may have arisen in the accounting, nor that it would constitute an abuse of the process of the court to require the witnesses to disclose it, since it may tend to prove the number of the infringing devices which Deere & Webber purchased from the defendant, Brennan & Co., or the extent to which the sales of these devices excluded the patented machines from the market or restricted their sales, or to rebut testimony of the same character as that here sought upon the very subject to which the evidence desired relates. This state of facts is ample to invoke the favorable action of the judges of the court below, and we are unanimously of the opinion that they should require the production of the evidence.

The general question which has been discussed and determined in this case has not heretofore been the subject of exhaustive investigation or of authoritative decision in this circuit, and the fact undoubtedly is that the rule of practice and the considerations and authorities in support of it, to which reference has now been made, were not carefully and exhaustively presented to the acting judges of the court below when they were requested to direct the production of the proposed

evidence. If they had been, we are assured that those judges would have reached the conclusion which has now been announced, and we are confident that, upon the presentation to them of this opinion and of the reasons and decisions to which reference has been made, they will immediately direct the production of the evidence in question.

In view of this situation, the issue of the writ of mandamus has not been considered, and the petition for it will be denied, without costs to either party.

ROBERTS, JOHNSON & RAND SHOE CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1906.)

No. 2,207.

1. ARBITRATION AND AWARD—CONTRACTS—PRACTICAL CONSTRUCTION—CONCLUSIVENESS OF AWARD.

   A contract for the purchase of certain machinery provided that if any question should arise during the progress of the work, at the acceptance of the plant, or "in regard to settlement," such question should be referred to the architect or engineer for decision. The parties submitted to the engineer for decision claims of defendant for damage caused by delay in performance on plaintiff's part, and the engineer, after a full hearing, determined that defendant had suffered from the delay loss in excess of the contract price. *Held*, that the submission of such question constituted a practical construction of the contract that such claim was within the terms of the submission.

2. SAME—CONCLUSIVENESS OF DECISION.

   A contract for the purchase of certain machinery provided that if any questions should arise at the acceptance of the plant, or regarding settlement, they should be referred to the architect or engineer for decision, reserving the right of final decision by two disinterested parties, one chosen by each party to the agreement, and in the event of their failure to agree they to choose a third, and the decision of the two referees to be binding on both parties. *Held* that, where a claim for plaintiff's delay was submitted by both parties to the engineer under such provision, the decision of the engineer, in the absence of fraud or gross mistake, without the exercise of the reserved right of appeal, was conclusive on the parties.

   [Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 440–450.]

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

Virgil Rule and Rhodes E. Cave, for plaintiff in error.

S. L. Swarts (Montague Lyon, on the brief), for defendant in error.

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

HOOK, Circuit Judge. The Westinghouse Electric & Manufacturing Company sued the Roberts, Johnson & Rand Shoe Company to recover the value of certain electrical machinery sold and delivered to the latter. By its answer, which was in two counts, and the evidence in support thereof, the defendant asserted (1) that the machinery had been sold to defendant and installed in its factory pur-

suant to a written contract dated July 17, 1903, which provided that the entire installation be completed and ready for service by November 1, 1903; that the plaintiff had been duly informed of the great importance to the business of defendant of full performance of the contract within the time specified, but that through inexcusable delay of the plaintiff the machinery was not furnished and fully installed until February 22, 1904, and the defendant thereby sustained damage in an amount largely in excess of the plaintiff's claim; that, having made its claim for the damage sustained, both parties, in compliance with the provisions of the contract, submitted the differences between them to the engineer in charge of the electric construction and his decision thereon was in favor of the defendant, and that such decision was in full force and effect and constituted a bar to the prosecution of the plaintiff's action; and (2) an affirmative counterclaim for the damage averred to have been sustained by defendant, with prayer for judgment therefor against the plaintiff.

During the trial, which was to a jury, the Circuit Court held that the provisions of the contract with reference to submission of differences between the parties to the engineer and what appeared to have been done thereunder were insufficient to constitute a defense to the plaintiff's action. Thereafter, and at the conclusion of the evidence, the Circuit Court in charging the jury also announced its opinion that, while defendant had doubtless sustained damage by the plaintiff's delay in installing the machinery, the evidence introduced furnished no reliable data for the ascertainment of the amount thereof. Thereupon the defendant withdrew its counterclaim set up in the second count of its answer. The charge of the court was in effect a direction to find for the plaintiff for the amount of its claim and a verdict of that character was accordingly rendered. The defendant now asks to have the action of the Circuit Court reviewed as to both branches of its defense. It contends that it suffered an involuntary nonsuit as to its counterclaim, and that it is therefore the duty of this court to review the evidence and the ruling of the court thereon. We do not think so. At the conclusion of the charge to the jury, in the course of which the Circuit Court announced that the evidence under the counterclaim was insufficient to show with proper definiteness the amount of damage sustained, the defendant reserved a general exception, but failed to indicate any part thereof which it claimed to be objectionable. With the permission of the court the defendant then withdrew its counterclaim. In other words, it voluntarily dismissed it without prejudice. It did not comply with the practice which obtains in respect of involuntary nonsuits, and no exceptions were preserved so as to impose upon this court the duty to review the evidence to determine whether the view of the Circuit Court was well founded. We therefore turn to a consideration of that branch of the case which relates to the submission of the controversies between the parties to the engineer, and his decision.

The evidence conclusively showed that a draft of a written contract between the parties had been prepared, and, although it was not signed by them, it was thereafter recognized as containing the

evidence of their agreements and stipulations excepting as to certain modifications which were subsequently made. The written correspondence between the parties contained frequent allusions to the writing as being their contract, and frequent references were also made to definite and specific provisions in it. So conclusive was the evidence upon the subject that the case should be considered as though, subject to the modifications referred to, the original draft of the contract had been duly executed by both parties. This was also the theory of the Circuit Court. The sixth and ninth paragraphs of the contract are important in the consideration of the question now before us, and it is not contended that they were subsequently eliminated or modified in any way. The sixth paragraph will be referred to hereafter. The ninth is as follows:

"Changes: Should it prove desirable to make any changes in the work, the architect or engineer may direct such changes in writing, and a fair and equitable addition to or deduction from the contract price shall be made, the amount to be determined by the architect or engineer. Such changes shall not extend the date of completion, nor modify the obligations of the contractor in any way."

The only important change in the contract which we need advert to here was one in respect of an item of machinery. A few days after the date of the contract the defendant found that it was advisable to have a generator of lower speed than the one specified, and it was thereupon ordered of the plaintiff by the engineer in charge. The letter which contained the order, July 29, 1903, recited: "The contract of July 17 to remain unchanged in all other respects." There was a conflict in the testimony whether this change was responsible for the delay of between three and four months in the final installation of the machinery and whether there was an agreement or understanding that the time limitation in the written contract for full compliance, namely, November 1, 1903, was thereby dispensed with. But whether this question was open to investigation under the defense now being considered depends upon the proper construction of the sixth paragraph of the contract and the effect to be attributed to the submission by the parties of the matters in controversy between them to the engineer and the decision which he rendered.

Paragraph 6 of the contract:

"Questions arising. Should any questions arise during the progress of the work, at the acceptance of the plant, or regarding settlement, such questions shall be referred to the architect or engineer for decision; but there is reserved the right of final decision by two disinterested parties; one chosen by each party to this agreement, and in the event of the parties so chosen failing to agree, they are to choose a third, the decision of two of said referees to be binding upon both parties."

The differences which arose between the parties resulted in the following correspondence:

March 4, 1904, a letter from the engineer to the plaintiff, the Westinghouse Company:

"I beg to acknowledge receipt of your Mr. Baetz several favors of 11th ult. reference f. o. b., and 1st inst. reference F. P. B., regarding payments on the Roberts, Johnson & Rand Shoe Co. contract of July 17th, 1903. Answering will say, that paragraph 6 of this contract reads as follows:

"'Questions Arising. Should any questions arise during the progress of this work, at the acceptance of the plant, or regarding settlement, such questions shall be referred to the architect or engineer for decision.'

"Some questions regarding settlement have arisen and the Roberts, Johnson & Rand Shoe Co., are preparing the details of certain claims they expect to make on account of expense they have been put to on account of your failure to deliver this apparatus within the time agreed upon. The justice of these claims is now being considered by the architect and myself, and you will be advised further about them in the near future."

March 17, 1904, a letter from the engineer to the plaintiff:

"In re Your Contract of July 17, 1903, with the Roberts, Johnson & Rand Shoe Co., of this City, for Electrical Apparatus:

"Answering the request of your Mr. Clegg for further particulars regarding the claim made by the Shoe Co. I have to advise you as follows:

"Paragraph 6 of this contract provides that, 'Should any questions arise during the progress of the work, at the acceptance of the plant or in regard to settlement such question shall be referred to the architect or engineer for decision.' I should like to have your interpretation, as well as that of the Shoe Company, as to what each of you consider my duties are under this clause of the contract. An early expression of your views on the subject will be much appreciated. I shall not shirk any responsibility by reason of having been the engineer under this contract, but I should like to have the views of both sides before being called upon to discharge this unpleasant duty.

"In order that you may have a clear understanding of the claims submitted by the Shoe Company I will here enumerate them and ask for your views. * * *

"If I am to be called upon to adjust this matter I should like, as I said in the beginning, have your views in regard to these claims."

The portion of this letter which is omitted for the sake of brevity is a statement in detail of the various items of damage claimed by the defendant.

March 8, 1904, a letter from the plaintiff to the engineer:

"Your letter of the 17th is received and I will give the claims made by Roberts, Johnson & Rand Shoe Co. very careful consideration. My understanding of the terms of paragraph six of the contract is that we can appeal to you for protection against precisely such unreasonable claims. Our understanding is that the contract selects you as an arbitrator to pass on claims because of your familiarity with the trade customs, and we will within the next few days lay our views before you and feel confident that you will find same so reasonable that they will have your approval."

April 2, 1904, a letter from the engineer to the plaintiff, in which he says that he will do his "utmost to make a decision in accordance with the facts and the equities of all parties in interest"; that he cannot agree with plaintiff that there was any alteration in the contract date; that the change from high to low speed machine was made only after plaintiff's promise that there should be no change in date of delivery, and that such matter was fully covered by the written order of the low speed machine on July 29, 1903. He also makes certain criticisms of the amount of defendant's claim of damage, and invites the plaintiff to furnish him with data covering the period mentioned by the defendant.

It will be observed from the foregoing that the plaintiff was fully and definitely advised of the character and extent of the defendant's claims, that its attention was directed to the sixth paragraph of the

contract providing for decision by the engineer of questions regarding settlement between the parties, and that its construction thereof was invited. The plaintiff, in response, said that its understanding was that the contract selected the engineer as an arbitrator to pass upon such claims, and that it would within a few days make its presentation. And, more than this, the plaintiff knew that its claim of an extension of the time for the completion of the contract was also within the scope of the submission to the engineer. The position of the defendant as to the duty and power of the engineer was the same as the plaintiff's, inasmuch as it invoked that particular paragraph of the contract and set in motion the proceeding thereunder. Even were this part of the contract ambiguous, we have a construction of it by the parties themselves and a voluntary course of action by them in accordance with such construction. The rule of law in such cases is a familiar one, and it has been applied to the submission of controversies under an arbitration clause of doubtful purport. Morse on Arbitration and Award, 62.

On April 26, 1904, the engineer announced his decision. In a letter of that date to the plaintiff and the defendant, he said:

"In reply to your verbal and written requests for some action on my part, under paragraph six, of the contract of July 17th, 1903, between you, for certain electrical apparatus, I find as follows:

"The controversy hinges upon the failure of the contractors to have the apparatus ready on the contract date, and the losses which the purchaser claims to have sustained by reason of such failure.

"I have given hearings and have received written data from both parties, and have considered all the points which have been advanced by each of them. As a result of this investigation I am convinced that the Roberts, Johnson & Rand Shoe Co. has, through the delay of the Westinghouse Electric & Mfg. Co. in completing their contract, suffered loss in excess of the contract price.

"This being my conclusion, I cannot see my way clear to approve payment of any part of the contract price."

Though no witness testified that evidence was received and hearings were had, the reasonable inference is that the proceedings were conducted with full regard to the rights of both parties. Affirmative support of such inference may be found in the recitals in the letters of intention to make presentation of the facts to the engineer, of his desire that it be done, and in the statement in his decision that such course had been pursued. Indeed, it is not asserted to have been otherwise. Nor is the decision attacked upon the ground of fraud, or such gross mistake as implies bad faith or a failure to exercise an honest judgment. Guild v. Andrews (C. C. A.) 137 Fed. 370

The parties in interest having agreed that their contract contemplated a decision by the engineer of the claims of the defendant for damage caused by delay in performance on the part of the plaintiff, and this necessarily included the fact and extent of such delay, and the parties having also acted upon such construction by actually submitting those matters to the engineer and obtaining his decision, we are unable to perceive upon what just ground we may ignore their course of action and determine their rights upon an independent consideration of the letter of their stipulation. And by this observation we should not be understood as indicating an opinion that the

clause of the contract providing for reference to the engineer of questions "regarding settlement" is not sufficiently comprehensive to include the questions actually submitted to and decided by him. The exigencies of the case require no opinion upon that matter. It is sufficient to say that a case is presented in which the construction of the parties, acted upon by them, should be followed by the courts. It is also contended that the paragraph of the contract under consideration is indefinite, in that it provides for reference of questions for decision to the "architect or engineer." The answer is that the expression is in the alternative and the parties in interest selected the engineer. We pass by the fact that the architect expressed in writing his concurrence in the decision.

The plaintiff invokes the doctrine of Hamilton v. Insurance Co., 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708, that a provision in a contract for submission to arbitration not making compliance therewith a condition precedent to a right of action is collateral and independent, and that a breach thereof will support a separate action for the damage sustained, but cannot be pleaded in bar to an action on the principal contract. The difficulty in applying that rule to the case before us is that here there was actually a submission and a decision. Had the parties not proceeded under the arbitration clause of their contract, the rule referred to might be applicable, for there was no provision therein suspending the right of action until arbitration or making it dependent in any way upon the result. But, when the plaintiff and the defendant came to the question of settlement under their contract the latter preferred its claims for damage caused by the plaintiff's delay, they submitted the claims to the engineer, and after a hearing he decided in favor of the defendant. And that decision still remains in force and effect. The plaintiff simply ignores it upon the ground that the proceeding was an idle ceremony.

Two things were contemplated by the sixth paragraph of the contract: First, the decision of certain matters by the engineer; and, second, the reservation of the right to secure the decision of two disinterested persons selected in the manner specified. The decision of the engineer is not made final and binding by the express terms of the contract, while there is a definite provision to that effect in respect of a decision by the others. It is said, therefore, that the absence of such a provision in the former and its presence in the latter clause indicate that it was not contemplated that a decision of the engineer should be effective for any purpose. But this is not a reasonable construction of the contract. If the first clause of the paragraph stood alone, a decision fairly made by the engineer as to matters within his jurisdiction to determine would be final and binding without an express stipulation to that effect in the contract. This would be so whether a favorable decision of the engineer be regarded as an agreed condition precedent to the right of the plaintiff to sue, or, on the other hand, the clause be construed to be a submission to arbitration. In the first instance the conclusive quality of the action of the engineer, not being attacked upon the ground of fraud or such gross mistake as implies bad faith or a failure to exercise an honest

judgment, would be inferred from the general context and purport of the contract (United States v. Gleason, 174 U. S. 588, 604, 20 Sup. Ct. 228, 44 L. Ed. 284; Kihlberg v. United States, 97 U. S. 398, 401, 24 L. Ed. 1106); and in the latter instance it would be equally conclusive because "the law implies an agreement to abide the result of an arbitration from the fact of submission." Smith v. Morse, 9 Wall. 76, 19 L. Ed. 597. The omission of a provision that the decision of the engineer shall be conclusive is only significant in the relation of the two clauses of the paragraph to each other. When there has been, as there was in this case, a decision of the engineer fairly made, the right reserved by the second clause is obviously one in the nature of an appeal, and it was in view of a permissible exercise of this reserved right that there was omitted from the first clause a provision for finality or conclusiveness. This reserved right is not one to ignore without cause or reason a decision of the engineer whether rendered upon his own initiative or upon invitation and request of the parties to the contract. It was certainly not intended that the reserved right to adopt additional proceedings when unexercised, should per se vacate and render wholly futile a prior decision by the engineer. To so hold would be in effect to withdraw from the contract of the parties words which they employed in framing it and to repudiate the construction which they placed thereon after a controversy arose. Said the plaintiff to the engineer: "Our understanding is that the contract selects you as an arbitrator to pass on claims because of your familiarity with the trade customs"—and the claims referred to were those of the defendant of which the plaintiff had been fully advised. The decision of the engineer is still in full force and effect, and we are of the opinion that the plaintiff should not have been permitted to wholly ignore it. The claims that, when the machinery was finally installed, it was not as contracted for, and that the plaintiff refused to subject it to a test were not pressed when the matters of controversy were submitted to the engineer, and no mention is made of them in his decision. We therefore have treated them as having been abandoned.

The judgment of the Circuit Court is reversed, with directions to grant a new trial.

UNITED STATES v. PARKERSBURG BRANCH R. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 601.

1. NAVIGABLE WATERS—BRIDGES—POWER TO ENJOIN AS OBSTRUCTIONS.

The right of a railroad company which constructed a bridge over a navigable stream, in conformity to the requirements of an act of Congress authorizing the same to maintain such bridge as a lawful structure, includes the right to repair or to renew the superstructure when necessary to its safe use, and, where it is at all times, both during and after the alteration, kept and maintained in conformity to the act, the courts have no power to enjoin the work or to abate the structure as a nuisance, on the ground that it is an unlawful obstruction to navigation.

2. EMINENT DOMAIN—REQUIRING REMOVAL ON RECONSTRUCTION—RIGHT TO COMPENSATION.

A railroad bridge over a navigable stream, built under authority of an act of Congress which contained no reservation as to repeal, modification, or alteration, can only be required to be removed or replaced by a new bridge constructed, in accordance with Act March 3, 1899, c. 425, 30 Stat. 1121, by an act of Congress authorizing the same and providing for just compensation.

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

For opinion below, see 134 Fed. 969.

Reese Blizzard, U. S. Atty.

John G. Wilson (Hugh L. Bond, on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

PRITCHARD, Circuit Judge. The United States filed a bill against the Baltimore & Ohio Railroad Company and the Parkersburg Branch Railroad Company operated by the Baltimore Railroad Company, and John W. Davis, receiver of the Parkersburg Railroad Company, alleging that the bridge across the Ohio river, at Parkersburg, is an obstruction to navigation at that point, and a great injury to the commerce on the Ohio river. The allegations of the bill are supported by sundry affidavits, some 15 in number. The relief demanded is an injunction to restrain and enjoin the appellees, their agents, and all others acting under them, from constructing or proceeding to construct "the contemplated bridge across the Ohio river between Parkersburg and Belpre." The appellees filed their answer, claiming that, under an act of Congress approved July 14, 1862 (chapter 167, 12 Stat. 569), they were authorized to build and construct said bridge subject to the terms and limitations as expressed in that act; that a bridge was not only built and constructed in compliance with the terms and provisions of the act, but that the appellees did more than they were required to do in building and constructing two channel spans instead of one, and giving greater space of waterway between the stone piers for navigation than was required by the act.

The only question presented for our consideration is whether the court below erred in refusing to grant an injunction against the appellees.

It is insisted by counsel for appellant that the bridge in question is such as to impede navigation; that, while it was properly constructed at the time of its erection, the changed conditions in trade and commerce and navigation are such that the bridge is not now in conformity with the several acts of Congress regulating the construction of bridges across navigable rivers, etc. It is further contended that the appellees have erected a new bridge, in violation of Act of Cong. March 3, 1899, c. 425, 30 Stat. 1121. It is shown by the bill that this bridge was erected under the authority and in accordance with the act of July 14, 1862. But to support the bill for an injunction the complainant alleges that, the bridge thus authorized and declared

to be a lawful structure having become worn out, appellees are building a new bridge on the same site, without the assent of Congress and without the approval of the Secretary of War, as provided in section 9 of the act of Congress of March 3, 1899 (30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540]). It is further alleged that in the building of this new structure temporary trestle work will be placed between the piers narrowing the main channel span. The last allegation as to temporary trestle work is denied under oath in the answer, and the testimony shows that no false work of any kind was erected between the piers. The act of 1862, among other things, provided that bridges erected thereon should have unobstructed headways in the channel of the river of not less than 90 feet above low-water mark, and that such channels or waterways should have a width of not less than 300 feet between the piers next to said channel or waterways, and one of the spans adjoining thereto should not be less than 220 feet in length.

This bridge was constructed in accordance with the provisions of the Act of 1862, as appears from the report of the board of engineers upon bridges across the Ohio river dated April 19, 1871, a portion of which reads as follows:

"The bridge accordingly was built of the required height and with two practical channel ways of 318 feet each. As the law only required one channel space of 300 feet, the bridge company are deserving of very great credit in not only providing two channel spaces instead of one, but in making each eighteen feet wider than required by law for the widest." U. S. Engineers' Report, p. 47.

"It was the original intention of the company to have built this bridge exactly like that at Bellaire, but after they had started the piers of their main channel span, a protest was made against this span by the coal boat interests. The latter claimed that, although the main span was over the deepest water of the river, it was yet not over the coal boat channel, as the very abrupt bend in the Ohio just below the bridge made it necessary for coal tows to hug the Ohio shore that they might not drift onto the Virginia shore after passing the bridge. An estimate was made of the cost of making an additional channel span near the Ohio shore, and it was found that it would increase the cost of the bridge by $60,000.00. The railroad, however, very liberally offered to bear half of this additional expense provided the coal men furnished the other half. The latter decided that, unless they obtained the new channel span, they might in a single year lose more by collision or by running ashore than the sum required, and therefore the money was advanced at once.

"The board have no changes to recommend in this bridge which like the one at Bellaire has been admirably built and with the most liberal care for the interest of navigation. It is a possibility that in the future it will be found that the main spans of these bridges are too narrow. Should that prove to be the case, we think that any change that may subsequently become necessary should be made at the national expense. The total cost of this bridge, as reported by the Chief Engineer, Jas. L. Randolph, has been $1,223,500."

The superstructure of this bridge which was made lawful by the act of 1862, and approved by the government engineers as being a "lawful structure," in the course of time became worn out to such an extent as to render its renewal necessary in order to insure the safety of passengers and the transportation of commerce. From the time of the erection of the bridge under the act of 1862, until the filing of the bill in this case, there was no objection made as to

the manner of its construction. It is therefore necessary that we should determine whether the acts complained of are such as to justify the contention that the appellees are constructing a new bridge. The piers as originally constructed remain intact and occupy the same relative position as when originally constructed in conformity with the act of Congress and approved by the government engineers as a "lawful structure," and the only change that has been made is the renewal of the superstructure, the erection of which affords every facility for navigation which was enjoyed when the original superstructure was placed on the piers. If the building of the superstructure can be held to be the erection of a new bridge, then the removal of cross-ties and the substitution of new rails could also be held to be prohibited by the act of 1899.

It appears from the record that nothing was done to the bridge, except to renew the superstructure, which was placed on the original piers 90 feet high—there being nothing done which could in the slightest degree interfere with navigation. The superstructure being renewed from time to time without any interruption to traffic. There is not a scintilla of evidence to support the appellant's contention that a new bridge is being built. Under these circumstances the Circuit Court would have no power to grant an injunction, because there is nothing in the record to show that a new bridge has been erected or that it is the purpose of appellees to erect such a structure.

The case of United States v. C. & M. R. R. Co., 134 Fed. 353, 67 C. C. A. 335, is in point, the facts of which are as follows: The United States sought by bill to restrain the Cincinnati & Muskingum Valley Railroad Company from renewing the superstructure of its bridge over the Muskingum river. The bridge was a lawful structure erected in 1870, under the authority granted by the board of public works of the state of Ohio as follows:

"Ordered that the application of Hon. J. J. Jewett, president Cincinnati & Washington Valley Railroad Company, permit it to build a bridge over the Muskingum river above Jackson Island, and also on the side cut of the Ohio canal, at Dresden, be and the same is hereby granted, and that plots of the same on file in this office be approved with the proviso that if at any time hereafter the interest of navigation on the Muskingum river should require it the said railroad company will modify the bridge by inserting a draw in the same."

Congress assumed control of this river in 1886, and in 1888 passed an act, the third section of which was the foundation of this proceeding (Act April 2, 1888, c. 53, 25 Stat. 74). In discussing the questions involved the court, among other things, said:

"The original bridge of the railroad company was built 30 or more years ago, with piers and abutments of stone and a wooden superstructure. The bridge was built in conformity with the authorization of the state, and was maintained in its form and materials of construction until 1903, when the superstructure having become unsafe on account of age, decay, and wear, the railroad company resolved to replace it with one of iron.

"The government objects to this, not so much, as we infer, because it is proposed to build the superstructure of iron, but because the railroad company cannot lawfully rebuild it at all without conforming its entire bridge, including its piers and abutments, to said section 3 of the said act of Congress of 1888 which reads as follows: 'That if the bridge be built as a con-

tinuous bridge, it shall have at least one channel span, the centre of which shall be in the middle of the channel usually run in high stages by steamboats descending the river with barges or rafts in tow; said channel span to have a clear opening of two hundred and fifty feet, measured at the low water line, and the lowest part of the span to be forty feet above highest navigable water, as determined by a straight line connecting the tops of the lower lock gates at the head and foot of the pool in which the bridge is to be built. The other spans may have such grades as may be desired.'

"The channel span of the bridge, as it was originally built and still stands, is 127 feet long, and the height of the superstructure above low water has been 30.38 feet. The question, therefore, is whether the renewing of the superstructure of an old bridge is the building of a bridge, within the meaning of the act of 1888, for we think that it cannot be doubted that, if the superstructure could be renewed in any way, the question whether it should be of wood or iron would be one of mere expediency, resting in the preference of the railroad company. In the original grant of authority there was no restriction in respect to the kind of material of which the superstructure should be built. The grant was not for a limited time, shorter than the uses of the railroad company should require. In the nature of things it must have been known and appreciated that the superstructure of the bridge, especially, would be subject to dilapidation and decay from the effects of time and use, and might be injured or destroyed by fire or flood. It could not have been contemplated that in such case the company should be obliged to relocate and rebuild the masonry composing the piers and abutments of the bridge, so as to make an entirely new bridge. The grant must be construed with reference to the subject-matter, and, while it should be construed liberally in favor of the grantor, it should be construed reasonably, and in such manner as to fulfill the intention of the parties. Conceding that no alteration of the bridge could be made which should derogate from the rights of the public—as, for instance, by making it narrower or lower than it was authorized and built—yet it would seem that, subject to this restriction, the company was authorized to maintain any such bridge at this point as its uses might reasonably require.

"We are not required, however, to decide how the case might be if the bridge should be entirely destroyed, and its restoration by a new structure should become necessary. But we have no hesitation in holding that the renewal of parts of the bridge from time to time for the purpose of maintaining it, or better adapting it to the exigencies of the business, without substantial change in its form, whether it be done with the same or some other suitable material, is well within the privilege of the company, under the authorization of the original grant. Counsel for the government protest that this view would result in enabling the railroad company to change the entire structure of the bridge, providing it is done piecemeal, and the government would be powerless to stop it. Very likely this would be so. But the government would have no right to stop such changes as are necessary to the maintainance of the structure, unless it is in position to claim advantage of all dilapidation or decay, or the insufficiency of some part to sustain heavier traffic, which might ensue. This would be tantamount to saying that the privilege of the grant would endure only so long as the material of the original bridge should last—a proposition which we think altogether untenable. * * *

"And it is evident that the act contemplates as its subject the building of entirely new bridges, having substructures and superstructures, for its regulations involve them. * * *

"A similar view appears to have been entertained by Goff, Circuit Judge, and Jackson, District Judge, in the case of a bill filed by the United States against the Baltimore & Ohio Railroad Company and the American Bridge Company in the Circuit Court of the United States for the Northern District of West Virginia (no written opinion filed) to restrain the rebuilding of a bridge across the Ohio, and making it a much heavier structure to accommodate the increased weight of motive power and heavier traffic of the

railroad company. The United States relied upon Act February 14, 1883, c. 44, 22 Stat. 414, which forbids the construction of bridges across that river unless the plans are approved by the Secretary of War. But the bridge had been built before the passage of that act, and the injunction prayed was refused.

"Our conclusion is that for both reasons—namely, that the renewal of the superstructure, in the circumstances existing, was within the privilege of the company under its grant from the state, and that Act Cong. August 5, 1886, c. 929, 24 Stat. 324, did not contemplate the application of its provisions to the construction of new parts, in place of old, required for the maintenance of bridges already built under lawful authority—the bill cannot be maintained. Or, as expressed by the Circuit Court below: The superstructure cannot be regarded as the bridge within the meaning of the act, and the changing of the superstructure will not be the erection of a new bridge in violation of the act."

In the case of Central Co. v. Wabash Railway Co. (C. C.) 32 Fed. 566, a proceeding instituted to recover damage for a failure to properly remove piling used, the court decided as stated in the syllabus:

"The grant of power to a railroad company to bridge a navigable stream carries with it as a necessary incident the right to repair."

The language of the act, under which this bridge was erected contemplates its permanent use. There is nothing to be found therein which justifies the assumption that the bridge was to be constructed for temporary use, or until it should become an obstruction to navigation; but, among other things, the right is granted to charge tolls for the use thereof as long as the balance of the appellees' lines were operated ("no higher charge * * * than the rate per mile which the company may from time to time receive for the balance of their line"), coupled with the provision that the river interest should be so regulated as to conform to the construction of the bridge. Neither is it provided that the life of post routes should be limited to the life of the original superstructure or any portion of it. Even if it could be shown that the bridge as now constructed is an obstruction to navigation, the court would be powerless by injunction to abate it as a nuisance, in the absence of appropriate legislation by Congress.

The acts of Congress passed subsequent to the erection of this bridge cannot be construed to relate to, or to in any wise effect, the manner of its construction, and were evidently intended to apply to bridges that might be erected subsequent to the adoption of the same. There is no provision to be found in any of these acts which undertakes to regulate the building or repairing of bridges that may have been built and legalized under the act of 1862. The act of 1862 contains no reservation of any right of the government to amend or modify or repeal the same. Under it the owners of the bridge were vested with a permanent franchise the moment they complied with its terms, and it is therefore property of which they cannot be divested without due process of law and just compensation.

In view of the fact that the appellees constructed the bridge under the act of July 14, 1862, in strict accordance with its terms, we do not think that Congress has the power to direct such changes to be made as may be deemed necessary to the interest of navigation without providing compensation for the same. Here we have an act

which grants an unconditional license, in pursuance of which the owners of the bridge have invested their money and thereby acquired certain rights and franchises.

It is contended by counsel for appellant that the right granted the owners of the bridge by the Act of July 14, 1862, is simply a license which may be revoked at any time, and in support of this contention the case of Newport & Cincinnati R. R. Co. v. United States, 105 U. S. 470, 26 L. Ed. 1143, is cited. That case is not analogous to the one now before the court. The resolution which gave the assent of Congress to the erection of the Newport & Cincinnati Bridge (March 3, 1869) reserved the right to alter or modify the bridge at any time so as to prevent obstructions to the river.

In the case of United States v. Lynah, 188 U. S. 471, 23 Sup. Ct. 349, 47 L. Ed. 539, in discussing the right of Congress to regulate commerce, the court said:

"* * * But, if any one proposition can be considered as settled by the decisions of this court, it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the fifth amendment of paying just compensation. * * * Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use, within the meaning of the fifth amendment of the Constitution; and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

In the Monongahela Navigation Case, 148 U. S. 325, 13 Sup. Ct. 622, 37 L. Ed. 463, it is held that when a franchise was granted without reservation by State authority, and in pursuance of which a lock and dam were erected, accompanied by an implied invitation by the United States to proceed with such construction, it vests the company with a permanent franchise in the property, as well as the right of the owners to take toll; and that, under such conditions, the power to regulate commerce is wanting unless just compensation is provided for in accordance with the fifth amendment. In that case the franchise was granted by the state, but in the case at bar the authority to erect the bridge was granted by Congress, and it was erected in pursuance thereof. It thus became private property which could not be taken, in the absence of legislation providing for just compensation. In the case of United States v. Keokuk & Bridge Company (D. C.) 45 Fed. 180, the court said:

"* * * Until Congress, however, requires it to be remodeled or removed, it certainly cannot be claimed that the bridge company is liable in any form of proceeding to be fined or punished for maintaining the bridge, or that the structure can be judicially declared a nuisance, and abatable as such. The ruling of the Supreme Court in the Wheeling, etc., Bridge Case, 18 How. 421, 15 L. Ed. 435, is conclusive upon this proposition. It follows therefore that, if a bridge is constructed in accordance with the provisions of an act of Congress authorizing its erection, it is, when thus constructed, a legal structure, and its status in this particular cannot be changed by judicial action or by any power short of that which legalized it in the beginning.

In view of these authorities we are of opinion: First, that the allegations contained in the bill to the effect that the bridge in question is a

new structure are not sustained by the evidence, and therefore an injunction will not lie to restrain the railroad company or to abate the bridge as a nuisance; second, that the bridge having been built in conformity with the act of July 14, 1862, which contained no reservation as to repeal, modification, or alteration, the only means by which the structure as now constituted can be removed, and a new bridge constructed in lieu thereof, in accordance with the act of March 3, 1899, would be by act of Congress authorizing the same and providing for just compensation. Therefore the action of the Circuit Court in refusing an injunction was proper.

Affirmed.

HALL SAFE & LOCK CO. et al. v. HERRING-HALL-MARVIN SAFE CO.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1906.)

No. 1,192.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION.

Defendant's predecessors in business for many years were the Chicago representatives of Hall's Safe & Lock Company and of complainant, its successor in business, and at all times kept conspicuously displayed at their store and on their stationery the words "Hall's Safe" and the trade-name "Hall," as required by their contracts. Later defendant corporation was organized under the name "Hall Safe & Lock Company," took over the business, and continued the same signs and displays, but terminated the contracts with complainant and engaged in the sale of safes of another manufacture. There was no person by the name of Hall connected with the company. *Held*, that such action tended to deceive the public and injure complainant by using the reputation acquired by its safes for selling those of a competing manufacturer, and constituted unfair competition which entitled complainant to an injunction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, § 82.

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

2. SAME—USE OF NAME—ESTOPPEL BY SALE OF BUSINESS AND GOOD WILL.

One Hall and his sons established a successful business in the manufacture and sale of safes, which became well known as Hall's safes. Later they organized in corporate form as Hall's Safe & Lock Company and continued and increased the business, until it was sold by the corporation to complainant's predecessor; the instrument of sale expressly conveying its trade-marks, trade rights, and good will. The Halls, who were sons of the original founder, owned practically all of the stock of the selling corporation, and by the sale became the controlling stockholders of the purchasing corporation and its principal officers for some years, during all of which time it continued to use the name "Hall's Safes" on its product. They then severed their connection with it and organized a new corporation under the name "Hall's Safe Company" and engaged in the manufacture and sale of safes marked with such name. *Held*, that they were estopped by the sale of the business and good will of Hall's Safe & Lock Company, which, although made in the corporate name, was negotiated by them and of which they were individually the chief beneficiaries, from using the name Hall in connection with a competing business to the injury of the purchaser, and that such use constituted unfair competition.

[Ed. Note.—For cases in point, see vol. 46, Cent Dig. Trade-Marks and Trade-Names, § 84.]

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

The appellant Hall Safe & Lock Company was the complainant below in a bill filed against the appellee, Herring-Hall-Marvin Safe Company, to restrain the use of the name "Hall" in advertisements and otherwise, as descriptive of its business and of the safes manufactured and sold by the appellee. This appeal, however, is from a decree entered under a cross-bill filed by the appellee for like relief against the appellants, which restrains Hall Safe & Lock Company and James W. Donnell "from carrying on the safe and vault business in the name of 'Hall Safe & Lock Company,' or any name of which the name 'Hall' is a part, and from marking their safes with any name of which the name 'Hall' is a part, or from advertising or from offering for sale safes or vaults as 'Hall's Safe,' or by any name of which the name 'Hall' is a part, except or unless the safe so offered shall have been made or manufactured by the original Hall Safe & Lock Company of Ohio, or its successors, the Herring-Hall-Marvin Company, the receivers thereof, or the Herring-Hall-Marvin Safe Company." The original suit by the Hall Safe & Lock Company was commenced in the superior court of Cook county and was removed to the Circuit Court of the United States; the Herring-Hall-Marvin Safe Company, defendant therein, being a New Jersey corporation. The defendant answered the bill and with leave of court filed a cross-bill, which made James W. Donnell, president of the complainant corporation, defendant therein. Upon issues joined, the cause was referred to a special master on application of the respective parties for an injunction pendente lite. The master filed a report, and subsequently the Circuit Court denied the injunction prayed for in the original bill and dismissed the bill and entered an order restraining the complainants therein, as cross-defendants, from the use of the name "Hall's Safe & Lock Company" pendente lite. Proofs were subsequently taken on the issues under the cross-bill and answers thereto, and, upon hearing, the decree was entered which makes such injunction permanent, and from which the present appeal is brought.

The facts involved are many and complicated, but a statement of ultimate facts is deemed sufficient for the purposes of this opinion. The origin of the business and manufacture of safes, which became known as "Hall's Safes," is thus stated in the original bill filed by the appellant Hall Safe & Lock Company, as follows: "Your orator further represents that Hall's safes were first manufactured by Joseph L. Hall at or near Cincinnati, Ohio, on or about the year 1854, and that since said time said Joseph L. Hall, or his sons, either individually, or as managers of corporations in which the personal or family name of Hall appeared, have been engaged in the manufacture of safes, and the name 'Hall' has, by reason of such long business experience, acquired and now enjoys the highest reputation in the safe business; that safes so manufactured and labeled are known to the trade and the public as safes of the highest type of construction, durability, efficiency, and character for the purposes for which safes are manufactured, to wit, the preservation from fire and theft of money and personal property of great value."

The business was instituted by Joseph L. Hall in 1847, and was carried on successfully as a copartnership in which the name "Hall" appeared until 1867, when the parties organized under the name of Hall Safe & Lock Company at Cincinnati. Joseph L. Hall was the managing member of the several partnerships and became principal owner and president of the corporation, and so continued until his death in 1889, and his executors were his widow and son and a son-in-law. The business of that corporation was continued until 1892, when it was sold to the Herring-Hall-Marvin Company, a New Jersey corporation, under an instrument conveying, in the following terms, "all and singular its manufacturing plant, machinery, tools, patterns, buildings, fixtures, leasehold interests, stock of safes and other merchandise, material manufactured, in manufacture and in process of manufacture, horses, wagons, vehicles, cartage plant and rigging, bills receivable, book accounts, moneys, debts, dues, books of accounts and other books, papers, office furniture, trade-marks, patent rights, trade rights, good will and all its property and

assets of every name and nature wheresoever situated, as the same exist at the time of the delivery of these presents." Also the following: "It is hereby expressly understood, covenanted and agreed that the business of Hall's Safe & Lock Company is purchased and taken over by the parties of the second part in all respects as a going concern." The appellee, Herring-Hall-Marvin Safe Company, is the successor in interest and title to the business, good will, and all rights derived through such conveyances. Edward C. Hall and the other heirs of Joseph L. Hall participated in the sale referred to of the Hall's Safe & Lock Company and became officers of the original purchasing company and so continued until 1896, and the word "Hall" was retained and kept prominently in use and view in the operations and product of the purchasing company at all times subsequent to such purchase.

When the business was so purchased it was extensive, and the "Hall Safes" and "Hall's Standard Safes" were extensively used and known in this country and abroad. Upon the sale of the Hall's Safe & Lock Company's assets, the purchaser paid $600,000 in cash and $700,000 in the capital stock of the purchasing company. The then capital stock of the Hall's Safe & Lock Company was $375,000, of which the Hall estate owned $320,000, and the Hall interest was controlling in the new company, embracing the offices of president, treasurer, and secretary. Other contracts of employment in the new company covenanted that they would not, while their services were retained in that corporation, engage in Ohio or New Jersey, or elsewhere east of the Mississippi, in the business of manufacturing or dealing in vaults or safes, or any business such as the Hall's Safe & Lock Company had theretofore carried on. The Halls severed their connection with the purchasing corporation in 1896, and proceeded to organize the Hall Safe Company, under the laws of Ohio, out of which litigation arose, and which is now pending on appeal in the Circuit Court of Appeals for the Sixth Circuit. The Hall Safe Company of Ohio are engaged in the manufacture of safes, and their product was sold by the appellant Hall Safe & Lock Company, of Illinois, until restrained by the injunctional order above mentioned. Since that time the business has been carried on under the name of "Donnell Safe Company," of which the appellant, James W. Donnell, is the principal constituent. The appellant Hall Safe & Lock Company was organized in Chicago in 1898, to take over and continue the business of A. L. Dean & Co., when that firm became financially embarrassed. A. L. Dean & Co. from 1886, up to the time of its failure, was the representative, successively, of the original Hall's Safe & Lock Company of Cincinnati and its successors in interest, including the appellee. The contracts of service of that firm covenanted that they would faithfully represent their principal and the goods manufactured by it, and keep the name prominently before the public, and that they would not represent rival interests. In their business place in Chicago, the terms "Hall" and "Hall's Safes" were at all times conspicuous in signs and about the building, while A. L. Dean & Co. were such representatives, and the same or similar signs have been retained as conspicuously under the operations of the appellant and of the Donnell Safe Company, as well.

Geo. P. Merrick and O. W. Hatch, for appellant.

Chas. H. Aldrich and Lawrence Maxwell, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts). The decree appealed from grants completely the injunctional relief sought in the cross-bill filed by the appellee. Neither the prior decree, dismissing for want of equity the bill of the appellant Hall Safe & Lock Company, nor the prior injunction, restraining that company from using its corporate name in carrying on the safe and vault business, are brought for review. It is substantially conceded—and in any view unquestionable—that the adoption and use by the appellants of the name Hall Safe & Lock Company was wrongful. The un-

disputed facts—of prior business relation between the parties to this controversy, of the use and recognized value of the name "Hall" applied to the appellee's product, and of the methods of appellants in displaying the name in their competitive business, after severing connection with the appellee—are equally conclusive of the right of the appellee to injunctional relief against both appellants for unfair competition. This decree, however, is exceedingly broad in terms, prohibiting advertisement, display, or sale of any safes or vaults as "Hall's Safes," or under the name of "Hall" in any form, unless made by the appellee. As the appellants are engaged in selling the products of the Ohio corporation, operating as the Hall Safe Company, and using the name of Hall upon its safes, the decree perpetually enjoins their continuance in the business of dealing in such products, either under the name of the manufacturer, or with the trade-name which accompanies the goods. The appellants are under no obligation, by contract or otherwise, to deal with the appellee or its products, or to abstain from dealing in safes of any make not tending to deceive the public and induce purchase as the appellee's manufacture.

Unless the rights of the appellee are exclusive, therefore, in the use of the trade-name "Hall," as applied to their safes and vaults—irrespective of the just limitations in its use on the part of the appellants, arising out of their prior trade relations with the appellee—it is obvious that the decree cannot be upheld without modification. So the issues for review are twofold: First, as to the means of unfair trade practiced by the appellants; and, second, the measure of the appellee's trade rights thus violated and injured. The evidence upon these issues is formidable in volume and various transactions enter into consideration of the second issue, but the facts which are deemed material for solution of both are established by the testimony without substantial dispute.

1. For the inquiry of the prior trade relations on the part of the appellants and the means employed in the prosecution of their rival business after severing such relation, it is sufficient to mention the uncontroverted facts, without needless details or comment, beyond reference to the well-settled doctrine of unfair competition in trade. As averred in their bill, filed in this action: The manufacture of safes, under the name of Hall's safes, commenced in Cincinnati, about 1854; the name "acquired the highest reputation in the safe business," and the safes so labeled are known to the trade and public as "of the highest type of construction, durability, efficiency and character"; and for more than 20 years the appellant Donnell has continuously sold safes so named, made by the successors of the original Hall. The facts are that the operations of the Halls were successively, an individual Hall, then several copartnerships, and finally from 1867 to 1892, under an incorporation of Hall's Safe & Lock Company; that in 1892 the entire assets and good will of that corporation (composed of the Hall family) was acquired by the predecessor in interest of the appellee, Herring-Hall-Marvin Safe Co.; that about 1880 the appellant Donnell became the business

representative in Chicago of Hall's Safe & Lock Company and was the sole agent up to 1886, when he formed a copartnership with one Dean, and thereafter his firm continued the agency for that corporation and its above-mentioned successors in the business until 1898, when the appellant corporation was organized by Donnell and such agency terminated; and that the copartnership agency referred to operated under an express contract requiring, among other things, prominence of the trade-name Hall in the business. It is established by the admissions of Donnell, in his testimony, that the name Hall Safe & Lock Company was adopted for the appellant corporation, with no member of the name of Hall and for the purpose of retaining the business which was attached, not only to the name of Hall, but to the original corporate name of the appellee's predecessor, Hall Safe & Lock Company, and to obtain the business mail which was often addressed in that name; also that it was the intention thereafter to deal with the later Ohio corporation, organized by the Hall family, called Hall's Safe Company. During the continuance of the agency for appellee's predecessors, the Donnell office and store displayed numerous signs bearing the names "Hall's Safe & Lock Company," "Hall's Safes," and the trade-name Hall was kept prominently in view therein and on safes and stationery, in conformity with their contract. These signs were kept in equal prominence, at least, under the new organization and rival business of the appellants, and in advertising matter; for instance, advertising "Hall's Safe & Lock Company" as the largest manufacturer of safes and vaults in the world; also that "The only safes made by the Halls are sold in Chicago at the old stand, 52-54 Wabash Avenue. Beware of imitations." The corporate name so assumed was changed when enjoined by the trial court, but not the other methods.

With the trade thus established by Donnell and associates, under their relations to the business and good will acquired by the appellee, the methods adopted by them, in carrying on the competing business, were unmistakably calculated to trade on the good will achieved for the safes which they had so long represented, under the name of "Hall" and "Hall's Safe & Lock Company." This course tended to deceive the public and injure the appellee in trade benefits, which were the legitimate fruit of the good will it had acquired and maintained. The doctrine of the uniform line of authorities protecting the injured party from such unfair competition is plainly applicable, and the injunction was rightly granted. That the appellants were bound to recognize the rightful use of the name Hall, as descriptive of their safes, and did recognize its value in trade, are unquestionable propositions; and their violation of the cardinal rules of fair dealing —in keeping up the old signs and the old prominence of "Hall" as the mark of excellence in the safes, with no evidence to bring home to the public notice that the safes offered were not the Hall safes theretofore sold by them as the appellee's product—is alike unquestionable, whether the appellee's right to the use of that name was exclusive, or was either shared by the new principal, the Ohio corporation, or claimed by it as a monopoly in the name rights. If the right to use the name were not exclusive, the appellants' conduct

would be equally wrongful, but in such event the terms of the injunction would require modification to meet such view.

2. The question, therefore, whether the appellee's rights in the name Hall, as applied to its safes, are exclusive, thus arises for review, under the scope of the decree. We do not understand from the brief or oral argument of counsel for appellants that it is contended that use of this trade-name by the appellee was without right —and certainly the rightful use is not questionable under the terms of the conveyance and the subsequent participation of the Hall family in such use—but the contention is that the right is not exclusive, and that the Hall family, at least, have unrestricted right to employ the name in their rival trade. In other words, the only issue is whether the conceded like use by the Ohio manufacturer, Hall's Safe Company, is legitimate. It must be determined as between the parties to this record, for the reason that the contention for modification of the decree rests solely on the assumed rightfulness of the manufacturer's adoption of the name, so that neither the fact that the Ohio corporation is not present as a party, nor the more embarrassing fact that litigation is pending between that corporation and the present appellee, involving the same issue, will justify evasion of the inquiry. The contention, however, on the part of the Ohio corporation is presented by the testimony of Edward C. Hall and William H. Hall, its president and vice president, respectively, and with their admissions of fact the solution is free from difficulty, as we view the evidence.

The Halls, father and sons, had established a successful business in the manufacture and sale of safes, then called and well known as Hall's safes, when they organized in corporate form, in 1867, as Hall's Safe & Lock Company. Under this organization the Halls conducted the business and greatly increased the output and reputation of the safes, under the same name, until 1892, when the assets and business, as a successful going concern, were sold to the Herring-Hall-Marvin Company, a consolidation of safe manufacturers. The instrument of sale conveyed all the property of the corporation and expressly mentioned "trade-marks" "trade rights," and "good will." In the selling corporation, the Hall family were not only the officers and managers, but owned all or substantially all the stock, and negotiated the sale. Through the sale they became controlling in interest in the purchasing corporation and were the managing officers—of the above-mentioned witnesses, one being president and the other treasurer. The evidence is convincing that the name of Hall was kept prominently in view of the trade and constantly associated with the product, notwithstanding its midway position in the combined names of the new corporation. The engagement of the Halls with this corporation bound them only during the term of their service to enter no rival business. After four years in the management, the above-mentioned witnesses retired from the corporation and were released from their service contract, subsequently organizing the new Ohio corporation—Hall's Safe Company—and resumed the business of manufacturing safes which they named Hall safes. The Herring-Hall-Marvin Company promptly brought suit to enjoin such use

of the name, and the suit is pending on appeal in the Circuit Court of Appeals for the Sixth Circuit—delayed in its course through various causes without fault of either party.

The right of these succeeding Halls to enter the business and manufacture safes of the structure and quality thus undertaken, for any market, is not questioned. So their use of the name Hall in the connection stated was within their right, unless barred by contract or estoppel, or the use is deceptive and fraudulent. Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972. The general rule for which the appellants contend—that the family surname is "incapable of exclusive appropriation by any one, as against others of the same name who are using it legitimately in their own business"—is too well settled to require citation or review of the authorities. But the exceptions above mentioned, which make the use illegitimate, are equally well settled, and we are of opinion that the general rule is not applicable to the trade-name "Hall" thus applied to the product of the new corporation, and that the use was both fraudulent and in derogation of the rights acquired by the appellee under the conveyance by the original Hall corporation. The fact that such conveyance was not executed by the Halls as individuals cannot absolve them from the obligations of a contract, made in the corporate name, wherein they were individually the beneficiaries. As stated in McKinley v. Wheeler, 130 U. S 630, 636, 9 Sup. Ct. 638, 640, 32 L. Ed. 1048: "The court, when necessary, will look beyond the name of a corporation to the individuals whom it represents." See opinion of Judge Baker, speaking for this court, in Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co. et al. (decided October 3, 1905) 142 Fed. 157. The corporate form of the transfer will not be permitted "to distort or hide the truth" (Anthony v. American Glucose Co., 146 N. Y. 407, 413, 41 N. E. 23) but a court of equity will treat the contract in conformity with its true meaning.

The organizers and owners of this new corporation were not only the Halls who managed the original business, who established and maintained the reputation of the Hall safes, but they personally negotiated the sale of that business and good will to the purchasing corporation, for a large price, and received (as stockholders) a large share of the proceeds; they became managers of the purchasing corporation and so continued for four years, maintaining and enlarging the business and good will so acquired, in the product known as Hall safes; and, thus participating and profiting in the transfer of that valuable asset—which they have given to the selling corporation, through acquiescence, at least, in the use of the family name—their efforts to repossess themselves of its essence, destroying or impairing the value of the property rights granted to the purchaser, are plainly inequitable, and, as we believe, violative of their contract obligations.

In any view of the doctrine of unfair trade, we are of opinion that the appellee is entitled to protection against the sale by these appellants of safes so made and marked as Hall safes, as representatives of the so-called Hall's Safe Company, or otherwise. The recent de-

cision in Howe Scale Company v. Wyckoff, Seamans & Benedict, supra, is relied upon by the appellants for support of their contention that the Halls were not deprived of right to use the family surname by these transactions, but we are satisfied that the case is plainly distinguishable; that the contract elements above mentioned in the case at bar were not there present, and the decision was expressly grounded upon the absence of such obligations, together with the absence of deception or confusion in the use of the name Remington; and that the elements thus appearing in the present case are unmistakably recognized as excepted from the rule thus upheld.

Without reference to the question discussed in the briefs, whether the name Hall has been so long identified with the business as to acquire a secondary meaning, within the authorities cited, we are of opinion that the uses of the name upon the safes represented and sold by the appellants are plain violations of the doctrine of fair trade, and that the appellees are entitled to the protection granted by the decree of the Circuit Court.

The decree accordingly is affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. CITY OF EVANSVILLE.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,080.

TELEGRAPHS AND TELEPHONES—CITY ORDINANCES—ABANDONMENT.

Plaintiff telephone company refusing to furnish telephones at a statutory rate, defendant city repealed its original franchise ordinance, whereupon plaintiff brought suit against the city for damage sustained in the destruction of its property, and the city instituted suit for the removal of poles and wires from the streets. The controversy went on until 1887, when a stockholder of plaintiff company, whose subscribers had been reduced in the meantime to 37, sought and obtained a new franchise ordinance, which provided that it should terminate after 15 years. Immediately thereafter plaintiff began to rebuild its exchange and system, and the litigation between plaintiff and the city was allowed to lapse. *Held*, that plaintiff thereby accepted the franchise of 1887, and was estopped thereafter to claim any further rights under its original franchise.

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

For opinion below, see 127 Fed. 187.

The bill was to enjoin the appellee from destroying appellant's telephone plant in the city of Evansville, Indiana. On final hearing the bill was dismissed. The facts are stated in the opinion.

William L. Granbery and John J. Vertrees, for appellant.

Geo. A. Cunningham and W. M. Wheeler, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, delivered the opinion. The appellant maintains its poles and wires in the streets and alleys of Evansville,

as successor or assignee of the Evansville Telephone Exchange, to which was granted in December, 1882, its successors and assigns, the right to erect poles and wires in the streets and alleys of the city, for the purpose of operating a telephone plant; the transfer from the Evansville Telephone Exchange to appellant taking place in June, 1883, at a time when the Evansville Company had about five hundred subscribers.

May 24th, 1886, the Common Council of Evansville adopted an ordinance in terms repealing the ordinance of December, 1882; and in July, 1887, passed another ordinance in terms granting to appellant substantially the same rights embodied in the ordinance of 1882, except that the ordinance of 1882 was subject to no limitation in point of time, while the ordinance of 1887 was repealable after fifteen years. And August 18th, 1902, an ordinance was adopted formally repealing the ordinance of 1887, and directing the appellant to remove its poles and wires from the streets within ninety days.

The contentions of the appellee are, first, that the Common Council had no right in 1882 to grant a perpetual franchise; wherefore the ordinance of 1882 is nothing more than a revocable ordinance;

Second, that appellant acquired no rights under the pretended assignment to it by the Evansville Telephone Exchange, such pretended assignment being ultra vires;

Third, that whatever rights were acquired by appellant under the ordinance of 1882, and its assignment, were forfeited by its failure to comply with the ordinance, and with a law of the state fixing rates to be charged; and

Fourth, that all rights under the ordinance of 1882 have been relinquished and abandoned by appellant, by its acceptance of the ordinance of 1887, under which the right of revocation by the city, at the end of fifteen years, is expressly stipulated.

All of these propositions are controverted by appellant, and in addition it is urged that the contract of assignment between the two telephone companies being an executed one, and acquiesced in at the time by the city, the city is estopped from relying upon the defense that such assignment was ultra vires and illegal. And, apart from the transactions that led up to the ordinance of 1887, there is great force in the position thus taken. In view, however, of the conclusion to which we have come, upon the question of fact whether the ordinance of 1882 was relinquished and abandoned in an acceptance of the ordinance of 1887, these discussions become immaterial.

Did appellant accept the ordinance of 1887, or lead the city to believe that it had so accepted that ordinance, and was operating under it? That is the question of fact upon which the right of the city to exclude the appellant from its streets now turns. And it is a question of fact that must be determined upon a survey of the entire situation, giving effect to the reasonable inferences, as well as to the specific things proven, that the situation as shown in the record discloses. Thus considered, the question of fact raised is not a difficult one.

In 1885 the legislature of Indiana passed an act limiting to three dollars per month, the rates to be charged telephone subscribers. The

appellant declined to give its subscribers continuous service at these rates. In 1886, the constitutionality of this law was sustained by the Indiana courts. The appellant still refused continuous service at the rates prescribed. Thereupon war opened between the city and the company. The city carried on the war by disconnecting the telephones furnished the city officials, by ordering the chief of police to cut down the poles and wires of appellant's system, and, finally, by repealing the ordinance of 1882. The company carried on the war by a suit against the city and its various officials for the damage sustained in the destruction of its property, which suit went to trial and judgment in January 1887—the city meantime instituting suit also, charging that the telephone exchange had been dismantled, that no service since June or July had been rendered to the city or its inhabitants, and asking for the removal of the poles and wires, and the annulling of all rights of the company under its ordinances; which suit was still pending when the new ordinance of 1887 was passed. The effect of this war upon appellant was to reduce its subscribers from four hundred and ninety-six, July 1st, 1886, to thirty-seven a month later; and the effect on the city was to involve it in lawsuits and deprive it of telephone service.

In this state of affairs negotiations for the ordinance of 1887 were opened June 6th, 1887. The first step taken was a communication to the city council from one E. P. Huston, purporting to act for the appellant, presenting to the council an ordinance granting to appellant the right to establish a telephone system, and to place and maintain its poles and wires in the public streets and alleys of the city. There is no direct evidence, except from Huston himself, that he had authority to present this ordinance. The ordinance presented does not appear in the record. But Huston at the time, was a stockholder and director in the company. The president of the company knew that Huston, one of his stockholders and directors, had presented the ordinance, and was "busying himself" with the controversy. And, what is of equal significance, no other representative of the company, at this important epoch, appears to have been upon the ground.

The evidence shows that between June 6th, when the Huston ordinance was presented, and July 18th, when the final ordinance was passed, there were many consultations between Huston and the members of the city council, and other city officials, the purpose of which was to bring about an ordinance that would be satisfactory both to the company and to the city. Also that meetings were held by the business men of the city attended by Huston, the purpose of which was to formulate public opinion toward a settlement of the controversy—all of which eventuated in the ordinance passed July 18th, 1887.

In what respect the ordinance passed differed from the one presented by Huston is not disclosed, except that at one of the meetings Huston stated that the directors of the company would be willing to accept a twenty-five year ordinance. Nor is there disclosed the communications that passed between Huston and the home office at Nashville, Tenn.; nor whether any communications in fact passed.

But instantly the ordinance passed, the war ended. The city officials were furnished immediately with telephones in accordance with the requirements of the ordinance. The suit by the city against the company lapsed, and finally was dismissed. The company, undisturbed by the city, took possession anew of the streets, replacing the cut poles and wires with new poles and wires. And what had become, under the conflict, a broken down, disappearing system, with but thirty-seven subscribers in August, 1886, became, under the new ordinance, a growing system, having a year later one hundred and forty-four subscribers, two years later three hundred and eleven; growing with a steady growth that finally reached nearly twenty-five hundred subscribers.

These facts, looked upon as an entirety, leave us without doubt that whether the company formally accepted the ordinance, or not, the city was led by the company's conduct to believe that the ordinance had been accepted. It is of little consequence, in arriving at this conclusion, that we cannot from any direct evidence in the record, ascertain whether Huston was authorized to negotiate with the city or not. It is of little consequence that we cannot, from any direct evidence in the record, ascertain whether his negotiations were from time to time reported to the home office of the company. That Huston was a director and stockholder of the company we know. That the company had no other representative on the ground, we know. And that companies under a situation and strain such as existed at Evansville, are not in the habit of dwelling in ignorance and going unrepresented, we know. Indeed, considering in this connection, the opportunity the company had to clear up, by its own records or correspondence, the facts of the situation, we are without doubt that the company was cognizant of every step taken; and whether formally accepting the ordinance or not, intended that the city should be left under the impression that the ordinance was accepted, and would thereafter be the basis of their mutual rights.

An ordinance passed and made the basis of performance under such circumstances ought to be held binding, and in our judgment is binding, as a contract between the parties. The company took the benefits of the ordinance. The city, under the impression created, surrendered every supposedly advantageous position it had occupied. It restored to the company the possession of the streets. It dismissed its suits. It refrained from granting the streets to a competing company. This was either peace under the ordinance as a treaty, or unconditional capitulation. That it was capitulation is past belief. That it was a treaty of peace, accepted by the city as such, and known to the company that it was so accepted, is beyond reasonable doubt.

The appellant was in the Circuit Court asking for the writ of injunction. It is our judgment that under the circumstances disclosed, the writ was rightly denied.

The decree of the Circuit Court is affirmed.

HADLEY DEAN PLATE GLASS CO. v. HIGHLAND GLASS CO.

(Circuit Court of Appeals, Eighth Circuit. January 19, 1906.)

No. 2,210.

1. SALE—CONTRACT TO MANUFACTURE AND DELIVER GOODS—"MORE OR LESS" AS QUALIFYING STATEMENT OF QUANTITY.

Where, in a contract for the manufacture and delivery of goods, the statement of quantity is qualified by the words "more or less," these, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 191.

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

2. DAMAGES—CONTRACT—BREACH BY VENDEE—MEASURE OF DAMAGES.

Where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and the contract price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1106.]

3. MONOPOLIES—COMBINATION IN RESTRAINT OF TRADE—MISSOURI STATUTE IS WITHOUT APPLICATION TO INTERSTATE COMMERCE.

The anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965–8970) can have no application to a contract for the sale of goods to be manufactured by the vendor in another state and delivered to the vendee in Missouri, because such a contract directly relates to Interstate Commerce, the regulation of which is within the exclusive authority of Congress.

4. SAME—SHERMAN ANTI-TRUST ACT—CONTRACT FOR SALE OF GOODS BY MEMBER OF COMBINATION.

The Act of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the "Sherman Anti-Trust Act," does not invalidate, or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods.

(Syllabus by the Court.)

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

Charles Cummings Collins (W. F. Carter, William T. Jones, and A. R. Taylor, on the brief), for plaintiff in error.

James C. Jones (Lon O. Hocker, C. P. Ellerbe, C. P. Ellerbe, Jr., and Frank A. Thompson, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. The Highland Glass Company, a Pennsylvania corporation, engaged in manufacturing glass in that state, received and accepted the following order for the manufacture and delivery of glass from the Hadley-Dean Glass Company, a Missouri corporation, carrying on the business of a jobber and dealer in glass at St. Louis:

"Book us with 200,000 sq. ft. ⅛ ribbed more or less subject to sizes and delivery as required at price 5c. sq. ft. cut to size St. Louis delivery less 1% cash 10 days acct. St. L. World's Fair bldgs. Acc't Mr. Torrence. Ack."

23,056 square feet of glass was manufactured, delivered, accepted, and paid for under the contract so made. The Hadley-Dean Company then refused to furnish specifications for or to accept the remaining 176,944 feet, although the Highland Company offered and was ready and willing to manufacture and deliver the same as agreed. In an action in the Circuit Court to recover damages from the Hadley-Dean Company for its breach of the contract a verdict was directed in favor of the Highland Company for the difference between the cost of manufacturing and delivering the remaining glass and the contract price, and judgment was rendered on the verdict returned under that direction. The purpose in prosecuting the present writ of error is to secure a reversal of that judgment.

It is assigned as error that the court held that the order was for 200,000 square feet of glass, more or less, the latter words having their usual signification, and rejected the defendant's contention that the order was for such an amount of glass as would be required by the defendant "to fulfill its contracts for glazing the St. Louis World's Fair Buildings." No reference to the existence of any such contracts or to the amount of glass required to fulfill them is made in the pleadings or in the evidence, and it is conceded that the question presented by this assignment is to be determined by an examination of the order alone. We think it was properly interpreted. The quantity of glass is expressed in the words "200,000 sq. ft., ⅛ ribbed more or less." The succeeding phrase "subject to sizes and delivery as required," merely reserved to the defendant the right to thereafter designate the sizes to which the glass should be cut and the times when it should be delivered. The still later phrase "acc't St. L. World's Fair bldgs.," while explaining the use to which the glass was to be applied, is, in point of place and grammatical arrangement, so completely separated from the expression in respect to quantity that it could not well have been intended to qualify that expression. A more reasonable view of its purpose is that it was intended to give some indication of when the glass would be required and to apprise the plaintiff of the necessity for promptly conforming to such directions as should thereafter be given for its manufacture and delivery. It was common knowledge that the time for the completion of the World's Fair buildings was limited and that a failure to complete them within that time would result in serious inconvenience and loss. True the quantity specified is qualified by the words "more or less," but it is well settled that in a contract like this these words, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction. Brawley v. United States, 96 U. S. 168, 172, 24 L. Ed. 622; Norrington v. Wright, 115 U. S. 188, 204, 6 Sup. Ct. 12, 29 L. Ed. 366; Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; Id., 32 C. C. A. 406, 89 Fed. 907. There is no such broadening language in the order.

It is assigned as error that the damages were not measured by the difference between the market value of the glass and the con-

tract price, but the point may be dismissed with the statement that, under the established rule in this jurisdiction, and also in the state of Missouri where the controversy arose, where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and the contract price. Kingman v. Western Mfg. Co., 34 C. C. A. 489, 92 Fed. 486; Philadelphia, etc., Co. v. Howard, 13 How. 307, 344, 14 L. Ed. 157; United States v. Speed, 8 Wall. 77, 84, 19 L. Ed. 449; Hinckley v. Pittsburg Steel Co., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Roehm v. Horst, 178 U. S. 1, 21, 20 Sup. Ct. 780, 44 L. Ed. 953; Black River Lumber Co. v. Warner, 93 Mo. 374, 388, 6 S. W. 210; Crescent Mfg. Co. v. Nelson Mfg. Co., 100 Mo. 325, 336, 13 S. W. 503; Chapman v. Kansas City, etc., Ry. Co., 146 Mo. 481, 508, 48 S. W. 646.

There was some evidence tending to show that at the time of making the contract the plaintiff and others, not including the defendant, were in an unlawful combination to stifle competition in the sale of glass and to arbitrarily increase its price, and because of this it is contended that in directing a verdict for the plaintiff the court failed to give effect to the anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965–8970), and to the anti-trust legislation of Congress (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; Act August 27, 1894, c. 349, §§ 73-77, 28 Stat. 570 [U. S. Comp. St. 1901, pp. 3202, 3203]).

Of the state statute it is sufficient to say that it can have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several states. Railroad Co. v. Husen, 95 U. S. 465, 469, 24 L. Ed. 527; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 229-233, 20 Sup. Ct. 96, 44 L. Ed. 136; Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785. The contract was for the sale of glass to be manufactured by the vendor in Pennsylvania and delivered to the vendee in Missouri, and therefore directly related to interstate commerce. Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 246, 20 Sup. Ct. 96, 44 L. Ed. 136; Bement v. National Harrow Co., 186 U. S. 70, 92, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; Montague v. Lowry, 193 U. S. 38, 47, 24 Sup. Ct. 307, 48 L. Ed. 608.

The act of Congress of August 27, 1894, is also without application because it is confined to combinations "between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States."

The act of July 2, 1890, is what is popularly known as the "Sherman Anti-Trust Act," and declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." That it does not render illegal or prevent a recovery upon this contract is shown by Connolly v. Union Sewer Pipe Co., 184 U. S. 540,

22 Sup. Ct. 431, 46 L. Ed. 679. In that case the plaintiff sought to recover the purchase price of sewer pipe sold by it to the defendant and the latter sought to defend on the ground that at the time of the sale the plaintiff was in an unlawful combination to restrain interstate trade in sewer pipe. The court, after holding that the principles of the common law did not justify the buyer in refusing to pay for what he had bought and received, on the ground that the seller was in an unlawful combination with others to restrain trade in the article sold, said (pages 549, 550, of 184 U. S., page 435 of 22 Sup. Ct. [46 L. Ed. 679]):

"The special defense based upon the act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], was also properly rejected. * * * Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The contract for the sale of the glass being valid, it follows as a matter of course that an action lies for its breach.

No error is disclosed by the record, and the judgment is affirmed.

COLUMBUS RY. CO. v. PATTERSON.

(Circuit Court of Appeals, Sixth Circuit. February 15, 1906.)

No. 1,430.

1. DEPOSITIONS—GROUNDS FOR EXCLUSION—CLERICAL ERRORS IN CERTIFICATE. The fact that a notary public, in his certificate to a deposition taken before him, through a clerical mistake misstated the name of the witness, whose name was correctly given in the caption, and also signed his own name thereto, reciting that the signature was made by him instead of the witness under a stipulation attached which authorized him to sign the transcript of the shorthand notes which had been signed by the witness, is not sufficient to render the deposition inadmissible, where both parties were present and examined the witness and no prejudice resulted from the error.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, §§ 173, 183, 266-267.]

2. APPEAL—RESERVATION OF GROUNDS OF REVIEW—OBJECTIONS—ADMISSION OF DEPOSITION.

An objection to the admissibility of a deposition in a federal court, on the ground that it is not shown that the witness is at the time of trial without the reach of a subpœna, is waived if not made at the time, and will not be considered when made for the first time in the appellate court.

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

Thomas J. Keating, for plaintiff in error.
D. F. Pugh, for defendant in error.

Before SEVERENS, Circuit Judge, and WANTY and COCHRAN, District Judges.

SEVERENS, Circuit Judge. This is an action brought by Patterson against the Columbus Railway Company, a street railway company operating in the city of Columbus, to recover damages for a personal injury sustained by him, as he alleges, in consequence of the negligence of the company in the management of one of its cars in not stopping while he was attempting to enter it as a passenger. Upon the issues made by the answer, which denied the negligence charged to the defendant and alleged contributory negligence on the part of the plaintiff, and by the replication of the plaintiff to the latter charge, the cause was tried before a jury. A verdict for $2,100 in favor of the plaintiff was rendered, and judgment was entered accordingly.

At the trial evidence was given by both the parties upon both the issues above mentioned. The defendant, now plaintiff in error, offered in evidence a deposition of John H. King, who was the conductor of the car on or near which the plaintiff received his injury, and who, in his deposition, described the circumstances of the accident. Upon objection of counsel for the plaintiff, the court excluded the deposition, and an exception to this ruling was saved by the defendant. This exception is the only one which we now need to consider. The deposition was taken two months before the trial; but, as we infer from the remarks of the court, it was not filed until the day before the trial. The statute of Ohio relating to the practice of taking depositions prescribes that all objections to depositions, except those which go to the competency and relevancy of the evidence, must be taken before the trial; otherwise they will not be regarded. Rev. St. Ohio 1906, § 5285. This provision is not unusual in legislation and is obviously designed to prevent the party intending to use the deposition from falling into a trap on the trial when it is too late to extricate himself by asking a postponement or other opportunity for remedying the defect. And the courts of the United States, without the aid of any statute, have recognized the force of the principle underlying such statutes, and required the observance of fairness and good faith by making seasonable objection to all defects in matters of form or procedure which do not affect the substantial rights of parties. Doane v. Glenn, 21 Wall. 33, 22 L. Ed. 476; Howard v. Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Bidd v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

No objections had been filed. The objection made by plaintiff's counsel to the reading of the deposition was that there "is no certificate of the notary public certifying that such a deposition was taken, the name in the certificate of the notary public being 'John R. Patterson,' and the deposition being signed, 'Paul C. Martin, notary public, for and on behalf of John R. Patterson, as per stipulation;' the name 'John H. King' nowhere appearing in the certificate or signature." This last ground of objection imports nothing more than a clerical mistake in the use of names, as will be seen later on. It becomes necessary to explain that the deposition was taken on notice to the plaintiff's counsel stating that the witness John H. King was about to go out of the district and to a greater distance than 100 miles from the place of trial, and that his deposition was intended to be used upon the trial. At the time and place specified in the notice, counsel for the respective parties and the witness King appeared, and the deposition was taken before Paul C. Martin, a notary public. The caption states that what follows is the "depositions of sundry witnesses in a cause * * * wherein James R. Patterson is plaintiff and the Columbus Railway Company is defendant, * * * to be read as evidence in behalf of the defendant on the trial of the aforesaid cause." Then appears the following: "John R. Patterson, of lawful age, being by me first duly sworn as hereinafter certified, deposes and says as follows:" But no deposition of John R. Patterson follows, and the statement quoted is wholly inconsequential and inert.

Thereupon, under an original entitling of the court and cause, the document proceeds as follows:

"Deposition of John H. King, taken on the 15th day of April, A. D. 1903, at the law office of Martin & Martin, Springfield, Ohio, before Paul C. Martin, a notary public, of the county of Clark and state of Ohio, in the above entitled cause pending in the Circuit Court of the United States, for the Southern District of Ohio, Eastern Division.

"Present: F. S. Monnett, on behalf of plaintiff; H. J. Booth, on behalf of defendant."

Then, before proceeding to take the deposition, the counsel agreed as follows:

"It is stipulated by the parties that the deposition of the witness shall be taken in shorthand and the stenographic notes signed by him, and that the deposition shall be written out on typewriter and the transcript signed by the notary public before whom the deposition was taken, which shall have the same effect as if same were written out in longhand or typewritten, and signed by the witness himself."

The statement and deposition proceed as follows:

"John H. King, being by me first duly sworn as hereinafter certified, deposes and says as follows:

"Examined by H. J. Booth.

"Q. 1. State your name, your age, and your occupation. A. John H. King, thirty-nine, laborer."

On cross-examination by plaintiff's counsel, the first question put is: "When did you come to Springfield, Mr. King?" And in an examination and cross-examination filling nearly 20 pages of the record, the

witness states with much particularity the details of the accident and his own relations to it from being the conductor of the car. He also stated that he did not expect to remain in Ohio, but expected to leave that state within a week and go to Indiana. The deposition as offered was typewritten, and was not signed by the witness, but was signed by the person taking it as follows:

"Paul C. Martin, Notary Public, For and in behalf of John R. Patterson, As per Stipulation."

Then follows the certificate:

"I, Paul C. Martin, a notary public in and for the county and state aforesaid, duly commissioned and qualified, do hereby certify that the above-named witness, John R. Patterson, was by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him respectively subscribed as above set forth was reduced to writing by Marie Kelley, and also so written in the presence of the witness aforenamed respectively, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified and in accordance with the stipulations set forth at the beginning of this deposition. * * *

"In witness whereof, I have hereunto set my hand and seal of office this 21st day of April, A. D. 1903.

"[Signed] Paul C. Martin, Notary Public."

In the certificate it is seen that the name of the witness is given as "John R. Patterson," instead of "John H. King," as it should have been, and this is the fault of the certificate. But no one concerned with the case could possibly have any doubt that the witness intended by this certificate was John H. King, who gave the deposition, and that the giving another name was a clerical blunder. The statements made at the end of the certificate and the reference to "the stipulation set forth at the beginning of this deposition" show unmistakably the bond of connection between the certificate and the deposition. That being so, we think the court was in error in holding as it did that no deposition of the witness King had ever been certified by the notary. The identity of the witness was in nowise mistaken in consequence of naming him "John R. Patterson."

Then as to the objection that the deposition was signed "Paul C. Martin, Notary Public, For and in Behalf of John R. Patterson, As per Stipulation." This, too, was a clumsy performance in stating that it was signed in behalf of the plaintiff. But the notary was intending to sign the deposition in compliance with the stipulation as his reference to it shows. And his signature performed the purpose of the stipulation—that is, of identifying the deposition in typewriting as the one which had been taken in shorthand; and the language he appended was harmless. It is clear from the stipulation that it was intended that the shorthand notes only should be signed by the witness, and that the transcript thereof should be signed by the notary. The certificate states that the deposition as taken—that is, in shorthand—was signed by the witness. Thus every substantial requirement of the stipulation was complied with, and every requirement of the statute of Ohio (section 5280) in the statement of what facts shall be shown by the certificate was also fully complied with. We have gone through these facts quite fully in order to show our warrant for

thinking that the court below laid too much stress upon matters of form merely and too much disregarded the essential factors of the question.

The laws of the states prescribing the manner of taking and returning depositions de bene esse may be followed in suits prosecuted in the federal courts; but the circumstances in which they may be used depend upon the statutes of the United States whenever those statutes apply. By Act March 9, 1892, c. 14, 27 Stat. 7 [U. S. Comp. St. 1901, p. 664], it was provided:

"That in addition to the mode of taking the depositions of witnesses in causes pending at law or in equity in the District and Circuit Courts of the United States, it shall be lawful to take depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

But it is now urged that notwithstanding there may have been error in excluding the deposition on the ground stated in support of the objection, still the ruling may be supported on another ground not suggested by the counsel or by the court, which is that the defendant had not shown that the witness was then beyond the reach of the process of the court; and counsel argues that without such showing the deposition is without legal force or value as testimony and seems to suppose that it has no sanction or competency without the preliminary proof. But this is an erroneous view of the matter. It is true that the absence of the witness is a condition to the use of the deposition; but the condition is for the benefit of the opposite party, which he can insist upon or not as he pleases. If he does not insist upon it, the court would not of its own motion exclude the deposition because it has not the quality of evidence. Or if the court entertained the idea that the condition of the competency of the deposition as proof was the absence of the witness, still the court might well assume that as matter of fact the witness was absent and that the other party knowing it, waived the proof. There can be no doubt that proof of the absence of the witness can be waived, as one may waive any other benefit or privilege which the law gives him. And it is a familiar rule that when upon the trial of a cause a party rests an objection upon a stated ground he cannot afterwards suggest some other ground for its support not brought to the attention of the court and opposing counsel at the trial. Especially is this so when the latent ground is one which could have been removed if it had been brought to view. A familiar illustration is offered when a copy of a deed or other written instrument is offered in evidence. By a long-settled rule it is not admissible without proof that the original cannot be produced. But if the other party makes no objection, or makes one which is not rested upon the ground that the original is not accounted for, he waives that ground of objection. So, if a deed is offered without proof of the signature, it cannot be received if the opposite party objects on that ground. But, if he objects on some other, he cannot afterwards say that the deed was incompetent for the reason that the signature was not proven. In 8 Encl. of Plead. and Prac. 226, it is said:

"By limiting an objection to the admission of evidence to a particular ground, objections on other grounds are waived. There are two reasons for requiring counsel to state the grounds for objections: First, to show to the trial judge the exact point on which the ruling is asked, in order that he may act advisedly and not be misled; and, second, that the opposite party may have an opportunity to obviate the objection if it is well taken."

And see Stebbins v. Duncan, 108 U. S. 32, 46, 2 Sup. Ct. 313, 27 L. Ed. 641, a very pertinent case, and Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779. And in 13 Cyc. 1011, it is said:

"An objection to a deposition on the ground that the cause for taking the same was not shown to exist at the time of the hearing will not be considered when presented for the first time upon an appeal"—citing several cases from different jurisdictions.

The judgment must be reversed, and a new trial awarded.

BREESE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 585.

1. INDICTMENT—MOTION TO QUASH—EFFECT OF ORDER EXTENDING TIME FOR FILING.

   By the practice prevailing in the federal courts in North Carolina, a motion to quash an indictment is recognized as a proper method of presenting matters outside of the record equally with a plea in abatement, and under such practice an order entered by consent on the entry of a plea of not guilty, reserving to the defendant the right to take advantage, on motion in arrest of judgment or for a new trial, of all matters which could be taken advantage of on motion to quash or demurrer, gave him the right at a subsequent term, and even after trial and conviction, to file a motion to quash, on the ground that the grand jury which returned the indictment was not legally constituted.

2. GRAND JURY—QUALIFICATIONS OF JURORS—NORTH CAROLINA STATUTE.

   Under Code N. C. § 1722, as it stood in 1897, which required the county commissioners to select the jury list from "such persons only as have paid tax for the preceding year," as generally understood by the officers acting thereunder, and as inferentially construed by the Supreme Court of the state, only such persons as had paid all of their taxes for the preceding year were competent to serve as jurors or grand jurors.

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

For opinion below, see 131 Fed. 915.

Charles A. Moore (Moore & Rollins, on the briefs), for plaintiff in error.

A. E. Holton, Dist. Atty. (A. H. Price, Asst. U. S. Atty., on the brief), for the United States.

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

McDOWELL, District Judge. The plaintiff in error, who will hereinafter be referred to as the defendant, was the president of a national bank in Asheville, N. C., and was on November 6, 1897, in-

dicted for alleged violations of section 5209, Rev. St. [U. S. Comp. St. 1901, p. 3497]. On that day, in pursuance of an agreement entered into by counsel for defendant and the then assistant district attorney, the following order was entered:

"United States v. W. E. Breese.

"Filed Nov. 6, 1897.

"In the above entitled action it is ordered by the court that the defendant, being now arraigned, be and he is now required to enter his pleas to the indictment in said cause and he does now plead not guilty thereto, but such plea shall not operate or have the effect to prevent him taking advantage upon motion in arrest of judgment or on a motion for a new trial of all matters and things which could be taken advantage of by motion to quash or demurrer. Upon motion in arrest of judgment or for a new trial, all such matters and things shall be heard and determined as if the same were being heard upon motions to quash or demurrer. This order shall apply to any and all other indictments pending in this court against the defendant.

"Robert P. Dick, U. S. Judge.

"Concurred in. Covington, Ass't U. S. Att'y."

This cause was first tried in November, 1898, and the judgment against the defendant was ultimately reversed by this court. Breese v. U. S., 106 Fed. 680, 45 C. C. A. 535; Id., 108 Fed. 804, 48 C. C. A. 36. On the next trial the jury failed to agree. And this happened again on the third trial. The last trial was commenced July 12, 1904, and resulted in a verdict of guilty on certain counts in the indictment and a judgment that the defendant be imprisoned in the penitentiary at Atlanta for a term of seven years.

At the trial held in March, 1902, the defendant moved to quash the indictment "for certain reasons contained in a plea and affidavits which are filed." The plea and affidavit referred to do not appear in the record, nor does it appear that the motion was acted upon. In advance of the last trial the defendant filed a paper in the nature of both a plea in abatement and a motion to quash the indictment and certain affidavits in support thereof. This plea was demurred to, and the demurrer was sustained. The plea asserts, in brief, that one C. C. Phifer, one of the members of the grand jury that returned the indictment, was during the year preceding the finding of the indictment the owner of more than $100 worth of personal property, taxes on which had been properly assessed, and that he had not paid his taxes upon said property. Precisely similar statements are made also as to one W. H. Martin, another of the grand jurors. It is also alleged that defendant did not learn of the facts above mentioned, concerning Phifer, until February, 1902, and concerning Martin, until July 7, 1904.

The affidavits which appear in the record are those of A. B. Fortune and W. H. Martin. These affidavits were filed with and were treated as parts of the plea in abatement. The affidavit of Martin is to the effect that he was assessed with personal property and real estate taxes for the year 1896, and that he had not paid any of said taxes at the time he served as a grand juror. The affidavit of Fortune, register of deeds for Buncombe county, and ex officio clerk of the board of county commissioners, is to the effect that Mar-

tin was returned as insolvent, and that the tax collector was allowed a credit for the amount of personal property taxes assessed against him. Martin's real estate was sold under mortgage about February 1, 1897, and the purchaser at a subsequent date not set out paid the taxes thereon for 1896.

The trial court in sustaining the demurrer to the plea in abatement reserved the right to finally decide the question on motion to be made after verdict of guilty, should such verdict be returned. And after the verdict was returned the defendant renewed the motion to quash the indictment. This motion was overruled, and this action of the court was duly excepted to.

The objection to the two grand jurors is founded upon section 1722, Code N. C., as amended, which reads as follows:

"The commissioners for the several counties, at their regular meeting on the first Monday of June, in each year, shall cause their clerks to lay before them the tax returns for the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid tax for the preceding year and are of good moral character and of sufficient intelligence."

The first question presented for consideration is whether or not the objection was presented in due time. The rights of the defendant in this respect are governed by the order of November 6, 1897. If it were a fact that under the practice of the federal courts in North Carolina in criminal causes a motion to quash could only be made for errors apparent from the record, we should be constrained to hold, as urged by counsel for the government, that the intent of that order was merely to save to the defendant the right to raise subsequent to the plea of not guilty such objections as are ordinarily raised by demurrer. But there seems to be no doubt but that a motion to quash has long been recognized in the federal courts in that state as a method of making objections dehors the record equally as proper as a plea in abatement. U. S. v. Kilpatrick (D. C.) 16 Fed. 765. And under the common-law practice in the state courts of North Carolina it appears that the motion to quash for objections dehors the record was used as well as pleas in abatement (State v. Haywood, 94 N. C. 847; State v. Gardner, 104 N. C. 739, 10 S. E. 146), prior to the enactment of the statute (Code, § 1741) requiring that exceptions to grand jurors be taken by motion to quash the indictment. However unwise it may have been on the part of the prosecution to consent to such an order, it seems to us beyond dispute that the defendant was solemnly and beyond recall given the right to make any objection that could be made by motion to quash on a motion in arrest of judgment or on motion for a new trial. In other words, the right to make objections which regularly must be made in advance of plea of not guilty was saved to the defendant until after an adverse verdict.

As above intimated, a plea in abatement is one of the proper methods in the federal courts in North Carolina of raising objections to the qualifications of the grand jurors who returned the indictment. U. S. v. Kilpatrick, supra; Crowley v. U. S., 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1078. In filing the paper now under consideration,

whether treated as plea in abatement or a motion to quash, in advance of the last trial, we think the defendant properly raised for decision the question next to be considered, and we must now consider the validity of the objection to the jurors.

As the question as to the qualification of the two grand jurors was raised in proper manner and in due time, the ruling of the trial court thereon is subject to review, and for error in deciding such question adversely to the defendant this court must reverse. Crowley v. U. S., supra. Reading the plea in abatement and the two affidavits together, and they were thus treated in the lower court, the only contention that can be made in support of the proposition that Phifer and Martin were qualified grand jurors is as follows: There is no allegation that Martin was not assessed for 1896 for capitation tax, or that he had not paid this tax. As to Phifer, it is not alleged that he had not been assessed with and had not paid both his poll tax and real estate taxes. The contention of the government is that a mere failure to pay a part of the taxes assessed against a juror does not disqualify him. The defendant's contention is that a juror must have paid all the taxes properly assessed against him in order to be qualified.

To our surprise we have been unable to find that this question has ever been presented to, and expressly decided by, the Supreme Court of North Carolina. If the contention of the defendant be sound, it must at least be said that the language used in section 1722, supra, is not as happily chosen as might be. In strictness a citizen who has paid his capitation tax, although delinquent in the payment of sundry other taxes assessed against him, is one who has "paid tax." However, we have been led to the conclusion that the intent of the Legislature in enacting section 1722 was as is contended by counsel for the defendant; and that a failure to pay any part of the total assessment is, under such circumstances as we have here, a disqualification.

The statute in question requires the clerks of the boards of county commissioners to lay before them "the tax returns for the preceding year." So far as we have been enabled to discover, there is no statute requiring the tax collectors to make a "tax return" showing the names of the taxpayers. Where the tax collector desires credit for taxes assessed against insolvents he must return a list of such insolvents. But we have found no provision requiring a return of a list of citizens who have paid all or a part of the taxes assessed against them. In practice, as we are led to believe, the statute in question is in great measure disregarded by the boards of county commissioners. But, when a question arises before the board as to the qualifications of a citizen for jury service in respect to the payment of taxes, the tax collectors' receipt books are referred to. If the citizen has paid all the taxes for the preceding year, the receipt will have been delivered, and the stub (showing the name of the taxpayer, the amount paid, and the date of payment) will alone remain in the book. If the citizen has wholly failed to pay his taxes, the unsigned receipt will still be in the book; and, if he has paid part only of the taxes assessed against him, a credit for such part is indorsed on the

stub, but the receipt is left in the book. So far as we have been able to acquire information, we are led to believe that the practice of the boards is, in so far as they regard the statute, to leave on the jury lists only the names of citizens found on the stubs, from which receipts in full have been detached. In other words, although we regard such investigation as we have been able to make as far from conclusive, it would seem that the statute is in practice construed as excluding from jury service all citizens except those who have paid taxes in full.

In 1899 (Acts 1899, p. 901, c. 729; Revisal of 1905, § 1957) section 1722 of the Code was amended so as to read as follows:

"The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year 1905, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such."

We are not able to draw a satisfactory conclusion based on the changes in the statute made by this amendment. There is no preamble, nor is there in the act of 1899 any statement of the reasons for enacting the amendment. From the case of State v. Peoples, 131 N. C. 784, 42 S. E. 814, it may possibly be inferred that the boards of county commissioners in some of the counties made a practice of excluding all negroes from the jury lists. And it is at least possible that the sole reason for the amendment was to make an end of this practice. Under the amendment the boards can no longer reject citizens on the ground that they are not "of good moral character and of sufficient intelligence." And it is required that the boards shall select the names of all such persons as have paid "all the taxes assessed against them for the preceding year." If such was the only purpose of the amendment, it would seem not improbable that, in changing the language from "have paid tax," to "have paid all the taxes assessed against them," the Legislature did not intend to change the law in this respect, but merely intended to repeat the language of the old statute, and thus furnished an indication of the commonly accepted construction of that statute. However, this reasoning may be erroneous, and is certainly very far from being conclusive.

The Supreme Court of North Carolina has in many cases (some only of which are now before us) referred to the statute in force when the indictment at bar was returned, and in numerous instances it is paraphrased, as if it read "such as have paid their taxes." See Lee v. Lee, 71 N. C. 144: "* * * Moral and intelligent men, who have paid their taxes the preceding year." State v. Wincroft, 76 N. C. 38: "A juror was challenged because he had not paid his taxes." State v. Eddens, 85 N. C. 524: "On looking at the statute, * * * which is the only one that prescribes the qualifications of jurors for the superior court, we find that they are required to be such as have paid their taxes for the year preceding that in which they may be drawn, and as are of sufficient intelligence and good moral character." State

v. Carland, 90 N. C. 673: "They are not tales jurors, who are required, not only to be freeholders, but to have paid their taxes for the preceding year, as is required of jurors on the original panel." State v. Hargrave, 100 N. C. 485, 6 S. E. 186: "The juror challenged was on a like footing, as to the payment of taxes, with regular jurors. He had paid taxes for the fiscal year 1886." State v. Davis, 109 N. C., 781, 14 S. E. 56: "The cause was tried August term, 1891. The regular jurors were, therefore, drawn from the list revised by the commissioners at their session on the first Monday in September, 1890. They could not then have thrown out a juror for 'not having paid his taxes for the fiscal year ending June, 1890.'" State v. Fertilizer Co., 111 N. C. 659, 16 S. E. 231: "The motion to quash * * * was in apt time, and it being admitted that three of the grand jurors had failed to pay their taxes for the year 1890, * * * there was no error in granting it." State v. Perry, 122 N. C. 1020, 1021, 29 S. E. 384: "The judge, before the grand jury is impaneled, always asks (or should do so) if any of them had failed to pay their taxes for the preceding year. * * * If any respond affirmatively they are stood aside." See, also, State v. Haywood, 94 N. C. 847.

As the question we have under consideration was not involved in any of the foregoing cases, the expressions quoted furnish, of course, insufficient authority for holding that the expression "paid tax" means "paid all his taxes." But the language above quoted has certainly some tendency to support the contention that the statute has been thus understood by the Supreme Court of North Carolina.

In the case of State v. Heaton, 77 N. C. 505, the opinion was written by Judge Bynum. The following is all that is said concerning the qualification of a grand juror objected to on the ground of nonpayment of taxes:

"Upon the arraignment of the defendant, he filed a plea in abatement, alleging that George N. Harris, one of the 12 grand jurors who found the indictment, was disqualified because he had not paid tax for the preceding year, as required by Code Civ. Proc. § 229. Upon this plea, an issue was made by the state, upon the trial of which it appeared in evidence that the juror had paid a part of said tax, and that the sheriff was enjoined by an action from collecting the residue of the tax for that year, of this juror and other citizens of the county, and that the injunction was not vacated until after the time for collecting the tax of that year had expired, and that in fact the residue of the tax had not been paid at the time of the trial. Upon this state of facts, the court held that Harris was a competent juror. We concur in that opinion.

"It does not appear at whose instance the injunction was obtained, but suppose it had extended to all the taxpayers, and that in consequence none had paid the tax of the preceding year. Could it be held that this failure operated as a suspension of the criminal law of the state? The statute must, if possible, receive a reasonable construction not inconsistent with the public welfare. The failure to pay the tax was not the juror's voluntary act, but was caused by the act of the court in suspending its collection. It nowhere appears but that the juror was able, ready, and willing to pay the tax, and in fact he had paid all that the law, as then administered, required him to pay."

The fact that the admitted part payment of his taxes by the grand juror is not held by Judge Bynum to be the reason for holding the juror to have been qualified is, by inference at least, strongly in

support of the view that, under ordinary circumstances, the payment of all the taxes properly assessed is requisite. In fact, in the absence of a decision in a case in which the point now under consideration has been expressly raised and passed upon, we are inclined to give the inference drawn from the Heaton Case very great weight. In prescribing the qualifications of jurors there is something to be said in favor of the citizen who has paid only a part of the taxes assessed against him over the citizen who has paid no taxes. But, as the former may have performed only in very small part his full duty, it is clear that the intent may have been to make eligible only such citizens as had paid all the taxes properly assessed against them. If such was the intent in enacting section 1722, the language employed, as has been said, is not particularly apt. But, on the other hand, if the intent was to qualify citizens who had paid only some one item of the total assessment, the language of the statute is again ill adapted to express such intent. Much more clearly would such intent have been expressed if the language had been "such persons only as have paid any tax for the preceding year."

Having reached the conclusion that the two grand jurors were not qualified, and that the objection was made in due time, it is unnecessary that we consider the remaining assignments of error. The judgment of the trial court will be reversed, and the cause remanded for the entry of judgment in accordance with this opinion.

Reversed.

CARTER, WEBSTER & CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 608.

1. CUSTOMS DUTIES—CLASSIFICATION—EMBROIDERED HOSIERY.

The proviso in paragraph 339, Schedule J, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], prescribing that no embroidered wearing apparel, etc., "shall pay duty at a less rate than that imposed in any schedule * * * upon any of the embroideries of the materials of which such embroidery is composed," is not restricted to the articles previously enumerated in the same paragraph, but extends to other portions of the act. Silk-embroidered cotton hosiery is therefore dutiable at the rate applicable to silk embroideries, when such rate exceeds that provided for cotton hosiery in paragraph 318, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1660.]

2. SAME—SPECIFIC DESIGNATION.

With respect to embroidered hosiery, the provision in paragraph 339, Schedule J, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], for "wearing apparel * * * embroidered in any manner by hand or machinery, * * * composed wholly or in chief value of flax, cotton, or other vegetable fiber, * * * and not elsewhere specially provided for," is less specific than the provision in paragraph 318, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1660], for "stockings, hose and half-hose * * * composed of cotton or other vegetable fiber."

3. STATUTORY CONSTRUCTION—SCOPE OF PROVISO.

While ordinarily a proviso is to be strictly construed and held confined to what precedes it, yet, when manifestly intended to be applied generally to the entire act, it must be so treated and construed.

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

For decision below, see 137 Fed. 978, affirming a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of Baltimore. Note G. A. 4,721 (T. D. 22,357).

This was an appeal by the importers from a decision of the Circuit Court of the United States for the District of Maryland sustaining the decision of the Board of United States General Appraisers as to the proper duties collectible upon certain merchandise imported by them per vessel Karlsruhe, January 5, 1901, and subject to duty under the provisions of "An act of Congress to provide revenue for the government, and to encourage the industries of the United States," approved and which took effect July 24, 1897. The importation which was the subject of the protest and the subsequent decision of the Board of General Appraisers, and of the Circuit Court for the District of Maryland, is thus described in Exhibit D: "Certain hose and half-hose of cotton in open work or lace effects, and having embroidered upon them dots or other designs in colored silk thread." The controversy between the importers and the government was as to whether the importation was dutiable under the provisions of paragraph 318, Act July 24, 1897, c. 11, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1660], as is contended by the former, or under those of the proviso to paragraph 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662], as is contended by the latter.

Those paragraphs, in so far as they are applicable or important to be considered, read as follows:

"318. Stockings, hose and half-hose, selvedged, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames, or knit by hand, including such as are commercially known as seamless stockings, hose and half-hose, and clocked stockings, hose or half-hose, all of the above composed of cotton or other vegetable fiber, finished or unfinished. * * *"

"339. * * * Embroideries, and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; * * all of the foregoing composed wholly or in chief value of flax, cotton or other vegetable fiber, and not elsewhere specially provided for in this Act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: Provided, that no wearing apparel or other textile fabric, when embroidered by hand or machinery shall pay duty at a less rate *than that imposed in any schedule in this Act upon any of the embroideries of the materials of which such embroidery is composed.*" (Italics ours.)

Under paragraph 318 a specific duty is levied upon each dozen pairs imported, the duty varying with the price per dozen pairs, and in addition thereto, an ad valorem duty is imposed. Upon some of the grades of half hose, the provisions of paragraph 318 would impose a duty in excess of the 60 per cent. ad valorem duty levied by the collector on this importation, but it is admitted that in the case at bar the duty provided by paragraph 318 is less than 60 per cent. ad valorem.

The assignments of error relied upon by the appellants are as follows: "First. In that the said court held that the merchandise in suit was dutiable at 60 per cent. ad valorem under paragraph 339 of the tariff act of July 24, 1897. Second. In that the said court held that said merchandise was not dutiable under paragraph 318 of said tariff act. Third. In that the said court held that said merchandise was not specifically provided for in paragraph 318 of said tariff act. Fourth. In that the said court held that said merchandise was more specifically or aptly described in paragraph 339 of said tariff act than in paragraph 318 of said act. Fifth. In that the said court did not hold that said merchandise was classifiable and dutiable, either directly, or by similitude, at the appropriate rate under paragraph 318 of said tariff act, according to value per dozen pairs. Sixth. In that the said

court did not hold that said merchandise was classifiable and dutiable as claimed by the importers either directly, or by similitude, at 30 per cent. ad valorem under paragraph 317 of said tariff act. Seventh. In that the said court affirmed the decision of the Board of General Appraisers. Eighth. In that the said court did not reverse the decision of the Board of General Appraisers, and sustain the protests."

J. Stuart Tompkins (Hatch, Keener & Clute, on the brief), for importers.

John C. Rose, U. S. Atty.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

KELLER, District Judge (after making the foregoing statement): This case depends upon the proper construction and application of the proviso contained in paragraph 339 of the tariff act of July 24, 1897, and it was admitted in argument that, if that proviso was applicable to other schedules in the act than those contained in paragraph 339 itself, the appellants could not win this case; but it was strenuously contended that the operation of this proviso was limited entirely to the things mentioned in that paragraph. We will hereinafter discuss the purpose and effect of this proviso.

The appellants contend with force and effect that the commercial classification in paragraph 318 (and also 317) is more apt, specific, and definite, as applied to the articles embraced in this importation, than that found in the body of paragraph 339, and hence that the provisions of paragraph 339 cannot provide the duty to be imposed. This, we think, may at once be conceded, and, as the government contends that paragraph 318 is applicable to half hose embroidered, whenever the duties imposed by that paragraph exceed 60 per cent. ad valorem, it would be very inconsistent to hold that paragraph 318 specifically describes embroidered half hose of one cost value, and does not so describe the same article having another cost price. We have no hesitancy, then, in holding that the provisions of the body of paragraph 339, eo nomine, do not apply to this importation, and, in so far as the opinion of the district judge holds that they do so apply, his opinion is disapproved for the reasons hereinbefore given. Were paragraph 339 denuded of its proviso, we would, we think, be bound to hold that this importation would be dutiable under the provisions of paragraph 318.

This brings us to consider the proper interpretation and effect of the last clause embodied in paragraph 339, which reads as follows:

"Provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery shall pay duty at a less rate than that imposed in any schedule of this act upon any of the embroideries of the materials of which such embroidery is composed."

It is familiar doctrine that a proviso is to be strictly construed, and that it should be confined to what precedes it, unless it clearly appears to have been intended to apply to other matters also. Endlich Interp. of Stats. § 186; Suth. St. Const. § 223; Potter's Dwarris, 272; Boston Safe Deposit & Trust Co. v. Hudson, 68 Fed. 760, 15 C. C. A. 651, but it is equally fundamental that, when by the terms of the proviso

it manifestly appears it was intended to apply generally to the entire act, it must be so treated and construed. In Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377, it was said that the general purpose of a proviso is to except the clause covered by it from the provisions of a statute, or to qualify the operation of the statute. But the word "provided" is often used "as a conjunction to an independent paragraph."

The clear general purpose of this clause is to provide, by reference, a minimum duty upon wearing apparel and other articles or textile fabrics when embroidered. The purpose of the paragraph to which it was attached was to provide a duty upon vegetable fiber embroideries, etc., and wearing apparel, etc., composed wholly or in chief value of vegetable fiber, embroidered, and not otherwise specially provided for. That the proviso cannot be limited to the articles named in the body of the paragraph is, we think, apparent upon a careful reading of both.

It is to be observed that the "wearing apparel," and other "articles or fabrics" mentioned in the body of the paragraph, are confined to such as are "composed wholly or in chief value of flax, cotton or other vegetable fiber and not elsewhere specially provided for in this act"; but the language of the proviso is not thus restricted. It enacts that "no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than imposed" upon embroideries of the material used in the embroidery. This manifestly extends far beyond the body of the paragraph and applies to textile fabrics, of whatever material composed, when embroidered. That this is a correct interpretation of the extent of this proviso was substantially held in Thomas v. Wanamaker, 129 Fed. 92, 63 C. C. A. 594, in which the Circuit Court of Appeals for the Third Circuit adopted the opinion of the Board of General Appraisers. In that case, which involved an importation of wool robes embroidered in silk, one of the contentions of the importer was that the conjoint provisions of the proviso to paragraph 339 and paragraph 390 (30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]) should govern in fixing the duty upon the importation, but it was held by the board that these provisions prescribe merely a minimum rate of duty upon such merchandise, which is much less than that imposed by paragraph 369, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], which latter was found applicable to the case. The decision, however, shows that, had the conjoint rate been higher than that fixed by paragraph 369, the proviso to paragraph 339 would have been applicable to wool robes embroidered in silk.

The appellants have argued that the application of this proviso is much restricted as compared with that found in paragraph 373 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 594, which was substantially like this except that it embraced the phrase, "Whether specially or otherwise provided for in this act." We are not impressed by the argument, and are inclined to the belief that the proviso means as much with this language omitted as it would with the language retained. However, we are not called upon to decide that. Had paragraph 318 contained the specific designation "embroidered" among its terms, it would have been directly necessary for us to pass upon

this question, but in the absence of such specific word in paragraph 318 we do not think it necessary to do so. In view of our holding as to the general character of the proviso to paragraph 339, it is unnecessary for us to consider the assignments of errors separately.

Holding, as we do, that it is not the body of paragraph 339 that is applicable to fix the duty upon this importation, but the proviso thereto, we must look for the amount of duty imposed to the proper schedule to which reference is made by that proviso. The record shows that the material of which the embroidery upon this importation is composed is "colored silk thread." We must, therefore, look to the schedule for silk embroideries to determine what rate is applicable in this case. This is found in paragraph 390, and imposes on silk embroideries a duty of 60 per cent. ad valorem.

It is a coincidence that the duty imposed by paragraph 390 is the same as that imposed in the body of paragraph 339, but this coincidence should not be allowed to blind one to the fact that paragraph 339 (that is, the body of it) is not in any way applicable to the case. Had the embroidery upon the importation been of cotton, or other vegetable fiber, then, indeed, paragraph 339, by reference from the proviso, would have been applicable.

The purpose and effect of the proviso to paragraph 339 is similar to that of the proviso to paragraph 373 of the act of October 1, 1890, in construing which the Circuit Court of Appeals for the Second Circuit said:

"Thus an article of wearing apparel, of whatever material composed, which is embroidered in silk, shall not pay a less rate of duty than that imposed on silk embroideries." In re Schefer, 53 Fed. 1011, 4 C. C. A. 153.

We hold that the importation is dutiable under the minimum proviso contained in paragraph 339, by reference to paragraph 390, and, as the Circuit Court reached the correct conclusion as to the amount of duty to be levied, its conclusion in that regard is affirmed; but, in so far as the opinion of the court seems to hold that the importation is dutiable under the provisions of the body of paragraph 339, its findings are disapproved.

The proper basis for the levy of the minimum duty applicable to "hose and half-hose of cotton in open work or lace effects, and having embroidered upon them dots or other designs in colored silk thread," is the proviso to paragraph 339 by reference to paragraph 390, as hereinbefore mentioned.

Affirmed.

HASTING v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 620.

1. RAILROADS—INJURY OF PERSON BY MOVING TRAIN—STATUTE RELATING TO CROSSINGS.

Civ. Code S. C. 1902, §§ 2132, 2139, prescribing the duties and liabilities of railroad companies in running trains over highway crossings, as construed by the Supreme Court of the state, can be invoked in an action

to recover for a personal injury only where the injury occurred at a crossing and by reason of a collision with a train.

2. SAME—ACTION FOR INJURY TO TRESPASSER—ACTIONABLE NEGLIGENCE.

Plaintiff's intestate, a boy eight years old, finding a highway crossing obstructed by cars of defendant railroad company, walked to the station platform, 40 or 50 feet from the crossing, and stepped from it to the platform of a car standing on a side track, and while thereon the car was struck or moved by an engine engaged in shifting cars on the side track, and he was thrown under the moving cars and killed. His presence on the station platform or car was not known to any of defendant's employés. *Held*, that he was a trespasser, to whom defendant owed no duty, except that of not willfully, wantonly, or intentionally injuring him; and that the direction of a verdict for defendant, on the ground that no negligence rendering it liable for the death was shown, was justified.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1238, 1239, 1367.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

Jos. A. McCollough, for plaintiff in error.

C. P. Saunders, for defendant in error.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PURNELL, District Judge. Paul Hasting, an infant, son of the plaintiff, eight years old, was killed at Welford, S. C., a station on the line of the defendant's road, by being thrown from the platform of a shanty or caboose car and run over in the yard of the defendant while the defendant was engaged in shifting and coupling cars.

The complaint alleges that the deceased was going from his home to an orchard of his father's, and in order to do so it was necessary for him to cross the track of the defendant where the public highway or street intersects the same. When he arrived at this point he found the highway blocked with cars, and it so remained for an unreasonable and unlawful length of time, and the deceased being induced by the conduct of the defendant company, or its agent, attempted to cross from the platform of the station to the platform of the shanty car, and, while he was so doing, the defendant, in a careless and negligent manner, backed its engine against a line of cars connected with the said shanty car with such force as to throw the deceased from the platform to the track and under the wheels of a car, and the negligence of the defendant consisted in the unlawful blocking of the public highway with its cars, and the failure of the company to furnish a lookout to warn persons attempting to cross the track at this station, and the failure to ring the bell or sound the whistle or to give any warning before moving the cars.

The following facts appear by the testimony: On the day alleged, the defendant was engaged in shifting cars at Welford, S. C., with an engine of one of its freight trains. In doing this it was necessary for it to move the engine from the main line to the side track, on which several freight cars, including the shanty car, were standing. In going back into the side track, and in undertaking to couple

cars there, it shoved some of the cars back, striking and moving the shanty car on the platform of which the deceased was standing. In shifting from main line to side track the noise made by the engine was heard by persons at some distance from the track. In moving these cars it used due care, coupling them in the ordinary and usual way. Deceased left the street in the town of Welford, walked down to the depot of the defendant, finding the cars across the street, and, without waiting for them to move, at once left the street or highway and entered upon the depot platform of the defendant, and at a point 40 or 50 feet away from the highway undertook to cross over by stepping from the depot platform to the shanty car. While he was on the platform of the depot going towards the shanty car, the engine which was doing the shifting was in sight and hearing of the deceased and others. Just before, and as he was about to step from the platform to the shanty car, a negro standing on the platform warned him and told him not to do so, telling him to come back. The deceased, instead of heeding the warning, made a mouth at the negro, left the depot platform, and entered on the shanty car. Immediately after he had done so, the engine, in coupling the cars, shoved or moved this shanty car, and the deceased, who was standing on its platform, fell off, and the wheels of the car ran over him, inflicting injuries from which he died.

The testimony also shows that none of the employés of defendant had any knowledge that the deceased was on or about the depot or cars. There is no allegation of willfulness and wantonness or of the earning capacity of deceased, nor was there any testimony introduced tending to show such facts. His honor, the presiding judge, directed a verdict for the defendant, from the judgment based thereon plaintiff appealed.

There was no error in the trial judge directing a verdict, if, after the testimony, the court was, as stated in the record, "of the opinion that there is no sufficient proof of negligence to sustain a verdict and it [the court] would set aside any verdict that is rendered." The courts of the United States have so often decided this question that it seems useless to cite authorities which were collated by this court in an appeal from the same district as the case at bar, at the last term of this court, in Turnbull v. Ross et al., 141 Fed. 649. It may be taken as settled law. Of course, the action of a trial judge in directing a verdict is subject to review, but error in so doing must be plainly pointed out. Appellate courts will not lightly set aside a verdict directed by a trial judge who has heard the whole case and thus expressed his deliberate opinion that either party is not entitled to a verdict. Many of the exceptions in the record appear to be based on a different view of the law as to the duties of a trial judge. This erroneous view of the law is expressed in nine paragraphs of the bill of exceptions, or nine exceptions.

The statement of the trial judge is not based on the question of contributory negligence, which is interjected into the briefs and argued at length. It is held by many of the courts, as cited in Pierce on R. R., 338, and note, that the negligence of parents in allowing

children of tender years to wander unattended upon a railroad is contributory negligence which will defeat an action by the parents. The same doctrine, in Manly v. Railroad, 74 N. C. 655, and other cases citing and affirming this decision, which is founded on good law, common sense and equity. But, as said, this does not seem to have entered into the reasons of the trial judge, who puts his action plainly and explicitly on the one ground "that there is not sufficient proof of negligence to sustain a verdict." It will be noted the facts proved do not measure up to the allegations of the complaint. There is a material difference in the allegations and facts proved. There is no controversy about the facts stated as proved or appearing by the testimony. Much is said in the briefs and the argument, in fact great stress is laid, on the fact that the highway or street was blocked, in violation of the town ordinance of Welford. The city or town ordinance was proved by parol testimony to have been passed and advertised, as was another ordinance prohibiting boys trespassing on the railroad yards and jumping on the cars—the last having been caused by the action of the Hasting boys and others; but neither ordinance is set out in the record, and hence cannot be considered. The South Carolina statute, too, in regard to sounding the whistle at crossings, is invoked; but the first part of this statute clearly applies to moving, not standing, trains, and is intended to give warning to people who are traveling the highway, not to boys eight years old who leave the highway, and after being warned persist in crossing the track on a shanty car some distance from the highway. Most of the statute has no application to the case at bar. The deceased was not traveling the highway, was not on the highway, but had left it and gone on the station property of defendant.

Was the deceased a trespasser? If he was, then the railroad company owed him no duty, except not to wantonly or willfully injure him. The accident, to be covered by the statute, must be at a crossing. This is the trend of decisions of the Supreme Court of South Carolina, construing this statute. Neely v. Railroad, 33 S. C. 136, 11 S. E. 636; Barber v. Railroad, 34 S. C. 444, 13 S. E. 630; Hankinson v. Railroad, 41 S. C. 1, 19 S. E. 206; Hutto v. Railroad, 61 S. C. 495, 39 S. E. 710; Sims v. Railroad, 59 S. C. 254, 37 S. E. 836. And a collision between the train and the traveler must have occurred. Kinard v. Railroad, 39 S. C. 514, 18 S. E. 119; Whilton v. Railroad (C. C.) 57 Fed. 551.

Was the boy a trespasser? He was not there for the purpose of transacting any business with, or at the invitation of, the defendant company, but solely for his own convenience. He had left the highway crossing and was some 50 feet therefrom, not on business, but for the purpose of crossing to go to an orchard, without the knowledge of, or at the instance of, the defendant.

In Cleveland, C., C. & St. L. Ry. Co. v. Tartt, 64 Fed. 831, 12 C. C. A. 618, the court, in considering the liability of a railway company for the death of a boy eight years and seven months old who was killed on the track of defendant, held the company was not liable, for the reason that the boy was a trespasser, and was old enough to be prima facie responsible for his trespasses, as well as chargeable

with contributory negligence for a failure to exercise ordinary care, having regard to his age and intelligence and the circumstances in which he was placed when killed. In Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436, a boy nine years old was killed while crossing the track of the defendant's railroad within the corporate limits of a city, at a point where there was no street or highway crossing, and while in the private yard of the defendant company. Held the boy was a trespasser, and the defendant company owed him no duty except that of not willfully, wantonly, or intentionally injuring him. See, also, Railroad v. Bennett, 69 Fed. 525, 16 C. C. A. 300; Railroad v. Cook, 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181. In 3 Elliott on Railroads, §§ 1259, 1260, the liability of a railroad company to children trespassing on its track is fully discussed and numerous authorities cited, and the conclusion reached is: A railroad company owes to trespassing children no greater or higher duty than it owes to trespassing adults, unless there is something in the case which would tend to show that the company knew, or ought to have known, that the child was on or about its premises. This principle has been followed in South Carolina. In Darwin v. Railroad, 23 S. C. 531, 55 Am. Rep. 32, a boy, with the knowledge of the engineer, was on the pilot of the engine. There was a collision, and the boy was killed. Held that, as the boy had unlawfully intruded himself on the engine and cars of the defendant, he was a trespasser, and the only duty the company owed him was not to willfully, wantonly, or intentionally injure him. And in Burns v. Railway Co., 63 S. C. 46, 40 S. E. 1018, a boy, at the invitation of the engineer and conductor, went into the cab of a material train, and while the train was on a bridge so high from the ground that the boy could not get out, and when thus situated, a freight train ran into the cab and injured the boy. The complaint did not allege any willful, wanton, or intentional injury. A demurrer was interposed. The demurrer was sustained; the court holding that the boy was a trespasser, and that the defendant company was not liable, except for a willful, wanton, and intentional injury.

In the case at bar there is no allegation or proof tending to show willfulness or wantonness on the part of the defendant company.

It was contended that as there was evidence tending to show that the highway crossing was blocked for such an unreasonable time that the deceased had a right to leave the highway and cross at another point. Littlejohn v. Railway, 49 S. C. 12, 26 S. E. 967, is relied upon to sustain this contention. In that case the court does say that if a railway company obstructs a highway for an unreasonable length of time, or for a longer time than the law permits, unless it is without fault, the company thereupon becomes a trespasser, and if a person makes a reasonable use of its cars, without injury to them, at a crossing, for the sole purpose of crossing the railroad track, then the railroad company would be estopped from saying that he is a trespasser. The facts in the case, however, are not the facts in the case at bar. In that case Littlejohn undertook to climb over between the cars on the crossing, and the court, in discussing this question and in deciding the case, uses the expression:

"If a person makes a reasonable use of its cars, without injury to them, at a crossing, for the sole purpose of crossing the railroad track, the railroad company is estopped from saying that he is a trespasser."

The court seems to have considered as an important factor that Littlejohn remained on the highway, where he had a legal right to be, while in the case at bar the deceased had of his own motion left the highway and gone on the private property of the railroad company.

The statute law of the state, on which the plaintiff in error relies, is as follows (1 Code Laws S. C. 1902):

"Sec. 2132. A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street, or traveled place; and if such engine or cars shall be at a standstill, within a less distance than one hundred rods of such crossing, such bell shall be rung, or whistle sounded, for at least thirty seconds before such engine shall be moved; and shall be kept ringing or sounding until such engine shall have crossed such public highway or street or traveled place."

"Section 2139. If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contribute to the injury."

The accident did not happen on a street or highway crossing or other traveled place where the deceased had a right to be, neither was there a collision between the deceased and the train of the defendant company. The statute therefore does not apply. The object and purpose of the statute is to prevent a collision between a person on the crossing and the cars or engines of the railroad company. It has no reference to a trespasser and applies stricti juris to crossings. Under the facts as proved, there was no sufficient proof of negligence on the part of defendant to entitle plaintiff in error to a verdict for damages. There is no merit in the other exceptions to the rulings of the court as to the exclusion of testimony, which could in no way affect the case if admitted. Those exceptions raise questions which might have influenced or affected the prejudice of a jury, but on the merits of the case are without weight.

The Circuit Court is therefore affirmed.

UNITED STATES ex rel. GREENBRIER COAL & COKE CO. v. NORFOLK & WESTERN RY. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 623.

CARRIERS—MANDAMUS—ENFORCEMENT OF COMPLIANCE WITH INTERSTATE COMMERCE ACT—EFFECT OF AGREEMENT.

An arrangement between an interstate railroad company and coal shippers in a certain field, fixing a basis which should be considered equitable for the distribution of cars between such shippers, does not operate to relieve the railroad company from the obligations imposed on it by section 3 of that interstate commerce act of February 4, 1887 (24 Stat. 380, c. 104 [U. S. Comp. St. 1901, p. 3155]), to treat shippers without discrimination, nor does it deprive one of such shippers of the right to maintain a proceeding in a federal court for a writ of mandamus under the amendatory act of March 2, 1889 (25 Stat. 862, c. 382, § 10 [U. S. Comp. St. 1901, p. 3172]), to compel the company to furnish to relator its equitable proportion of cars, upon allegations that the basis of distribution fixed by the agreement was equitable and that defendant has refused to observe it, but has discriminated in favor of other shippers; the agreement being in fact in aid of the act by fixing as between the parties what should be considered and accepted as a compliance with its requirements.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 120; vol. 33, Cent. Dig. Mandamus, § 268.]

In Error to the Circuit Court of the United States for the Southern District of West Virginia.

For opinion below, see 138 Fed. 849.

Geo. E. Price, C. W. Dillon and Wm. A. Glasgow, for plaintiff in error.

John H. Holt and Z. T. Vinson (Brown, Jackson & Knight, Holt & Duncan, Vinson & Thompson, Jos. I. Doran, and D. E. Johnston, on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and WADDILL, District Judge.

PRITCHARD, Circuit Judge. This is a petition for mandamus to the Circuit Court of the United States for the Southern District of West Virginia, under the provisions of the act of Congress of March 2, 1889, alleging a violation of "An act to regulate commerce," approved February 4, 1887, and acts supplementary thereto. Upon this petition an alternative writ of mandamus was awarded, and on the 6th day of June, 1905, the parties defendant appeared and a motion was made by the railway company and certain other defendants to quash the alternative writ of mandamus and each paragraph thereof, which motion the court sustained. The allegations upon which the writ is asked are that the Norfolk & Western Railway Company is a common carrier, and is subject to the provisions of "An act to regulate commerce," and the several acts amendatory and supplemental thereto, and said railway company is engaged in carrying coal and coke for the plaintiff company and other coal companies in the state of West Virginia in various markets in other

states; that the Norfolk & Western Railway Company agreed that the car supply furnished by it to the several shippers of coal along its line would be distributed pro rata to such shippers; that the railway company agreed that the coke ovens owned and operated by the respective coal shippers along the line of the said railway should form the basis of coal car distribution, and that the car supply furnished by the said railway company between the respective coal shippers mentioned would be distributed to each shipper in the same proportion as the number of ovens owned and operated by such shipper bore to the whole number of ovens owned and operated by all the shippers of coal from such field; that said coke ovens basis of distribution was and is equitable and fair; that the railway company agreed, with the plaintiffs in error and all the other coal companies mentioned as defendants, that the car supply would be furnished upon the coke ovens basis aforesaid; that the railroad company had declined to furnish the plaintiff in error with the number of cars to which it was entitled under this basis of distribution; that the railway company has departed from such basis of distribution and has furnished to coal companies, other than the plaintiff in error, more than their fair number of cars, and the railway company thereby discriminated against the plaintiff in error, and did not carry out the fair and equitable basis of distribution above set forth. Upon the hearing the Circuit Court held that, inasmuch as all the parties interested in the distribution of cars had agreed upon a method of distribution according to an arbitrary basis, it could not enforce such an agreement by mandamus under the act of March 2, 1889.

The main question presented for consideration is whether the court erred in sustaining the motion to quash the alternative writ of mandamus. Section 3 of the interstate commerce act, approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), in pursuance of which the petition was filed herein, is as follows:

"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," etc.

This section, while comprehensive in its scope, did not afford effective means by which the provision of the act could be carried into effect, and as a result Congress passed a supplemental act on the 2d of March, 1889 (25 Stat. 862, c. 382 [U. S. Comp. St. 1901, p. 3172]), section 10, of which is as follows:

"That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against

said common carrier, commanding such common carrier to move and transport the traffic or to furnish cars or other facilities for transportation for the party applying for the writ: provided, that if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

The purpose of this act is to place "all shippers on an absolute equality." The sections in question were intended to prevent discrimination in all branches of freight traffic. The language employed therein is plain, and leaves no doubt as to the true intent and meaning of Congress in the enactment of this legislation. There is nothing in the interstate commerce act, nor in the acts supplemental thereto, which undertakes to describe any particular method of service by common carriers, either in equipment and allotment of cars or the manner of movement of traffic. It leaves the carrier free to make such an arrangement with its shippers as it may deem proper, but the basis of distribution must be such as to put "all shippers on an absolute equality" and to transport traffic for each shipper "upon terms and conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper," provided that it does not give "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 subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable preference or disadvantage in any respect whatsoever."

It is insisted by the defendants in error that the allegations contained in the petition for the writ of mandamus do not bring this case within the purview of the statute; that the operators in the Pocahontas coal fields, by entering into an agreement with the common carrier as to the basis upon which the distribution of cars is to be made, have placed themselves in a position where the United States Court is powerless to interfere by mandamus as provided in section 23 of the act of March 2, 1889, to prevent the discrimination forbidden in section 3 of the interstate commerce act. In other words, it is insisted that the agreement between the shipper and the common carrier to adopt the coke ovens basis as the means by which to secure a proper distribution of cars among the shippers is in the nature of a contract, and that the United States court has no power to compel the execution of a contract by mandamus. This would undoubtedly be true if the plaintiff in error relied upon a contract as the basis of its cause of action, but in this case the agreement entered into between the shippers and the carrier is not a contract in the ordinary acceptation of the term. A mere arrangement between the railroad company and its patrons, relating solely to the basis upon which an equitable and fair distribution of cars could be secured, does

not operate to relieve the carrier from the obligations imposed by section 3, nor does the shipper lose the rights or remedies of section 23 of the act of March 2, 1889, supplemental thereto.

The agreement in question is clearly in aid of the interstate commerce act, and, at most, is but an expression of opinion by the carrier on the one hand and the shipper on the other as to what they deem a proper basis for an equitable distribution of cars among shippers. Some such arrangement was necessary in order to enable the carrier to properly understand what would constitute a compliance with the statute on its part, and at the same time to enable the shipper to ascertain and enforce his rights in accordance with section 3, in the event he should be of opinion that the acts of the carrier were such as to amount to a discrimination against him as contemplated by the statute. It merely indicates a disposition on the part of the shipper to accept his proportionate share of the cars to be allotted by a particular method of distribution as being a substantial compliance with the statute by the carrier. To hold otherwise would be to decide that the carrier by entering into an agreement with the shipper as to the basis or means by which the distribution of cars is to be made could thus by indirection nullify the plain provisions of the statute. The only defense which the shipper could interpose as a reason for not complying with the act would be to show that such basis was not a reasonable or just one, and that is a matter which cannot be considered in the present state of the pleading, and one which the court would not have been justified in considering in passing upon a motion to quash. The case of Interstate Stockyards Co. v. Indianapolis Union R. R. Co. (C. C.) 99 Fed. 472, bears directly on this point. In that case the Belt Line Railroad Company and the stockyards applied to the City of Indianapolis for assistance in the construction of a belt line around the city, and, among other things, it agreed as follows:

"That it would construct said railroad, together with all necessary and proper switch connections with other railroads crossed by it, and with permission to manufacturers and others to connect with it by switches and side tracks."

In pursuance of this agreement $500,000 of the bonds of the city were given to the Belt Line Railroad Company, with the understanding that it should extend to all persons doing business on or along the line of the said railroad full facilities to connect switches with the said road, and carry and transport freight to and from such switches at rates per car not exceeding that charged by said company for transporting through freight of a like class and character over said road. Although the Interstate Stockyards Company was the owner of one of the switches connected with the Belt Line Railroad, such road refused to transport freight for it as others similarly situated. Suit was brought in the Circuit Court of the United States to compel the transportation of freight for the Interstate Stockyards Company on the ground that the refusal of the Belt Line Railroad Company to transport such freight was discrimination forbidden by the interstate commerce act. The Belt Line Railroad

Company contended that the jurisdiction of the court was limited to the enforcement of rates growing out of national legislation, and in the absence of diverse citizenship that the articles of incorporation and the ordinance conferring such were irrelevant, and should be disregarded upon the theory that, if a contract was executed, that the court could not assume jurisdiction under the interstate commerce act to enforce such a contract.

In this case Judge Baker, who delivered the opinion of the court, among other things, said:

"But why is the complainant not entitled to show that its right to such switch service for interstate freight consigned to or received by it does not rest solely upon the ground that such service is voluntarily afforded to others and denied to it? Is it any the less a discrimination, within the prohibition of the interstate commerce act, that the party complaining has a legal right created by ordinance and statute to the service which is denied, than if the right to such service grew out of mutual arrangement between connecting interstate carriers? The duty in the one case grows out of contract, and in the other is created by law. But in each case the obligation to perform the duty is equally binding. Neither grows out of federal legislation, but either may be looked to in determining whether there has been a discrimination in the performance of that duty within the prohibition of the interstate commerce act. The thing forbidden by the federal statute is discrimination by a carrier engaged, in whole or in part, in the transportation of interstate freight and whether the existence of such discriminations depends on the duty of the carrier created by statute or on a duty growing out of contract, express or to be inferred from a common course of business, would seem to be quite immaterial. The jurisdiction of this court does not depend upon the ultimate determination of the case, but on the question whether it is made to appear by the averments of the bill of complaint that the Union Railway Company has discriminated, within the true intent of the interstate commerce act, in failing to perform a legal duty owing to the complainant by refusing to deliver or to receive interstate freight, consigned to or by it on through bills of lading on its switch connected with the Belt Railroad. It seems to me that the complaint shows the existence of a duty imposed upon the Union Railway Company to deliver and receive interstate freight consigned to or by the complainant on its switch connected with the Belt Railroad. The agreement referred to in the complaint, and hereinbefore set out, leads to the same conclusion."

It matters not how petitioner's right to an equal distribution of cars may have arisen, whether by contract, statute, or common law. The plaintiff in error avers that it has such legal right, and that the defendant in error is discriminating against complainant. The interstate commerce act clearly forbids the discrimination described in the bill, and we are therefore of the opinion that the court has the power under the interstate commerce act and the act of March 2, 1889, supplemental thereto, to prohibit such discrimination. A careful consideration of the statutes bearing on this subject leads us to the conclusion that to adopt any other construction would be to render the interstate commerce act, in so far as it relates to discrimination, of no force, and to defeat the obvious purpose for which it was enacted.

The court below erred in allowing the motion to quash the alternative writ of mandamus. We are also of the opinion that the court erred in not allowing the amendment which was offered by the plain-

tiff in error to the petition and the alternative writ of mandamus. The amendment should have been allowed.

The judgment of the Circuit Court is therefore reversed, with instructions to proceed in accordance with the views herein expressed.

Reversed.

FIDELITY & CASUALTY CO. OF NEW YORK v. STACEY'S EX'RS.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 626.

INSURANCE—ACTION ON ACCIDENT POLICY—ACCIDENTAL DEATH.

The holder of a policy, insuring him against disability or death "resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent and accidental means," committed an assault and battery on a person who made no resistance, and, in striking such person in the face, injured his hand, and a few days later died from the effects of blood poisoning which developed in the wound. *Held*, that such injury, which was the direct means causing the death of the insured, being the natural result of a voluntary act committed when he was in full possession of his mental faculties, was not "accidental," within the meaning of the policy, and did not give a right of action thereon to recover for the resulting disability or death.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1162.

Accident insurance—Risks and causes of loss, see note to National Accident Society of New York v. Dolph, 38 C. C. A. 3.]

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

For opinion below, see 137 Fed. 1012.

C. P. Sanders and T. P. Cothran (Sanders & Depass and W. S. Hall, on the brief), for plaintiff in error.

H. J. Haynsworth (J. C. Jeffries, on the brief), for defendants in error.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PRITCHARD, Circuit Judge. This is an action at law based on what is known as an accident insurance policy, and was brought by the defendants in error against the Fidelity & Casualty Company of New York, to recover $5,000 on an accident policy which the plaintiff in error had issued to Frederick G. Stacey, the testator of the defendants in error.

The complaint alleges that, on the 23d day of February, 1903, the plaintiff in error issued to Frederick G. Stacey, the testator of the defendants in error, its policy of insurance, and thereby insured the said Stacey "against disability or death resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent and accidental means (suicide, sane or insane, not included), and it thereby promised to pay to the executors, administrators, or assigns of the said Frederick G. Stacey, the sum of $5,000 if death should result within 90 days from said injuries."

It also alleges that while said policy was still in force the said Stacey departed this life, and that his death resulted directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means, to wit: an injury to his hand which was received on or about June 8, 1904. The answer of the plaintiff in error admitted that it issued the policy mentioned in the complaint, and that the said Stacey departed this life while the policy was in force. It, however, denied the other allegations of the complaint and set up the defense that the death of the said Stacey was caused or brought about by a violent act of his while he was committing an assault and battery on one of the citizens of South Carolina. The case was tried, resulting in a verdict and judgment for defendants in error.

In order to comprehend the questions involved in this case, it is necessary to recur to the testimony upon which defendants in error base their cause of action. The testimony, about which there is no contention, is as follows:

"Stacey was president of the National Bank of Gaffney. He and one Porter had some business transaction in the bank, during which Porter charged Stacey with having required him upon a former occasion to accept less then the face value of a certain check issued by J. A. Carroll & Company (of which firm Stacey was a partner), in the conduct of their lime business, and that he (Stacey) would not pay his debts, specifying one Jones as the party whom Stacey owed and would not pay. Stacey then insisted that Porter accompany him to Jones' place of business, where he could face Jones with the charge. On the way they met W. C. Carpenter, another member of the firm of J. A. Carroll & Co. Then this conversation occurred:

"Stacey: 'That man says that we beat him out of some money.'

"Carpenter: 'How?'

"Stacey: 'He says he had a lime check and Carroll discounted it 10 per cent.'

"Carpenter: 'I don't think so. Those checks are always at par.'

"About that time Carroll, the other member of the firm, came in sight and was about to pass them, when Stacey called him to come to where they were talking. When he got to them, Stacey repeated to Carroll, in substance, what he had said to Carpenter. Carroll denied it, making about the same explanation as Carpenter had made. Stacey then said: 'I knew that he was telling a lie about it.' Porter replied: 'You are another liar.' As soon as Porter said that, Stacey struck him with right hand, staggering him, and immediately followed it up with a blow from his left hand upon or about the mouth, knocking him down. Porter made no resistance, but got up and walked off. Stacey immediately looked at his finger and showed it to Carroll, where he had cut his knuckle. He gave it some immediate attention, but it grew steadily worse, developing into blood poison, followed by amputation of the arm and death, on the 28th of June, 1904."

This being an action at law, if the defendant in error is entitled to recover at all, it must be upon his contract of insurance, and not otherwise. The contract provides for the liability of the plaintiff in error for the death of the insured, provided that such death results "directly, and independently of all other causes, from bodily injuries sustained through external, violent and accidental means." According to the evidence, the insured, while in a fit of temper on account of something that Porter had said about him in connection with a transaction at his bank, accosted him on the street and engaged in a conversation, and, at a time when Porter was making

no demonstration of violence, assaulted him on the face, first with his right hand and then with his left; the last blow landing in Porter's mouth, coming in contact with one of his teeth, thereby causing a slight abrasion of the skin of one of the fingers of the insured. Subsequently thereto the finger became infected, which resulted in blood poison, and from the effect of which he died in about 20 days thereafter. It thus appears that the insured, at a time when he was in full possession of his mental faculties, accosted Porter and engaged in a controversy in consequence of which he committed an assault on the body of Porter, evidently for the purpose of punishing him for what had just occurred between them. Everything connected with the transaction clearly indicates that the insured intended to do exactly what he did on that occasion. Therefore the injury which he received at the time was the natural and logical result of an intentional act on his part. He was a man of intelligence, and it must be presumed that he knew that in making an assault with his fist in the manner described he would probably sustain more or less injury to himself.

If, in this instance, it had been shown that, instead of striking an individual, the insured had deliberately struck a tree or a wall with his fist, it could not have been successfully contended that an injury received in consequence thereof would be due to an accident. It would be doing that which was intended, and as a result of which he might have reasonably inferred that he would sustain an injury. Or if the wound which the insured received on his knuckle had been only of such a character as to disable him temporarily, it could not be insisted that, having received the injury, under the circumstances, he would be entitled to compensation for loss of time sustained thereby. In order to enable one to recover in an action based on an accident policy on account of accidental injury, it must be shown that the insured would be entitled to recover for the original injury; and, unless it appears that such original injury was due to an accident then known, or the results flowing therefrom could be imputed to the result of an accident, recovery could not be had. All other results are accidental causes disconnected with the original cause, and cannot be said to flow therefrom.

In the case of Mutual Accident Ins. Co. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, it appeared that three men jumped from a platform. Two of them alighted without injury. The third, observing that his comrades had alighted in safety, and feeling that he would incur no risk in doing that which others had done without injury, also jumped, and received an injury from which he died. In that case the court held that the death of the deceased was caused by an accident; that the injury which resulted to him was unforeseen and unexpected, and therefore an accident. But in the case at bar the insured knew by common observation and experience that he would likely receive an injury by assaulting his antagonist in the manner he did. The injury which the insured received, under the circumstances, cannot be said to be unusual in its character. What is an accident? Webster defines it to be:

"An event that takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected."

It cannot be contended that the action of the insured in first striking Porter was beyond his control, or that the injury to his hand was "an event that took place without his foresight or expectation," for he was a man of intelligence and must have known that in bringing his fist in violent contact with the face or head of another he was liable to bruise his knuckles and break the skin of his hand. Nor can it be contended that such injury proceeded from an unknown cause, for he knew that men have teeth and bones in their faces and heads, the striking of which with the bare hand will produce just such an injury as resulted to him. The breaking and bruising of the skin of his hand was not an unusual effect of a known cause, and therefore unexpected, for nothing is more usual in such encounters than for assailants to have their knuckles and fingers sprained, bruised, and sometimes broken. It is insisted by counsel for defendant in error that the insured did not expect to strike Porter in the mouth, that striking the teeth was an accident, and that it cannot be presumed that he might have reasonably expected to receive the injury that followed. There is nothing in the record to support this contention; but, on the other hand, the evidence shows that the insured was very angry, and that he was not content with striking Porter with his right hand, but he immediately struck him a second blow with his left hand, and it does not appear that he intended to strike any particular part of his face.

There is a well-defined distinction between a death resulting from an accident and one resulting from accidental means. As is well said in 3 Joyce on Insurance, § 2863, p. 208:

"A person may do a certain act the result of which act may produce unforseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental."

In the case of Fedar v. Assurance Society (Iowa) 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212, the injury received resulted from an artery that was ruptured while the insured was reaching over a chair to close the window shutters. In that case the evidence showed that he did not fall, slip, or lose his balance. He did nothing which he did not foresee or plan, except the rupture of the artery. This was held not to be an accidental cause, within the meaning of the terms used in an accident policy. Among other things the court said:

"* * * Although a result may not be designed, foreseen, or expected, yet, if it be the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, it cannot be said to be accidental."

In the case of Accident Co. v. Reigart (Ky.) 23 S. W. 191, 21 L. R. A., 651, 42 Am. St. Rep. 374, in discussing this phase of the question, the court, said:

"They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes. * * *"

The immediate cause of the insured's death was disease, to wit, blood poisoning. The company did not undertake to insure against blood poisoning or any other disease. But the fact that it had not insured against disease would not be a good defense in this case, if it could be shown that the blood poisoning of which the deceased died was the direct result of accidental means. Therefore, inasmuch as it is not shown that the disease which caused the insured's death was the direct result of accidental means, this case does not come within the class of cases contemplated in the insurance clause which undertakes to insure against "external, violent and accidental means."

In the case of Ass'n v. Smith, 85 Fed. 404, 29 C. C. A. 226, 40 L. R. A. 653, the court said:

"In such a case, the disease is an effect of the accident, the accidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable not to the disease but to the causa causans, to the accident alone. * * *"

Unless it could be shown that the original cause to which the disease can be traced was "accidental means," then the disease from which the insured died would be a subject against which the company did not insure.

In the Case of Isitt, 22 Q. B. 504; cited in Delaney v. Modern Accident Club (Iowa) 97 N. W. 91, 63 L. R. A. 607, this distinction is clearly laid down. In that case the insured had received an accidental injury and while in a debilitated condition resulting therefrom, contracted a cold which developed into pneumonia resulting in death. It was held to be a death from accidental causes, and, in discussing the question of liability, the court said:

"The question of law is then whether or not, as a matter of law, the chain of circumstances ought to be taken into consideration as 'effects' under this insurance. Construing, as I do, the terms of insurance as meaning that injury must be immediately caused by the accident, but that death need not be immediately caused by the injury, I answer this question in the affirmative."

In that case the original cause was the result of accidental means, in consequence of which the human system was left in such a weak and debilitated condition that it could not resist the disease to the extent that it could have done had it not been for such condition which was caused by accidental means. Therefore, it was an easy matter to trace the immediate cause from which death followed directly to the cause in the first instance.

In view of the facts in this case we are of opinion that the injury received in the first instance was not due to an accident, and therefore the results which flowed therefrom cannot be said to be due to an accidental cause. Such being the case, the court below should have instructed the jury that there was not sufficient legal evidence upon which to base a finding in favor of the defendants in error, and

should have directed them to return a verdict in favor of the plaintiff in error. The court erred in refusing to instruct the jury to that effect.

The judgment of the Circuit Court is reversed, and the case remanded to that court with instructions to set aside the verdict and award a new trial, and to proceed thereafter in conformity with the views herein expressed.

Reversed.

PARKS v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1906.)

No. 627.

1. DISMISSAL AND NONSUIT—FEDERAL PRACTICE—DISCRETION OF COURT.

In a state where a plaintiff is entitled to take a nonsuit as a matter of right, such right must be exercised in a federal court before the cause has been submitted for decision either to the court or jury. On the making of a motion by defendant for direction of a verdict, plaintiff is required to elect whether or not he will take a nonsuit, and, if he submits the cause for determination on the motion, it is within the discretion of the court to grant the motion and to refuse to permit a nonsuit, although such discretion should be so exercised as not to work an injustice to plaintiff.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 31.

Conformity of practice in federal courts 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.]

2. RAILROADS—KILLING OF PERSON ON TRACK—PROOF OF NEGLIGENCE.

Plaintiff's intestate was a flagman employed by defendant railroad company which was changing the grade of its road, and he had been working continuously for three days without rest or sleep. About noon of the third day he was sent down the track to flag a train, and was killed, as the evidence in an action to recover for his death tended to show, by the train which he was to flag. A witness testified that some time before the arrival of the train he passed deceased, who was then lying on the outside of the ties and appeared to be drowsy, but he, "raised up" and spoke to the witness. There was no direct evidence as to the manner of the accident. It was shown that the track in the direction from which the train approached was level, straight, and unobstructed for a distance of 500 yards from the place, and that the train could have been stopped in about 200 yards. *Held*, that such evidence was insufficient to establish negligence on the part of defendant, and that the court properly directed a verdict in its favor.

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

J. W. Keerans (I. T. Avery, W. L. Pearson, and Osborne, Maxwell & Keerans, on the brief), for plaintiff in error.

L. C. Caldwell (A. H. Price and G. F. Bason, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

PRITCHARD, Circuit Judge. This is an action by plaintiff in error to recover damages for the alleged negligent killing of the intestate, S. Arthur Parks. The intestate was a flagman in the employment of Oliver & Co., who were engaged in changing and reducing the grade of the Western North Carolina Railroad then owned and operated by the defendant, the Southern Railway Company. The intestate had worked from Monday afternoon until Thursday afternoon constantly, without sleep, and was very much in need of rest. On November 22, 1901, about 12 o'clock, he was sent to flag train known as No. 11. When last seen alive, he was on the outside of the track, with his right arm under his head resting on a cross-tie. The witness Garrison, who last saw the deceased alive, said "he was laying down on the track with his right arm under his head on the outside on the ties." He said that he called to him and "he raised up and spoke; he looked like he was tired and sleepy." This was only a short time before the intestate was killed. Garrison testified that he had walked about 600 or 700 yards before passenger train No. 11, which killed the intestate, passed him. The track for about 500 yards in the direction in which train No. 11 was approaching was straight, level, and without any obstructions whatever. It was shown that a train of about the same number of cars and running at about the same rate of speed had been frequently stopped within a distance of about 200 yards near where the intestate was killed.

It is insisted by the plaintiff in error that the court below erred, first, in refusing to permit the plaintiff in error to take a nonsuit after all the plaintiff's evidence had been introduced, and after the defendant had made a motion to instruct a verdict in his behalf, and the court upon argument of such motion had passed thereon favorably to the defendant; and, secondly, in directing the jury to find a verdict in favor of the defendant in error. We think that under the circumstances it was within the discretion of the court to either permit the plaintiff to take a nonsuit or to direct a verdict in favor of the defendant in error. In the case of Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 482, 3 Sup. Ct. 324, 27 L. Ed. 1003, Mr. Justice Gray, who delivered the opinion of the court, among other things said:

"It is the settled law of this court 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 the 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." Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780; Griggs v. Houston, 104 U. S. 453, 26 L. Ed. 840; Herbert v. Butler, 97 U. S. 319, 24 L. Ed. 958; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980.

The court may in such cases direct a verdict and it necessarily follows that in the exercise of a sound discretion it has the power to deny a motion for nonsuit and direct a verdict in favor of the defendant.

In the case of Huntt v. McNamee (decided at the last term of this

court) 141 Fed. 293 Judge Goff, in discussing the question, laid down the law in a clear and forceful manner as follows:

"* * * 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. 597, 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 Trns. 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 exceptations taken during the trial, in states where statutes authorized 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 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 could be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle 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.' * * * 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., R. R. 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, 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."

At common law the action of the court upon a motion for a nonsuit was not a discretionary one, but the plaintiff, as of right, could at any time before verdict exercise this privilege; and this is now substantially the rule in North Carolina. But the more reasonable practice, certainly so far as the federal courts are concerned, is that the plaintiff has the right to take a nonsuit at any time before the case has been submitted to the judge or jury for determination. The plaintiff upon the making of a motion to instruct a verdict against him, that being one of the methods in the federal court of finally disposing of the cause, should then elect whether or not he will take a nonsuit, and not submit his cause upon a full hearing of that motion to the court, and take chances of an adverse decision thereon. From the time of the submission of the motion to instruct a verdict the granting of a nonsuit lies wholly in the discretion of the court; and if the court should be of the opinion that the plaintiff for any reason has been deprived of a right to submit all the evidence on which he relied, or anything should occur during the trial in the nature of a surprise to the plaintiff, there should be a liberal exercise of this discretion in his favor. In this case no evidence was introduced by the defendant, and it is not intimated that the plaintiff had any further evidence which would tend in the slightest degree to strengthen the case as presented to the court below. We are therefore unable to see that any good purpose could have been served by allowing the plaintiff to take a nonsuit.

It is highly important that the court in the exercise of its discretion should not only see that equal and exact justice is done between litigants, but it is equally important that needless litigation should be speedily determined, and in the trial of cases the court should consider the rights of the defendant as well as those of the plaintiff, and where it appears that all the evidence which it is possible to obtain has been offered and the case has been submitted to the jury or to the court it is the duty of the court, if in its opinion the evidence is not sufficient to justify a verdict in favor of the plaintiff, to direct the jury to return a verdict in favor of the defendant. The courts are not organized for the purpose of permitting the plaintiff in an action to experiment with a certain state of facts for the purpose of ascertaining the opinion of the court as to the law applicable to the same and then permit him to withdraw from the scene of con-

flict and state a new cause of action and mend his licks in another direction. Such policy, if adopted, would be productive of much mischief, and should not be tolerated. But, as we have already stated, if the court can see any good reason why the plaintiff, on account of surprise or otherwise, will be denied the right to have his case fairly considered by the court, then, in the exercise of a sound discretion, it should not hesitate to permit the plaintiff to take a nonsuit in order that the ends of justice may be fully and satisfactorily met. In view of the evidence in this case, we are of opinion that the action of the court in refusing to grant the motion of the plaintiff for nonsuit was proper.

The second assignment of error relates to the exception of the plaintiff to the action of the court in directing the jury to return a verdict in favor of the defendant. In order to ascertain whether the court erred in directing a verdict in favor of the defendant in error, it is necessary to determine whether there was sufficient evidence as to the negligence of the defendant in error to justify a verdict in favor of the plaintiff on the first issue submitted to the jury. There was no direct testimony as to how the accident occurred, nor as to the position the deceased occupied at the time he was injured. The witness Garrison testified that he passed along the track where the accident occurred a short time before it happened, and saw the intestate lying on the track with his hand under his head on the cross-ties, and he looked like he was tired and sleepy and his eyes were towards Asheville, and being further questioned as to what part of the track on which the defendant was lying said "on the outside of the ties." He also said that he called to him and that he "raised up and spoke to him." He did not undertake to say to what extent he arose, but he did say that he was awake and his eyes were towards Asheville, and that he appeared to be in a drowsy condition. The witness said he went on his way and had gone about 600 or 700 yards when train No. 11 passed him, and that the train was running about 15 or 20 miles an hour. In the case of Upton v. Railroad Co., 128 N. C. 176, 38 S. E. 736, among other things, it is said:

"There is no presumption in this state of negligence against railroad companies upon simple proof of injury or death caused by their trains."

While the evidence in this case tends to show that the intestate was killed by the train of the defendant in error, at the same time there was no evidence from which the jury could have reasonably inferred that the intestate's death was caused by the negligent acts of the defendant in error.

In the case of Clegg v. Railroad Co., 133 N. C. 303, 45 S. E. 657, a suit was instituted against the railroad company for the alleged killing of the plaintiff's intestate. The evidence in that case tended to show that a short time before the passing of one of the defendant's trains on the track the intestate, not drunk, but under the influence of strong drink, was seen going in the direction of the railroad track and was soon thereafter found dead near the side of the track; that there was a dirt road which ran parallel with the railroad at that point, but there was no crossing; that at the place

where he was killed the track was straight for half a mile or more, but there were no eyewitnesses, and there was no evidence that the intestate had been run over by the engine. It was shown by the defendant that there was no sign of blood on the cross-ties. On the other hand, one of the plaintiff's witnesses said that next morning there was some blood on the cross-ties, but he could not say whether it was between the rails or on the outside. In that case the court held that "there was no evidence tending to show that the intestate was on the track in a helpless condition," and therefore that the plaintiff was not entitled to recover upon the theory that there was no evidence that the death of the intestate was caused by the negligence of the defendant.

In the case at bar, under the circumstances, the jury might have reasonably inferred that the intestate was killed by the defendant in error's train, but there was not sufficient evidence to raise the presumption that his death was caused by the negligence of the defendant in error.

In view of the fact that the witness Garrison testified that, when he last saw the intestate, he was awake and had "raised up" to talk to him, the presumption is that he was in possession of his mental faculties, and that he would do that which was necessary to insure his protection and safety. Therefore, in order to show that the death of the intestate was due to the negligence of the plaintiff in error, it was incumbent on the plaintiff in error to prove that at the time the intestate received the injury he was either sitting or lying upon the track in an apparently helpless condition and that the engineer saw him in time, or could by the exercise of due diligence have seen in time, to have avoided the accident, by stopping the train or by giving the proper signals of warning, and that he failed to do so. But there is a total absence of proof as to whether the intestate was lying down or sitting upon the track at the time he received the injury. In view of the evidence we are of opinion that the court did not err in instructing the jury that the "plaintiff's evidence, uncontradicted, with all legal and reasonable inferences to be drawn therefrom, was not legally and reasonably sufficient to warrant a recovery."

For the reasons stated, the judgment of the Circuit Court is affirmed.

AMERICAN TIN PLATE CO. v. SMITH.

(Circuit Court of Appeals, Third Circuit. January 30, 1906.)

No. 56.

MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—INSTRUCTIONS.

Plaintiff was an employé of defendant, and was sent with other workmen to drill holes in a large I beam, which ran along one side of defendant's shop, 20 or 25 feet from the floor, and supported one of the tracks upon which a traveling crane was moved. The beam was supported on iron posts which extended up on one side of it to the roof. Plaintiff was told to reach the scaffold on which he was to work by climbing one of the posts and walking along on the beam, which was

done by walking on the projection of the lower flange, holding to the top of the beam, which was about four feet deep. When coming down from the scaffold in the same manner, as plaintiff had reached the post and was about to descend, his arm, which was still across the top of the beam, was run over and crushed by the wheel of the crane, which approached from behind him. In an action to recover for the injury plaintiff alleged two grounds of negligence: First, in failing to furnish a ladder to reach the scaffold, as requested; and, second, in running the crane upon him without warning. Defendant pleaded assumption of risk and contributory negligence. *Held*, that it was error to submit the case to the jury on the issues made on the first ground of negligenge alleged alone; that in consenting to use the post as a means of reaching the scaffold plaintiff assumed the ordinary risks incident to such method, which were obvious; and that his right of recovery, if any, rested upon the second ground alleged.

[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 Western District of Pennsylvania.

Wm. W. Wishart, for plaintiff in error.

Philip Willett, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. Hunter Smith, the defendant in error the plaintiff below (hereinafter called the plaintiff), was, on the 9th day of January, 1903, and for some time prior thereto, employed by the American Tin Plate Company, the plaintiff in error and defendant below (hereinafter called the defendant), at its works in the town of Monessen, Penn., as a common laborer. He was working in what was called the "rigger gang," on new construction work. On said 9th day of January, plaintiff was ordered, by one Howard McLean, foreman of the gang in which he was working, to drill holes in an iron girder or "I" beam, the said girder being about 20 to 25 feet from the ground, running along one side of the building for its entire length, and supported at considerable intervals upon posts made of structural angle iron. A similar beam, similarly supported, ran along the other side of the building for its entire length. Across the building, stretching from "I" beam to "I" beam, was a truss construction, or crane. Each end of this truss or crane was supported upon a wheel or wheels, resting upon a single rail which ran along the top and center of the flange of each "I" beam. Upon these rails, the crane was moved from one end of the shop to the other, as its services might be required. The "I" beam was between three and four feet high, between the flanges, and the flanges were about one foot in width, extending on each side of the central portion of the beam from 4½ to 5 inches.

In the afternoon before the accident, a scaffolding had been constructed and hung from the roof, near one of these girders, upon which workmen could stand while engaged in drilling holes through the central portion or shank of the "I." The plaintiff had never, before the day of the accident, been engaged in this work, nor been called upon to go up to or upon the "I" beam. He testifies that, when

ordered up on the morning in question, he asked the foreman, McLean, for a ladder, but was told by him that there was no ladder long enough, and there was no time to piece one out, and that he was then told to climb up the nearest post, and walk along the "I" beam to the scaffolding, from which he was to work. McLean denies that any such request for a ladder was made by the plaintiff. There is testimony, to the effect that it was usual for those engaged in such work to climb up the posts and walk along the "I" beams, resting their feet on the lower flange, and holding on with their hands to the top of the beam. Plaintiff testifies that, after being told that he could not have the ladder, he climbed up the post, and made his way along the "I" beam to the scaffolding from which he was to work. Another man was working on the same scaffolding, who came up in the same way that the plaintiff did. After being there for some time, the tool with which plaintiff was working broke, and he was obliged to go down to the floor, in order to have it mended. Accordingly, he worked his way along the "I" beam, as before, with his feet, or a part of them, upon the lower flange, and his arm thrown across the top of the beam, to hold himself in position. When he reached the post, supporting the beam, and which extended upwards to the roof, he threw one arm around the post, still holding the other across the top of the beam, but preparing to remove it in order to slide down on the post to the ground. While in this position, the crane was moved along from the direction in which he had come, without his having been warned of its approach, striking the arm thrown across the girder, and crushing it and squeezing his body against the post, thus inflicting the serious injuries complained of in the action brought by plaintiff in the court below. There was testimony tending to show that, when working his way along the "I" beam, from the scaffolding to the post, his face was necessarily turned, or partly turned, away from the approaching crane; that he would have had to turn his head and look over his shoulder, in order to have seen it, and that, that would have been difficult to do, without endangering his position on the girder. It is in evidence, that no one was charged with the duty of warning those who were working on the beams, of the approach of the crane, and that the man who controlled the movement of the crane along the tracks, owing to the position of the cage in which he worked, could not conveniently see those who were on the girder.

In his declaration, the plaintiff states that the negligence charged against the defendant consists: (1) Of the failure on the part of the defendant to provide reasonable and suitable appliances upon which to ascend and descend from the girder, and refusing to furnish the plaintiff with a ladder, and ordering him to ascend to his working place by way of the post or pillar supporting the girder, knowing that that mode of ascent and descent was unsafe and dangerous. (2) In that the plaintiff, acting under the orders of the defendant, was, in the proper performance of his duty, engaged at work on said girder, and that while so engaged, a certain traveling crane, so constructed as to travel on and over said girder, on which plaintiff was working, was so negligently and carelessly operated and controlled by said

defendant, as to be permitted to run into and collide with plaintiff, whereby, etc.

McLean, the foreman of the labor gang under whom the plaintiff was working, was operating the crane at the time of the accident. The defendant requested the court to charge that, under all the evidence in the case, the verdict should be for the defendant; that McLean, both as foreman of the labor gang and as the one operating the crane, was a fellow servant with the plaintiff, and that therefore the latter could not recover in the action, and that the plaintiff was guilty of contributory negligence, in putting his arm over the track on which the electric crane ran, and in not looking before starting down the pillar, to see whether the crane was coming. The learned trial judge, in response to these requests, said that to grant them would require peremptory instructions in favor of the defendant, and he therefore refused them. The refusal as to each of these requests was made the ground for a specification of error, as to which it is not necessary to say more than that the judge was right in his refusals. The case was clearly one for submission to the jury, both as to the question of defendant's negligence, and as to that of plaintiff's contributory negligence.

We are, perhaps, not at liberty to discuss—at all events, it is unnecessary that we should—the question, whether the court was correct in affirming the fourth request of the plaintiff, as it is immaterial in the discussion of the single specification with which we are here concerned. The sixth assignment of error is as follows:

"(6) The court erred in its charge to the jury, as follows, viz.: 'Was it the duty of the employer in this case, under all the circumstances of the case, to furnish a ladder that this man says was reasonably necessary; or was it reasonable and proper and safe for the defendant company to have the man go up and down the pillar, which seemed to be the only other means of getting to and from this work? If you find that, under all the circumstances of this case, the defendant was required to furnish a ladder to get to and from this work, and that it failed to do so, then that would constitute negligence on the part of the defendant. The contention of the plaintiff is in this case that he requested such a ladder. The evidence of the defendant is that he did not. It will be for you to determine whether he did ask for any such appliance or not. Consider his interest in the outcome of this suit, his interest in telling exactly what is the truth here, and you will determine whether he did make such a request or whether he failed to make any such request and took upon himself voluntarily the risk of employment of going up and down by way of the pillar.'"

The whole charge is before us. What immediately follows the language contained in the specification is the following:

"Having determined that question of negligence, if you find there is no negligence or failure on the part of the defendant company, to furnish any appliances in that regard, you would be warranted in finding a verdict in favor of the defendant in the case. If, on the other hand, you find there was negligence in that regard, you then pass on to the next question in the case, which is that of contributory negligence on the part of the plaintiff, as is here alleged."

Except the prefatory remarks made by the learned judge, giving a general definition of "negligence," and stating that it was the duty of an employer to furnish an employé with a reasonably safe place

in which to work, and with reasonably safe tools and appliances for carrying on the work, and that among the reasonably safe appliances, would be means for getting to and from the work, we have before us, the whole charge in regard to the allegation of negligence against the defendant, and upon the charge in that respect the case was submitted to the jury.

We cannot agree that this is a correct statement of the law. Whether a ladder was asked for by the plaintiff, or not, it is undisputed that he went to his work in the way in which he was ordered, voluntarily, and thereby assumed the ordinary risks of so doing. If, as plaintiff asserts, he did ask the foreman for a ladder with which to ascend to the scaffolding, and the same was refused, the fact is only thereby emphasized, that his attention had been specially directed to this way of reaching the scaffolding before he attempted it. In and of itself, it was not especially dangerous, but was made so by conditions allowed to exist, but not necessarily appurtenant thereto. Everything that pertained to the mere climbing of the post and going along the girder to the scaffolding, was as open to the comprehension of the plaintiff as it was to the defendant, or to those under whose direction plaintiff was immediately working. The hazard of slipping or falling while climbing the post or getting from the post to the scaffolding, along the girder, was one assumed by the plaintiff, and ordinarily no liability would result therefrom to the defendant; yet, the only question of fact submitted to the jury by the learned trial judge was, whether it was the duty of the employer, under all the circumstances of the case, to furnish a ladder by which plaintiff could mount to the scaffolding, or whether it was reasonably proper and safe for the defendant company to have the man go up and down the pillar, which seemed to be the only other means of getting to and from this work.

The jury were made the judges, whether, "under all the circumstances of this case, the defendant was required to furnish a ladder to get to and from this work," and that, if in their judgment it was so required, they were told the failure to do so would constitute negligence on the part of the defendant. With great respect for the learned trial judge, we think that such instruction was unsound in law and misleading to the jury. No allusion was made by the learned judge to any other extraneous and adventitious dangers, by which the way along the girder might have been beset, and which were not within the dangers assumed by him in taking the way to the scaffolding pointed out to him by his foreman. The question for the jury was not, whether defendant was required, by his duty to plaintiff, to furnish him with a ladder with which to mount to the scaffolding, but whether, in addition to the ordinary risks assumed by plaintiff, as appertaining to the way in which he consented to go to his work, he was exposed to others not patent and unforeseen by him, from which it was the duty of defendant to protect him. Such a consideration was absolutely excluded from the minds of the jury, by the manner in which the case was submitted to them. The language last quoted in the specification of error is:

"You will determine whether he did make such a request" (that is, for the ladder) "or, whether he failed to make any such request, and took upon himself, voluntarily, the risk of employment, of going up and down by way of the pillar."

By this language, the attention of the jury is confined merely to the question, whether plaintiff requested the ladder, or not, the plain inference being that, if such request was made, defendant was liable, and if it was not made, then he voluntarily assumed the risk of going up and down the pillar to and from his work. This, to be sure, is at variance with the former part of the charge in this respect, and cannot be countenanced as a correct exposition of the law of the case, or of the duty of the jury. Unless the circumstances be very exceptional, an employer has the right to require or request his servant to conduct his business according to his own judgment, even though other methods might be safer, and, where the place provided by him for the servant to work, is free from dangers which are latent or not obvious, or he has instructed his servant expressly as to such dangers, if they exist, he has fulfilled his duty in the premises. Bethlehem Iron Co. v. Weiss, 100 Fed. 45, 40 C. C. A. 270; Tuttle v. Railway, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114.

Nothing was said by the court to the jury in regard to the negligence charged in the declaration, by reason of the defendant's allowing the crane to be run upon the girders, while men might be at work upon them, without providing for a warning to be given to such workmen, of its approach. This, it seems to us, was the gravamen of the case, and of this opinion the learned trial judge seems to have been, in what he said in refusing the motion for a new trial. Whether the plaintiff knew, or ought to have known, of the approach of the crane which crushed him, or whether he was so informed as to the practice of running the crane, and that the motorman had no means of looking ahead on the girders to see who were in the way, so that he could thoroughly understand the dangers to which he was exposed, and be taken to have assumed their risks, or whether all these dangers were so obvious that, if an intelligent man failed to appreciate their risk, he did so at his own peril, was questions for the jury, with proper instructions as to the primary duty of a master to see that no latent or non-obvious dangers existed, of which the employé was not specially informed or warned at the time of undertaking his work, and with the statement that of this primary duty the master cannot relieve himself by delegating its performance to an agent or servant of whatever grade, and that negligence of the master, is never one of the risks of his employment assumed by the servant. Was any provision made by the defendant, to warn those within the danger, of the approach of the crane, and if not, was plaintiff informed that no such provision was made, and of the danger incurred thereby? Had he the right to assume that the defendant would provide for such warning, and to act accordingly? These questions were all involved in this second alleged ground of liability. The plaintiff was clearly entitled to have this ground of liability, as alleged in his declaration, considered, and defendant was equally entitled to have the ground of liability correctly stated to the

jury. For the reason that it was erroneously stated by the learned judge, the defendant should be accorded the opportunity to have the law and facts that are properly determinative of his liability, presented to the jury.

We think, therefore, that the judgment below should be reversed, and that a venire de novo should be awarded. And it is so ordered.

UNITED STATES v. THURSTON COUNTY, NEB., et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1906.)

No. 2,339.

1. INDIANS—INDIAN LANDS—STATE TAXATION—ALLOTMENTS EXEMPT FROM WHILE INALIENABLE.

Lands allotted to Indians, inalienable for certain periods of time during which they are held in trust by the United States for the benefit of the allottees and their heirs under Act Aug. 7, 1882, 22 Stat. 342, c. 434, § 6, or Act Feb. 8, 1887, 24 Stat. 389, c. 119, § 5, are exempt from taxation by any state or county during the period of the trust, because they are instrumentalities lawfully employed by the nation in the exercise of its powers of government to protect, support, and instruct the Indians.

2. SAME—PROCEEDS OF INHERITED INDIAN LANDS EXEMPT FROM STATE TAXATION.

The proceeds of the sales of such allotted lands by the Indian heirs of the allottees under Act May 27, 1902, 32 Stat. 245, 275, c. 888, § 7, which have been deposited by direction of the Secretary of the Interior in a bank selected by the Commissioner of Indian Affairs to the credit of the heirs in proper proportions, subject to their checks only when approved by the agent or officer in charge, are held in trust by the United States for the same purposes as were the lands, and are exempt from taxation by any state or county for the same reason.

3. TRUSTS—NO CHANGE OF FORM OF PROPERTY DIVESTS—THE SUBSTITUTE TAKES THE NATURE OF THE ORIGINAL.

No change of form of property divests it of a trust. The substitute takes the nature of the original and stands charged with the same trust. The authorized sale of trust property by a trustee discharges the property sold from, and charges the proceeds of the sale in the hands or under the control of the trustee with, the trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 85.]

(Syllabus by the Court.)

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

For opinion below, see 140 Fed. 456.

A. W. Lane (Irving F. Baxter, on the brief), for appellant.

Thomas L. Sloan (W. S. Summers and W. E. Whitcomb, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of dismissal upon a demurrer to a bill exhibited by the United States to prevent the county of Thurston in the state of Nebraska from collecting taxes from certain Indians of the Omaha and Winnebago tribes

who reside in that county on account of the proceeds of the sales of their inherited lands which have been deposited in a bank by order of the Secretary of the Interior. These Indians are heirs of Indian allottees, whose lands were held in trust by the United States either under Act Aug. 7, 1882, 22 Stat. 342, c. 434, § 6, or under Act Feb. 8, 1887, 24 Stat. 389, c. 119, § 5, which provide that the United States will hold each of their respective allotments "for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs." The allottees died, and their heirs were permitted by the Secretary of the Interior to sell the allotments they inherited under Act May 27, 1902, 32 Stat. 245, 275, c. 888, § 7, on condition that the proceeds of the sales should be deposited to their respective individual credits in a bank selected by the Commissioner of Indian Affairs, subject to their respective checks for not exceeding $10 in any one month, when approved by the Indian agent or officer in charge, and to checks for sums in excess of $10 per month upon the approval of the agent when specifically authorized by the Commissioner of Indian Affairs. The proceeds of these sales on deposit in the bank aggregate more than $36,000. In no instance have the 25 years during which the United States undertook to hold the allotments in trust expired. The officers of the county of Thurston have assessed these deposits for taxation and will levy taxes thereon and collect the same of the Indians who are equitably entitled thereto unless prohibited by order of the court. The Indians to whom these proceeds belong in equity are members of the Omaha and Winnebago tribes, respectively, and these tribes are still under the charge of Indian agents appointed by the United States, which distributes annuities of merchandise, field seeds, farming machinery, and at times stores for subsistence and annuities in money to them, and maintains schools and employs a physician, farmers, teachers, and interpreters for their benefit. The complainant discloses the foregoing facts by its bill, alleges that it brings this suit as trustee for each of these individual heirs and as trustee of the funds derived from the sales of their inherited lands, that it has permitted these sales and caused the deposits of money derived therefrom in the bank, and is controlling the disposition thereof in execution of its trust for the use and benefit of these heirs, and it prays that the county of Thurston and its officers be enjoined from levying any taxes upon these deposits and from collecting any taxes from these Indians on account of them.

In the consideration of the questions which this bill presents the assumption will be indulged that the Indians for whose benefit the proceeds of these lands are held are citizens of the United States and of the state of Nebraska. Their civil and political status, however, does not condition the power, authority, or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit. Matter of Heff, 197 U. S. 488, 509, 25 Sup. Ct. 506, 49 L. Ed. 848; Buster v. Wright, 68 C. C. A. 505, 135 Fed. 947; Wallace v. Adams (C. C. A.) 143 Fed. 716, decided at

this term. They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." U. S. v. Kagama, 118 U. S. 375, 384, 6 Sup. Ct. 1109, 30 L. Ed. 228. The experience of more than a century has demonstrated the fact that the unrestrained greed, rapacity, cunning, and perfidy of members of the superior race in their dealings with the Indians unavoidably drive them to poverty, despair, and war. To protect them from want and despair, and the superior race from the inevitable attacks which these evils produce, to lead them to abandon their nomadic habits and to learn the arts of civilized life, the government of the United States has long exercised the power granted to it by the Constitution (article 1, § 8, subd. 3) to reserve and hold in trust for them large tracts of land and large sums of money derived from the release of their rights of occupancy of the lands of the continent, to manage and control their property, to furnish them with agricultural implements, houses, barns, and other permanent improvements upon their lands, domestic animals, means of subsistence, and small amounts of money, and to provide them with physicians, farmers, schools and teachers. The Indian reservations, the funds derived from the release of the Indian right of occupancy, the lands allotted to individual Indians, but still held in trust by the nation for their benefit, the improvements upon these lands, the agricultural implements, the domestic animals and other property of like character furnished to them by the nation to enable and induce them to cultivate the soil and to establish and maintain permanent homes and families, are the means by which the nation pursues its wise policy of protection and instruction and exercises its lawful powers of government.

The power to tax is the power to destroy. The Constitution, the laws of the United States made in pursuance of it, and the government of the United States, in the execution of these laws, are supreme. They are superior to, and control, the Constitutions, the laws, and the governments of the states. The power of a state to tax the forts, the arsenals, the ships, the buildings, the lands, the funds, or any other means lawfully used by the nation to exert its legal powers, is inconsistent with its supremacy and subversive of the national government. Hence no such power exists, or can exist, in any state. Every instrumentality lawfully employed by the United States to execute its constitutional laws and to exercise its lawful governmental authority is necessarily exempt from state taxation and interference. McCullough v. Maryland, 6 Wheat. 316, 4 L. Ed. 479; Van Brocklin v. State of Tennessee, 117 U. S. 151, 155, 6 Sup. Ct. 670, 29 L. Ed. 845; Wisconsin Central Railroad Co. v. Price County, 133 U. S. 496, 504, 10 Sup. Ct. 341, 33 L. Ed. 687. It is for this reason that the Supreme Court decided that lands held by Indian allottees under Act Feb. 8, 1887, 24 Stat. 389, c. 119, § 5, within 25

years after their allotment, houses and other permanent improvements thereon, and the cattle, horses, and other property of like character which had been issued to the allottees by the United States and which they were using upon their allotments, were exempt from state taxation, and declared that "no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians." U. S. v. Rickert, 188 U. S. 432, 441, 23 Sup. Ct. 478, 482, 47 L. Ed. 532. Why are not the proceeds of the sales of these allotted lands, which the United States causes to be deposited and held subject to its disposition, in a bank which it selects, for the benefit of those Indians equitably entitled thereto, equally held in trust by it for the same purpose and equally exempt from state taxation for the same reason?

The answer of counsel for the county is: (1) Because these deposits are discharged of the trust by Act May 27, 1902, 32 Stat. 245, 275, c. 888, § 7; and (2) because the United States has no lawful authority to withhold these moneys from their beneficiaries or to control their disposition. Let us examine these positions. The lands which were sold were held by the complainant in trust to preserve them for the exclusive use and benefit of the respective Indian allottees and their heirs until the expiration of 25 years from the respective dates of their allotments, and then to convey them to the allottees respectively or their heirs "in fee discharged of said trust and free of all charge or incumbrance whatsoever." 22 Stat. 342, c. 434, § 6; 24 Stat. 389, c. 119, § 5. The undertaking to convey them at the end of the 25 years free of all charge or incumbrance imposed an obligation to keep them free from the burden or charge of state taxation, as well as of every other incumbrance. U. S. v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532. The act of May 27, 1902, provides that any heir of any Indian allottee to whom a trust or other patent containing restrictions on alienation has issued may sell and convey the lands inherited from such an allottee, "but all such conveyances shall be subject to the approval of the Secretary of the Interior and when so approved shall convey a full title to the purchaser the same as if a final patent without restriction upon alienation had been issued to the allottee," and that lands so conveyed shall thenceforth be subject to taxation by the state in which they are situated. 32 Stat. 275, c. 888, § 7. The authorized sale and conveyance of trust property by a trustee discharges the property sold from, and charges the proceeds of its sale in the hands or under the control of the trustee with, the trust. No change of form of property can divest it of a trust. The substitution of one kind of property for another, of goods for promissory notes, of lands for bonds, or of money for lands, does not destroy it. The substitute takes the nature of the original and stands charged with the same trust. Taylor v. Plumer, 3 Maule & Sel. 562, 574; In re Hallett's Estate, Knatchbull v. Hallett, 13 Chan. Div. 696, 717, 719, 733; Cook v. Tullis, 85 U. S. 332, 341, 21 L. Ed. 933; McLaughlin v. Fulton, 104 Pa. 161, 171; Third National Bank v. Stillwater Gas Co., 36 Minn. 75, 78, 30 N. W. 440; 2 Perry on Trusts,

§§ 835, 836, 837. The act of May 27, 1902, contains nothing to withdraw these sales or their proceeds from the operation of this basic principle of equity jurisprudence. All the provisions of that act are in strict conformity to it, and there is no logical escape from the conclusion that, as long as the United States withholds the possession of these proceeds from those who are equitably entitled to the benefit of them and the term of the original trust continues, it holds these proceeds, as it held the lands which produced them, charged with the same trust to preserve them intact and to pay them to the cestuis que trust "free of all charge or incumbrance whatsoever," either by reason of taxation by any state or county or otherwise.

Nor is the complainant without lawful authority to hold these proceeds and to control their disposition in the same way that it held and controlled the lands in trust for the benefit of these Indian heirs. The act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secretary of the Interior. It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts, and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved. By rules and regulations approved October 4, 1902, and amended September 16, 1904, and May 25, 1905, the Secretary provided that owners of inherited Indian lands might be permitted to sell them on condition that they agreed that the proceeds of such lands should be placed in one or more banks, which should furnish satisfactory bonds to guaranty the safety of the deposits, to the credit of each heir in proper proportion, subject to the checks of such heirs only when approved by the agent or officer in charge for amounts not exceeding $10 to each in any one month, and subject to their checks for larger amounts only when approved by the agent specifically authorized by the Commissioner of Indian Affairs. The acts of Congress authorized the Secretary to make these regulations for the purpose of carrying into effect the act of 1902, and, when made, they had the force of statutory enactments. Rev. St. §§ 441, 465 [U. S. Comp. St. 1901, pp. 252, 264]; U. S. v. Eaton, 144 U. S. 688, 12 Sup. Ct. 764, 36 L. Ed. 591; Wilkins v. U. S., 96 Fed. 837, 37 C. C. A. 588. The Indians whose rights are under consideration made the sales of their lands subject to the conditions prescribed by these rules. The bank and a surety executed a bond in the sum of $50,000 to the United States, conditioned that it would pay the rate of interest upon the proceeds of the sales of these lands deposited with it which should be agreed upon by it and the Commissioner of Indian Affairs, and that it would pay over the deposits in the manner provided in the regulations of the Secretary of the Interior to which reference has been made. The proceeds of these sales were deposited with this bank under this bond and under these rules. These facts, the statutes, and the principles of equity jurisprudence which have been considered, have led our minds to these conclusions:

As the Secretary of the Interior was empowered to permit or for-

bid the sales of these inherited Indian lands, he had authority to determine upon what conditions he would allow such sales, and to prescribe and enforce the terms specified in his regulations upon this subject. The allotted lands were held in trust by the United States for the benefit of those to whom they were assigned, and their heirs, under the acts of August 7, 1882, and February 8, 1887. The proceeds of the sales of these lands have been lawfully substituted for the lands themselves by the trustee. The substitutes partake of the nature of the originals, and stand charged with the same trust. The lands and their proceeds, so long as they are held or controlled by the United States and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any state or county.

The decree below must be reversed, and the cause must be remanded to the Circuit Court, with instructions to permit the defendants to answer the bill and to take further proceedings not inconsistent with the views expressed in this opinion. It is so ordered.

HAMMOND ELEVATOR CO. v. BOARD OF TRADE OF CITY OF CHICAGO.

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

No. 1,207.

1. APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.
An interlocutory order granting a preliminary injunction will not be reversed on appeal unless it appears from the record that the injunction was improvidently granted.
[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3818.]

2. INJUNCTION—PRELIMINARY ORDER—SCOPE.
An order granting an injunction pendente lite restraining defendant from obtaining and using quotations from complainant's exchange without its consent considered, and *held* not broader in its scope than was warranted by the bill and proofs.
[Ed. Note.—Quotation of prices and transactions on exchanges, see note to Sullivan v. Postal Telegraph Cable Co., 61 C. C. A. 2.]

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

Jacob J. Kern, John A. Brown, and Lloyd C. Whitman, for appellant.
Henry S. Robbins, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. This is an appeal from an interlocutory order enjoining the appellant pendente lite from obtaining and using, without appellee's consent, the continuous quotation of prices offered and taken at appellee's exchange hall at Chicago.

The record fails to show that the Circuit Court acted improvidently

in granting the temporary injunction. We are not now concerned with the ultimate merits, as they may appear upon a fuller or different record at the final hearing. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540.

Complaint is made of the phraseology of the order in certain particulars.

1. In the part of the injunctional order forbidding the use of the quotations until appellant shall "lawfully acquire the right, with complainant's consent, from some telegraph company authorized by complainant to distribute said quotations," we do not interpret the words "with complainant's consent" to mean that the appellant is subjected to the arbitrary or capricious refusel of appellee to allow the use of the quotations. On the contrary, the order should be read in the light of the bill and proofs; and thereupon it appears that appellant may obtain and use the quotations upon complying with the reasonable regulations which appellee has made for all. If the present record does not show the true situation in that respect, the appellant is not precluded from obtaining what is just and equitable on a motion to modify the order or on the final hearing.

2. The words "restrained from taking any further steps in the mandamus case in Indiana" are not to be held, in view of the bills and proofs, to prevent the appellant from appearing in the Supreme Court of Indiana (or in the Supreme Court of the United States, if the case should be taken there on writ of error) and arguing that the judgment in mandamus which the appellant has obtained should be affirmed. The order only means that the appellant shall not take any steps in the mandamus case which would interfere with appellee's obtaining in this suit, if ultimately entitled thereto, protection for itself and its agents, the telegraph companies, in the distribution and use of the quotations, until appellant shall be willing to comply with the reasonable regulations which have been established.

3. The record fails to show any basis for criticising the words "from having, maintaining or permitting any telegraph or other wire running into its office, over which said quotations are passing." Appellee's proofs, justified the inference that appellant was obtaining quotations, in defiance of appellee's rights as set forth in the bill, by means of such wires. If this part of the order unjustly or unnecessarily interferes with appellant's legitimate business, the proofs will have to be furnished to the Circuit Court. This record contains none.

The order appealed from is affirmed.

In re EADES.

(Circuit Court of Appeals, Seventh Circuit. November 14, 1905.)

No. 1,197.

1. BANKRUPTCY—DISCHARGE—BURDEN OF PROOF TO SUSTAIN OBJECTIONS.

Under Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], it is the duty of the court to grant a bankrupt his discharge, unless his commission of one of the offenses therein specified is established by due proof; the burden of proof resting on the objector.

2. SAME—SUFFICIENCY OF EVIDENCE—CONCEALMENT OF BOOKS.
A specification of objection to a bankrupt's discharge that he concealed certain books of account mentioned in his schedules, with intent to conceal his financial condition, is not sustained, where is appears from the bankrupt's testimony, which was uncontradicted, that he left the books in his office subject to the control of the trustee, and also that they were not material to the ascertainment of his financial condition, and their concealment could not benefit him; no fact appearing to discredit his testimony, although in fact the books did not come into the actual possession of the trustee.

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

Robt. F. Kolb, for appellant.

Walter F. Hienemann, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. The bankrupt appeals from an order of the District Court which denies his application for a discharge. On this application and specifications of objection, the hearing was referred to Referee Wean, as special master, who reported the testimony, with his conclusions that the specifications are not sustained by the evidence and should be overruled and discharge granted. The report states that four of the eight specifications, Nos. 2, 3, 4, and 5, were waived by counsel for the objector; that no proof was offered under No. 8, and the evidence under No. 7 was "clearly insufficient." Specifications 1 and 6 are the only objections discussed in the report or in the argument on appeal. No. 1 charges concealment of books of account "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," upon which the master finds no evidence "which convincingly shows fraudulent intent or contemplation of bankruptcy in the failure to produce" certain books, and that it does "not appear from the evidence that it was within the power of the bankrupt to produce them, or that he concealed them." No. 6 charges concealment from the trustee of stock in a corporation of the par value of $50,000, which the report states was expressly scheduled by the bankrupt with remark that it was not issued; and that the evidence shows the stock was valueless, and no certificates therefor came to the possession of the bankrupt. The trustee filed exceptions to these conclusions, and on hearing the District Court appears to have sustained the exceptions and disapproved the report, without further proof, and entered the order from which this appeal is brought.

The conclusions of the master rest upon the undisputed testimony of the bankrupt, and, without both rejection of that testimony as unworthy of credit and unwarrantable assumption of facts not in evidence, we are of opinion that no conclusions are authorized which sustain the objections. Under section 14 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), the bankrupt is entitled to a discharge, on due application, unless guilty of one of the offenses there specified, and the objector has the burden of proof upon such issue. The question whether the grounds for denying a discharge are wisely so limited cannot enter into consideration when an

issue is raised, and the terms of the act are plain that the application is deniable only upon due proof of commission of one of these enumerated offenses. That the charge of concealing the stock is unsupported and untenable under the evidence admits of no doubt. The charge of concealing certain account books (which are expressly mentioned in the bankrupt's schedules) rests alone upon the fact that they have not come to the actual possession of the trustee and the testimony of the bankrupt, explaining the circumstances under which these books were left by him in the office vault. If true, this testimony shows: That the bankrupt is not chargeable for their disappearance, after so leaving them subject to the control of the trustee; that he did not conceal them; that they were not material for ascertaining his financial condition, or other purpose, and their concealment could not benefit him. The master, who heard the examination, reports in favor of its credibility, and no just ground appears to discredit the testimony or disapprove the master's finding.

We are satisfied, therefore, that error is well assigned upon the ruling of the District Court sustaining the objections, and the order thereupon is reversed, with direction to grant the discharge.

J. W. BUTLER PAPER CO. et al. v. GOEMBEL.

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

No. 1,146.

1. BANKRUPTCY—PREFERENCE—EVIDENCE ON ISSUE OF INSOLVENCY.
   In estimating the value of a bankrupt's property, consisting of a printing office plant, at a date prior to the bankruptcy when he gave a mortgage thereon to a creditor, for the purpose of determining whether he was then insolvent so as to render the mortgage voidable as a preference, it should be taken in the condition it then was as a going concern, and not at its value as mere dead property after the bankruptcy intervened.
2. SAME—GOOD FAITH OF CREDITOR.
   Neither the fact that a debtor's accounts are past due, nor the fact alone of his financial embarrassment, is sufficient to impeach the good faith of a creditor in taking security so as to render the same voidable as a preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], where there were circumstances which tended to explain such embarrassment upon grounds other than insolvency.
3. SAME—EVIDENCE CONSIDERED.
   Evidence considered and *held* insufficient to sustain the burden of proof resting on a trustee to establish the insolvency of the bankrupt at the time of giving a mortgage to a creditor, or that the creditor had reasonable cause to believe that a preference was intended, so as to render the mortgage voidable as a preference, even if insolvency were shown.

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

This appeal is from an order of the District Court, which sets aside and declares void a chattel mortgage in favor of the appellants, upon certain property of H. F. Chandler, bankrupt, involved in the bankruptcy proceedings. The appellants, J. W. Butler Paper Company and American Type Founders Company, as owners of a chattel mortgage executed by the bankrupt February 9, 1904, filed their petition in the District Court to have such mortgage ad-

judicated as a lien, with direction to the trustee to turn over the property to them, or satisfy their lien for $875 and interest upon sale thereof. The petition was referred to the referee in bankruptcy, who heard the testimony and reported in favor of the appellants—substantially, that the mortgage was given to secure the bankrupt's pre-existing indebtedness to them, respectively, and when so given the appellants (mortgagees) had no reasonable cause to believe that it "was intended thereby to give a preference," and that the bankrupt was then solvent in fact. Upon the testimony and report so filed, exceptions on the part of the trustee were sustained and the report disapproved. While specific exception appears to the finding that the bankrupt was solvent when the mortgage was made, no such exception appears to the finding that the appellants were without reasonable cause to believe that a preference was thereby given, and no finding of such cause is stated in the order of the District Court or elsewhere in the record. The mortgage covered the main items of the mortgagor's printing office plant—one press and sundry articles and office supplies not being included—and the proceedings in bankruptcy were commenced May 28, 1904, so that the mortgage was executed within four months before the filing of the petition to be adjudicated a bankrupt. The material testimony relating to the transaction is referred to in the opinion.

Asa Q. Reynolds, for appellants.

H. S. Hicks, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. The validity of the appellants' mortgage is challenged only as an unlawful preference within the terms of Section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). Section 3a (2) prescribes one of the acts of bankruptcy to be, the transfer by a person, while insolvent, of "any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." Section 60a defines such preference to consist of three elements, namely: (1) insolvency of the bankrupt when the transfer is made; (2) making within the four months period named; and (3) having the effect "to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Thereupon section 60b further provides:

"If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The issue for review arises under the last mentioned provision, but involves primarily the ascertainment of a preference in fact, as defined in section 60a, upon which liability under section 60b is predicated. Thus the only reviewable questions are: (1) Whether the fact of insolvency appears at the date of executing the mortgage; and, such fact appearing, (2) whether the appellants are chargeable with reasonable cause to believe that the preference so defined was intended thereby. Both are inquiries of fact, and the burden of proof rests on the trustee to establish both conditions.

1. The testimony as to the value of the aggregate of the bankrupt's property at the date of the mortgage is conflicting in the valuations placed upon the printing office plant by several witnesses of various degrees of competency, and seemingly upon various standards for an

estimate. In reference to other property owned and claimed by the bankrupt at such date the testimony is quite indefinite, both in items and valuation. While an equity which the bankrupt claimed in real estate owned by his wife—represented to the appellants as sufficient to "square up with every one" if negotiations pending could be carried out—seems not well founded under the testimony, other property is mentioned as owned or claimed by him, but without specifications for ascertaining the value. The referee finds from the testimony, as we understand his report, that the value of the printing plant was more than $4,000, and that the other property owned by the bankrupt was "worth from $500 to $1,000," while the aggregate indebtedness "was about the sum of $4,000," The exact amount of indebtedness stated in the testimony was $3,935, and unless this finding of the value of the plant is disapproved, as opposed to the preponderance of testimony, the bankrupt was not insolvent within the meaning of the act (section 1 [15]) when the mortgage was given. We are not satisfied that the testimony thus preponderates against the plant valuation of $4,000, either in the number of witnesses or the character of the testimony, in so far as its weight can be ascertained from the record. While six witnesses were introduced on behalf of the trustee to estimate the value, and four were examined on behalf of the appellants, two of the former and all of the latter concur in valuations of $4,000 or upwards; and the testimony of the four witnesses, who state valuations below that amount, bears upon its face no reasonable ground for overruling the referee's conclusion. The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter of the plant after bankruptcy intervened; and neither of the last mentioned witnesses on behalf of the trustee appears to have observed this rule.

2. Upon the state of proof thus appearing—with the mortgagor's property "at a fair valuation" found "sufficient in amount to pay his debts"—it goes without saying that the appellants are not chargeable with cause to believe that an unlawful preference was intended in the mortgage transaction. Were it assumed, however, that the valuations so adopted were excessive, and that a fair valuation would indicate the insufficiency of the entire property to pay the indebtedness, we are of opinion that the finding of the referee, that the appellants were without reasonable cause to believe that an unlawful preference was intended, is nevertheless well supported by the testimony; indeed, that no testimony appears which would authorize a finding against them. The following facts are in evidence, without substantial dispute: The bankrupt repeatedly stated to representatives of the appellants that litigation with his wife was the cause of his failure to pay up his indebtedness to them; that he had a large interest in the real estate held in her name which was to be sold, and out of the proceeds he would pay them; that his other indebtedness was not large and he could then "square up with everyone." He had suggested to one of them that he might, on account of his matrimonial troubles, go South, trading his plant for land there, but was persuaded to re-

main and keep up his business. It was understood by the appellants at all times, up to and including the mortgage transaction, that the value of the bankrupt's property largely exceeded the amount of his debts, and that his embarrassment and neglect in the payment of bills resulted alone from the litigation and difficulties with his wife; and their representatives were not informed of, and did not suspect, indebtedness to other parties for considerable amounts.

The good faith of these creditors in seeking and accepting security for their account is not impeached by the circumstances thus appearing. Neither the fact that the accounts are past due, nor the fact alone of financial embarrassment under the conditions stated, establishes the statutory ground for setting aside the security so received as an unlawful preference. Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Loveland's Law and Proceedings in Bankruptcy (2d Ed.) § 194; Collier on Bankruptcy (5th Ed.) 460; Brandenberg on Bankruptcy (3d Ed.) § 963. The bankrupt complains in his testimony that the appellants refused to furnish him supplies upon credit, after the security was given, and it is contended that such refusal is evidence of their belief in his insolvency. It appears, however, that they had required cash payments for all supplies purchased during several prior months, so that no change of policy is indicated. In any view the circumstance is of slight weight, as the extension of credit to purchasers is governed by various considerations; the solvent owner of property may well be refused credit if known to be slow pay, deceitful, litigious, or in litigation.

The order of the District Court is reversed, with direction to proceed in conformity with this opinion.

ALLIS-CHALMERS CO. v. REILLEY.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,208.

NEGLIGENCE—ACTION FOR PERSONAL INJURY—SUFFICIENCY OF EVIDENCE—QUESTIONS FOR JURY.

Plaintiff was employed by an independent contractor in putting a steam-heating plant into the large shop of defendant, and was in the habit of walking on rails used by traveling cranes which extended 300 feet, the length of the shop, as the only available means of reaching his work. Such custom was known to those operating the cranes, who had been warned to look out for him; but, on one occasion, as plaintiff was sitting on one of the rails handing some tools to a helper below, one of the cranes, the engineer of which was not looking, struck and knocked him from the track, causing his injury. He was not watching the crane, which when he stooped down was standing still 150 feet away. *Held*, that it could not be said as matter of law that plaintiff was guilty of contributory negligence in not keeping his eyes on the crane while engaged in his work, and that the jury was justified in finding that he was licensed to use the track; that he was not negligent, and that the engineer of the crane was negligent in failing to keep a lookout for plaintiff.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 333-346.]

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 damages for personal injuries suffered through the alleged negligence of the plaintiff in error. The result of the action was a verdict for the defendant in error for the sum of seven thousand dollars, upon which judgment was entered. The principal assignments of error are, that a motion of plaintiff in error at the conclusion of defendant in error's evidence, and again at the conclusion of the trial, to direct a verdict for the plaintiff in error was overruled. Other assignments of error are as to requests for instructions by the plaintiff in error, not given, and to instructions given to which plaintiff in error excepted.

The facts are stated in the opinion.

E. P. Vilas, for plaintiff in error.

O. W. Bow and Joseph B. Doe, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The injury to defendant in error was caused by a large electric crane striking him while delivering his tools to an assistant while seated on the T-rail of the track on which the crane ran. At the time of the accident, the defendant in error was in the employ of an independent contractor, and was employed in the placing of steam heating apparatus in the shop belonging to the plaintiff in error.

The T-rail on which the accident took place, was about thirty feet above the floor. There were two of them, about seventy feet apart, running the whole length of the building, three hundred feet. The cranes traveling these rails were used to carry iron and other articles for plaintiff in error from one place to another in the shop, having no connection with the independent work on which defendant in error was engaged. The only fact tending to show defendant in error's right to be on the rail was his habit, known to the men running the crane, of going to and from his work over the rails—that being the only way available to reach his work; as also the fact that the engineer in charge of the crane that struck him knew of this habit, and had been told as late as the morning of the accident, to look out for him.

On the day of the accident, defendant in error having gotten some tools, walked down the track to the place where he was about to work, one of the cranes following him. "The first thing I did," said the defendant in error in his testimony, "when I got back with the tools, was to hand them down to my helper. I was standing on the girder with one foot on each side of the track on top, and I sat down on my heels and handed him down the tools. As I leaned over Kadd (the helper) took the tools away from me, and just as I went to get up, the crane struck me and knocked me down." The crane that struck him was not the one that had followed him, but one coming from the opposite direction. This crane he had seen several hundred feet away, before he had sat down, but it was then standing still.

The engineer of the crane that struck him tells of the accident as follows:

"On the trip on which Mr. Reilley [defendant in error] was hurt, I started my crane from where I picked up the bucket of sand, probably forty feet from the east end of the shop [fully one hundred and fifty feet from where Reilley was sitting]. When I started the crane, I did not look ahead and down the tracks. I hoisted up the bucket of sand until I thought I had it up high enough, and then I started to travel down the track, running the carriage over in such a position so that it would clear the obstructions along the floor. I had probably traveled one hundred and twenty feet, when I felt that the crane had struck something, and immediately heard Reilley call for me to stop."

The evidence that went to the jury to show that Reilley had license to use the track, was in our judgment sufficient to justify such finding. That being the case, the remaining questions were: Was the engineer negligent? Was Reilley free from negligence? Had the engineer of the crane looked ahead, the accident would not have occurred. Had Reilley kept his eye upon the crane, as he saw it at rest, the accident would not have occurred. The accident occurred because, in the interval of a minute or two, between the starting of the crane and the striking of Reilley, neither one was looking out for the other.

The failure of the engineer to look constantly ahead justified, in our judgment, the finding of the jury that the engineer was guilty of negligence. The engineer of a crane, running upon a track upon which others are licensed to walk or work, is under obligation to keep a lookout that is without interruption. His position in that respect is like that of an engineer of a locomotive in respect to persons licensed to be upon the railway tracks.

The jury was justified, too, in our judgment, in finding that in not keeping his eye constantly upon the crane, Reilley was not guilty of contributory negligence. Reilley's work at the moment was to hand down the tools. This required that he should give his attention to that performance. He was under no obligation to anticipate that the crane at rest would start up without warning, or that the engineer would not be on the lookout, or would run him down without warning. We are not prepared to hold, as a matter of law, that for the minute or two during which he did not look, Reilley was not exercising reasonable prudence—the prudence that a reasonably careful man in a like position would have exercised.

The assignments of error that relate to instructions given and instructions refused, present no reversible error. And as none of the assignments present legal questions that are not elementary we deem it useless—the judgment of the lower court being affirmed—to review them in detail.

The judgment of the Circuit Court is affirmed.

UNITED STATES v. MARION TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,177.

INTERNAL REVENUE—LEGACY TAX—CONSTRUCTION OF REPEALING ACT.

The legacy or inheritance tax provided for by section 29 of the war revenue act of June 13, 1898 (30 Stat. 464, c. 448 [U. S. Comp. St. 1901, p. 2308]), being an ad valorem tax, was not "imposed," within the meaning of the saving clause of the repealing Act April 12, 1902, c. 500, 32 Stat. 97, § 7 [U. S. Comp. St. Supp. 1905, p. 447], until its assessment, and where an intestate died while the act was in force and more than one year before its repeal, but owing to a dispute as to the heirship and the pendency of unsettled claims the estate did not become distributable nor the tax ascertainable until after the repealing act took effect, it is not subject to the tax.

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

Jesse M. La Follette, for the United States.

Morris M. Townley, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. Section 29 of the Act of June 13th, 1898 (30 Stat. 464, c. 448 [U. S. Comp. St. 1901, p. 2308]), known as the War Revenue Act, makes subject to duty or tax, any executor, administrator, or other person having in charge or trust, any legacy or distributive share arising from personal property, exceeding the sum of ten thousand dollars, passing, after the passage of that act, from any person possessed of such property, either by will or intestate law, to any person—the tax being graduated according to the amount of the property thus passing, and the degree of consanguinity of the person to whom it passes.

April 12th, 1902, this act (32 Stat. 97, c. 500, § 7 [U. S. Comp. St. Supp. 1905, p. 447]) was repealed, the repealing act containing a saving clause to the effect, that all taxes or duties imposed by the previous act should be a lien and charge subject, as to lien, charge, collection and otherwise, to the provisions of Section 30 of the Act repealed; the provision of Section 30 being that such tax or duty should be a lien and charge upon the property of every person dying as aforesaid, for twenty years, or until the same, within that period, should be fully paid.

The action in the court below was by plaintiff in error against the defendant in error, administrator of the estate of one Mason J. Osgood, to recover the tax laid under this War Revenue law of 1898. Osgood died intestate September 10th, 1900, two years after the act was passed, and two years before it was repealed. But owing to a dispute between certain persons who claimed to be his heirs, and to the pendency of certain unsettled claims against the estate, the estate remained in process of administration, and was not distributed until after the repealing act. And pending administration, no effort was made by the government to assess the tax upon the estate.

The sole question thus presented is whether, prior to the repealing act of 1902, a tax or duty under the act of 1898 had been "imposed" upon the distributive shares in process of "passing" from the intestate to the heirs; the contention of the government being that the tax is upon the "passing of the property"—the whole chain that from death to distribution, as an entirety, vests the heirs with the property of which the intestate died seized—and that, though not payable, the tax accrues—is already "imposed"—the moment such "passing" begins. The defendant in error, on the contrary, contends that the subject of taxation is the distribution of the estate to the beneficiaries—the passing of the estate out of the hands of the administrator to the beneficiaries; so that no tax is imposable until the event of distribution arrives.

The statute fails to identify without ambiguity, the thing to be taxed. We must go for light, therefore, to some of the collateral considerations. One of these, and in our judgment a determinative one, is that the tax provided for is ad valorem as distinguished from being specific, and that an ad valorem tax is imposed only by assessment—an assessment being prerequisite to the existence of the tax, "the first step in the proceedings against individual subjects of taxation." 1 Cooley, Taxation (3d Ed.) 597. But until the estate is ready to pass, without diminution, to the heir, no assessment can take place. Until the administration is in such condition that the heir is in a position to take, the thing to be taxed is not definitely knowable—the tax itself is not determinable. True an estate likely to eventuate in distribution, becomes prospectively the subject of taxation under the War Revenue Act. But obviously it is not on a mere prospect, a thing coming, that the duty was intended to be laid. Obviously the duty was intended to be laid on a thing already at hand—on a thing that can be measured, and in that way assessed. And this leads to the conclusion that at the time the War Revenue Act was repealed, no tax had been imposed upon the distributive share under consideration.

The judgment of the Circuit Court is affirmed.

BARRETT, Sheriff, v. PRINCE.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,186.

BANKRUPTCY—STAY OF SUITS AGAINST BANKRUPT—CLAIMS RELEASED BY DISCHARGE.

A bankrupt, arrested and held on a capias in an action to recover from him the value of property which it is alleged he embezzled and fraudulently converted to his own use, is entitled to release on a writ of habeas corpus, where no facts are pleaded which show such embezzlement to have been committed while acting in a fiduciary capacity, so as to prevent a discharge in bankruptcy from being a release of the debt under Bankr. Act July 1, 1898, c. 541, § 17a (4), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].

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

March 30th, 1905, on his voluntary petition filed February 15th, preceding, appellee was adjudged, in the District Court of the Northern District of Illinois, a bankrupt. Between the filing of the petition, and the adjudication, at the suit of one John L. Robson, in the Circuit Court of Cook County, appellee was arrested on a capias ad respondendum, and held to bail. Subsequent to the adjudication of bankruptcy, having been surrendered by his bondsmen in the capias suit to the sheriff, the petition of appellee for a writ of habeas corpus was filed, based upon the averment that the claim of Robson, in the suit in which the capias was issued, was one provable in bankruptcy, from which appellee's discharge in bankruptcy would be a release. The petition for habeas corpus was heard in the District Court upon the stipulation of the parties that the return of the respondent contained a full statement of the claim upon which the suit in the state court had been brought and the capias issued, which statement is as follows:

"John L. Robson of the City of Chicago, County and State aforesaid, who is about to commence his action of Trespass on the Case in the Circuit Court of the said County against E. H. Prince of the same place, makes oath and says that on or about, to wit, February 28, 1905, at Chicago, County aforesaid, the said E. H. Prince embezzled and fraudulently converted to his own use certain goods and chattels, to wit, 60 shares of common stock of the U. S. Steel Corporation, a corporation, of the value, to wit, $2100.00, which said shares of stock were then and there the property of this affiant and which shares of stock had before that time been delivered by this affiant to said E. H. Prince as a stock broker to be sold by said E. H. Prince for the sole use and benefit of this affiant according to certain instructions there given by this affiant to said E. H. Prince, to wit, that said E. H. Prince should sell 20 shares of said stock when the market price should reach $34 per share, another 20 shares of said stock when the market price should reach $35 per share, and the remaining 20 shares of said stock when the market price should reach $36 per share. Affiant further says that the said E. H. Prince disregarded utterly the aforesaid instructions and embezzled and fraudulently converted the said shares of stock to his own use as aforesaid well knowing the said shares of stock to be the property of this affiant and has not as yet delivered the same or any part of them to this affiant although often thereto requested. And this affiant further says that by reason of the premises he has sustained damages in this behalf to the amount of $2100.00 and this affiant verily believes that the benefit of whatever judgment he may obtain in said suit will be in danger of being lost unless the said E. H. Prince be held to bail."

The petition was granted.

Edwin Terwilliger, Jr., for appellant.

Chas. C. Carnahan and M. Slusser, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion.

The sole question in this case is whether the cause of action set out in the return is one provable as a claim against appellee in bankruptcy. If it be thus provable, the detention of the petitioner on the capias was unlawful, and the order of the District Court discharging him is not erroneous. Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]; General Orders in Bankruptcy, 30 (89 Fed. xii, 32 C. C. A. xxx).

Though the suit on which the capias was issued was in tort, that alone would not exclude it from claims provable in bankruptcy; for the

tort could have been waived, and a judgment had, as upon the implied contract.

But it is said that under the bankruptcy act—Section 17 as amended in 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1905, p. 684])—a discharge in bankruptcy does not release the bankrupt from provable debts created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity. It may very well be doubted if within the meaning of this section, the steel shares in the possession of Prince for sale were in his possession in a fiduciary capacity. In the acts of 1841 and of 1867 it was provided, in almost identical language, that no debt created by fraud or embezzlement, while acting in any fiduciary character, should discharge the bankrupt; and in construing these acts, the Supreme Court held in many cases, some of which are almost identical in character with the case under review, that mere confidence reposed in the punctuality and integrity of a person with whom one has commercial transactions is not the fiduciary relation that was meant to be covered by the excepting portion of the bankruptcy acts. Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; Palmer v. Hussey, 119 U. S. 96, 7 Sup. Ct. 158, 30 L. Ed. 362; Upshur v. Briscoe, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931; Noble v. Hammond, 129 U. S. 65, 9 Sup. Ct. 235, 32 L. Ed. 621. And this view was applied to the bankruptcy act of 1898 by Mr. Justice Brown, in Re Basch (C. C.) 97 Fed. 761, and by Judge Wheeler in Knott v. Putnam, (D. C.) 107 Fed. 907.

But whatever the law may be, a case being properly pleaded, the appellant has not pleaded, in the record before us, a case of fraud, embezzlement, misappropriation or defalcation in a fiduciary capacity. The return recites that appellee "embezzled and fraudulently converted to his own use" the goods and chattels described, and goes no further. It does not set forth facts that constitute fiduciary relationship, or facts that disclose fraud, embezzlement, misappropriation or defalcation. It satisfies itself with the statement of the conclusion of the pleader, pleading no facts by which such conclusion can be judicially tested. As an indictment, a declaration, or a plea, intended to make a case of fraud, embezzlement, misappropriation or defalcation in a fiduciary capacity, the statement contained in the return would be open to demurrer. Thus tested—and in our judgment the case made in the return must be thus tested—no case coming within the exception of the discharge clause of the bankruptcy act is shown in the return.

The judgment of the District Court is affirmed.

INTERNATIONAL MERCANTILE MARINE CO. v. GAFFNEY et ux.

(Circuit Court of Appeals, Third Circuit. January 26, 1906. On Rehearing, April 19, 1906.)

No. 31.

SHIPPING—INJURY OF THIRD PERSONS—LIABILITY OF VESSEL FOR NEGLIGENCE OF TOWING TUG.

The owners of a steamship which was wholly in charge of tugs hired to take her from her mooring at a public pier and start her on her voyage cannot be held liable for the injury of a person on the pier, not a passenger, resulting from such handling of one of the tugs by those in charge of it, who had no connection with the ship, as to cause a hawser to sweep across the pier.

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

Charles Biddle, for plaintiff in error.

J. H. Brinton, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The errors assigned in this case all go to the charge of the court, or to its refusal to charge in accordance with several points which were submitted on behalf of the defendant below, who is the plaintiff here. The questions raised may be comprehensively stated to be, (1) whether the defendant was entitled to the direction of a verdict in its favor, and (2) whether, if it was not, the instructions that were given to the jury were correct. But as we are of opinion that the first of these questions must be affirmatively answered, the second need not be separately considered.

The action was brought by John Gaffney and Theresa Gaffney, his wife, to recover damages for personal injuries sustained by the latter, which the plaintiffs alleged had been caused by negligence of the defendant. There was no substantial dispute about the material facts. The steamship Friesland belonged to the defendant. On July 16, 1904, she was moored at a public pier on the Delaware river, and was in readiness to proceed upon a voyage down the river and out to sea. A section of the pier was roped off, and Theresa Gaffney, whose niece was among the passengers, was standing there, with others, to see the vessel start. The steamtugs Churchman and Bryn Mawr were taking the vessel out into the river, and turning her bow, which had been moored toward the shore, in the direction in which she was to go. The Bryn Mawr, having been made fast to the Friesland's stern by a hawser of considerable length, went to a point in the river above the end of the pier, where she remained, until, upon being signaled to proceed, she did so, with the result that the hawser that has been mentioned slipped over the end of the pier and struck the plaintiff, Theresa Gaffney. Neither of the tugs belonged to the defendant. They were owned by Peter Wright & Sons, and that firm was performing the service in which they were then engaged under a contract between it and the defendant. When the ship was connected with the tugs, it was placed in their exclusive

control. Their representative was on the Friesland's bridge when he gave the order for the Bryn Mawr to proceed. From that place he could not signal directly to her, but he communicated the signal to an agent of the defendant, who was upon the pier, and by him it was conveyed, as it was intended it should be, to the tug. The latter gave no order himself, nor did he have, or assume to have, any authority to do so on behalf of the defendant. He merely transmitted an order which was given by the person to whom the contractors had confided the management of the work.

The learned trial judge did not overlook, but expressly recognized, the well-known rule that one who has contracted with a competent independent contractor to perform a lawful service for him, cannot be held liable for negligence committed by such contractor or his servants in prosecuting the work he had agreed to do. Nor does it appear that the court below was at all influenced by the wholly inadmissible suggestion which has been urged upon the attention of this court, that the transmission of the signal that has been referred to amounted to an assumption of control by an agent of the defendant. Yet the case was submitted to the jury upon the ground that the defendant owed to Theresa Gaffney a duty to see to it that she should suffer no injury, and that this duty was so absolute in its nature that responsibility for failing to discharge it could not be shifted to an independent contractor. "So that" (to quote from the charge) "it makes no difference that this was another company hired to pull the Friesland into the stream, for they [the defendants] were responsible for whatever occurred in doing that, and, if Peter Wright & Sons * * * did that in a negligent way, it was their [the defendants'] act for which they are responsible." We cannot concur in this view of the law. Theresa Gaffney was not a passenger on the vessel of the defendant, and therefore no obligation arising out of that relation is for consideration. The pier, though used by the defendant, was a public one, and the plaintiff was rightfully upon it. But her hurt was not occasioned by any defect in it, or by any act or omission of the defendant or its agents. It was caused solely by the servants of the independent contractors, and whether their conduct was or was not duly careful is a question which need not, and should not, be now discussed.

We are of opinion that the facts we have stated were fatal to the plaintiff's supposed cause of action, and that they were so conclusively shown that nothing remained for the jury. The defendant, therefore, was entitled to an instruction to return a verdict in its favor; and because such instruction was refused, the judgment of the Circuit Court is reversed.

On Petition to Rehear.

PER CURIAM. The evidence was thoroughly examined before this case was decided. It is supposed, however, that we failed to observe that there was (as is asserted in the petition for a rehearing) a "substantial dispute (1) as to whether or not the owners of the tug boats were shown to have been independent contractors, and (2) as to whether or not the defendant company exercised control of the un-

docking of the vessel." These matters were fully considered; and we thought, as we still think, that the fact that the Friesland was being moved from the dock by an independent contractor, without any exercise of control by the defendant, "was so conclusively shown that nothing remained for the jury." Schofield v. Chicago, M. & St. Paul Railway Co., 114 U. S. 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific Railroad Co. v. Freeman, 174 U. S. 384, 19 Sup. Ct. 763, 43 L. Ed. 1014.

The evidence to which the petition refers does not admit of the construction which it is claimed the jury should have been permitted to put upon it. The testimony of Stephen A. Shell, when fully and fairly read, is plainly to the effect that the captains of the tugs were the servants of the contractor, and that they were exclusively in control at the time of the accident. The "terms" of the contract—"its duration, its consideration, and scope"—were not material. It was conclusively shown that the firm which was doing the work was acting under an agreement with the defendant, which left to the latter no power of control; and this is all it was necessary to show.

The suggestion that the defendant actually exercised control over the undocking of the vessel is again made; but our opinion upon that subject remains unchanged. An agent of the defendant did inform a representative of the contractor that the vessel was ready to be moved, and he did, as stated in the opinion heretofore filed, transmit an order of such representative to the tug in the river; but there was no evidence whatever that he in any way interfered with or directed the operation.

The prayer of the petition for a rehearing is denied.

FOSTER et al. v. HOME INS. CO. OF CITY OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. January 30, 1906.)

No. 53.

INSURANCE—CONDITIONS OF FIRE POLICY—FALL OF BUILDING.

Instructions in an action to recover on a fire insurance policy construing and giving effect to a provision of the policy that "if a building or any part thereof fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease," reviewed and approved under uncontradicted evidence showing that a substantial part of the building fell as the result of structural weakness before the fire originated which destroyed the insured property therein.

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

Charles P. Orr, for plaintiffs in error.

Willis F. McCook, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought by the plaintiffs below (who are the plaintiffs in error) upon a policy of fire insurance, issued to the plaintiffs by the defendant, to recover damages for the loss of certain personal property. The insured property was

contained in two adjoining buildings, Nos. 527 and 529 Wood street, Pittsburgh, used connectedly as a printing establishment and stationery store. The buildings were of brick and four stories in height. Between them was a 13-inch brick partition wall, extending through all the stories to the roof, upon which the floors of both buildings rested. The joists of the floors extended from each side wall over to this partition wall, their ends resting thereon. By means of arched openings cut in this wall the two establishments were connected. On the floors of these buildings were printing presses, type and type-presses, folding and other machinery, and stock of paper.

The policy contained the following clauses:

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

"This company shall not be liable for loss caused directly or indirectly by invasion * * * or (unless fire ensues, and, in that event, for the damage by fire only), by explosion of any kind."

About 1 o'clock on the night of February 3, 1901, the watchman at these establishments discovered that this partition wall was cracking and something falling, and he left the building and went to the other side of Wood street. A telephone message summoning the city superintendent of the bureau of building inspectors, Capt. J. A. Brown, was immediately sent. The superintendent reached the premises and entered the buildings about a quarter after 2 o'clock and found (to quote his own language) that "the center or division wall between the two buildings was crushing." In his testimony he thus described the situation disclosed upon his inspection then made:

"I could see that the wall for about 10 or 12 feet, running from the front towards the rear, had split from the ceiling down, and that 9 inches of that 13-inch wall for about four or five feet from the ceiling, had fallen down. This was the noise that had been made. The four inches was buckled; the weight of the floors was resting on those four inches, and it was buckled into the other room in that shape (indicating)."

The building inspector summoned the manager of the firm and advised him to get Mr. Eichleay, who was engaged in work nearby, to shore up the building. Accordingly, Eichleay was employed to do this, and he and his workmen soon started to work. While they were at work, about 9:30 o'clock, a. m., the partition wall gave way and the upper floors came down. The front part of the buildings, for the distance of about one-third of their length back toward the rear, fell. Almost immediately after the fall, a small fire started in the débris on the first floor a short distance back from the front and spread very rapidly, the flames soon mounting up to the top of the standing walls.

The foregoing stated facts were established indisputably by uncontradicted testimony of eye witnesses. There was no evidence to show that any fire occurred before the fall of the buildings. It was not shown that any explosion occurred. The theory of explosion was without basis. It seems to have arisen from the fact that some of the witnesses, in speaking of the crash caused by the fall of the buildings, employed the word "explosion" as indicating the noise. Under a

charge as favorable to the plaintiffs as at all admissible, the jury rendered a verdict for the defendant. There is no assignment of error to the charge. The assignments go to the answers to the three following points:

"(1) The court erred in answering plaintiffs' first point, which point and answer are as follows: If the jury find that the fire which resulted in the destruction of the plaintiff's goods covered by the policy of insurance in this case preceded the fall of the building, then the plaintiff is entitled to recover. Answer: This point is affirmed if the jury also find that the fall of the building was the result of that fire."

We are of opinion that there was no reversible error in this answer in view of the uncontradicted evidence. Upon a most careful consideration of the case we are entirely satisfied that there was no evidence to justify a finding either that any fire preceded the fall of the buildings or that any explosion occurred. There was no evidence, therefore, to justify this point.

"(2) The court erred in answering the second point of the defendant, which point and answer thereto are as follows: If the jury find that the building containing the insured property fell, or any part of it fell, from any cause other than fire, then the insurance and the defendant's liability fell with it, and the verdict must be for the defendant. Answer: This point is affirmed. As we have stated in the general charge, the policy provides, 'if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.'"

We see no ground of objection to this answer. It simply affirmed the plain provision of the policy. If the plaintiffs desired any more specific instruction as to the meaning of the words "or any part thereof fall," they could have asked for the same. Moreover, under the proofs there was no question as to the fall being of a material and integral part of the buildings.

"(3) The court erred in answering defendant's fourth and last point, which point and answer are as follows: As the evidence is uncontradicted that a substantial part of the building fell, before the plaintiffs can recover they must show that its fall was caused by the fire alone and not by explosion or crushing of the building. Answer: That point is affirmed."

The court was quite right in saying that the evidence was uncontradicted that a substantial part of the building fell. In the general charge the judge explicitly instructed the jury that the burden of proof that the case was within one of the exceptions of the policy was on the defendant. Fairly read, this fourth point does not assert or imply anything to the contrary of that instruction. We think this answer is free from error. Finally, in overruling the assignments of error, we have only this to add, that in our judgment it was clearly shown by uncontradicted evidence that the fall of the buildings was not the result of fire but was altogether owing to inherent weakness or defects of construction, that the fire which destroyed the plaintiffs' property was not caused by explosion, and that the fire originated after the fall of the buildings. Accordingly the policy by its express provisions was not in force at the time of the loss.

The judgment of the Circuit Court is affirmed.

In re SALE.

(Circuit Court of Appeals, Sixth Circuit. February 20, 1906.)

No. 1,453.

BANKRUPTCY—HOMESTEAD EXEMPTION—KENTUCKY STATUTE.

Under the homestead statute of Kentucky (Ky. St. 1903, § 1702 et seq.), which, as construed by the Court of Appeals of the state, gives a mere right of occupancy to a debtor as against his creditors, the right cannot exist in land to which the debtor has not a present legal right of occupancy; and a bankrupt is not entitled to a homestead exemption in land the title to which is in his wife for life, with remainder to him on her death, although the land is occupied as a home by both husband and wife and their children.

Petition to Review an Order of the District Court of the United States for the Western District of Kentucky.

Jos. R. Grogan, for petitioner.

Campbell & Campbell, for bankrupt.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The bankrupt has been allowed a homestead as exempt under the law of Kentucky in a house and lot occupied by the bankrupt, his wife, and their family, the title to which is in the bankrupt's wife for life, with remainder to the bankrupt at the death of the wife. The trustee has filed this petition for a review of this order.

Ky. St. 1903, § 1702, provides that there shall be exempt, subject to certain exceptions not necessary to be here stated, "so much land, including the dwelling house and appurtenances owned by debtors, who are actual bona fide housekeepers with a family, resident in the commonwealth, as shall not exceed in value one thousand dollars." By section 1707 this homestead is declared to be for the use of the widow so long as she occupies the same and the unmarried infant children of the husband, and by section 1708 the homestead of a woman is in like manner for the use of her surviving husband and her unmarried children.

In Brame v. Craig, 75 Ky. 404, it is held that the homestead exemption is not an estate in lands, but only a privilege of occupancy with the family as against creditors. To the same effect are the cases of Little's Guardian v. Woodword, 14 Bush (Ky.) 585, Eby v. Lovelace, 4 Ky. Law Rep. 449, and Schmidt v. Oliges, 6 Ky. Law Rep. 297. Being a mere right of occupancy, it is lost by removing with intent to permanently locate elsewhere. Carter v. Goodman, 11 Bush (Ky.) 228. But the Kentucky homestead law applies as well to estates for life as it does to estates held by the debtor in fee, and in Robinson v. Smithey, 80 Ky. 636, it was held that a widow holding a life estate under the will of her husband, with remainder to her children, was entitled to a homestead out of her life estate as against her personal creditors. It follows, therefore, that Mrs. Sales would be entitled to a homestead out of her life estate for the benefit of herself

and family, including her husband. If her husband is also entitled to a homestead out of his reversionary remainder, there may be two homesteads at the same time in the same land.

Inasmuch as the right of homestead is a mere right of use and occupancy protected against creditors for reasons of public policy affecting the security of a home for the debtor and his family, it logically cannot exist in any land in which the debtor has not a present legal right of possession or occupancy. It is therefore generally held that a homestead cannot exist in a remainder or reversion, for in such case the legal present right of occupancy is in the tenant for life, and the remainderman or reversioner can have no present legal right of occupation. 15 Am. & Eng. Encyc. of Law, p. 557; Howell v. Jones, 91 Tenn. 402, 19 S. W. 757; Brokaw v. Ogle, 170 Ill. 115, 48 N. E. 394; Murchison v. Plyler, 87 N. C. 79; Wilson v. Counts, 52 S. C. 218, 29 S. E. 649. This seems to be the settled law of Kentucky. In Merrifield v. Merrifield's Assignee, 82 Ky. 527, 535, it appeared that the land in which D. B. Merrifield claimed a homestead was a place conveyed by his father to him subject to a life estate in his mother. His mother, becoming a widow and indebted, was allowed a homestead out of her life estate, or the value thereof in the proceeds of sale. D. B. Merrifield also claimed as against his creditors a homestead exemption in his reversionary estate. This was denied him, although it is stated that Abigail Merrifield, the widow of the grantor and mother of D. B. Merrifield, "jointly with D. B. Merrifield and his family continued, as they had done before his death [the grantor], to occupy the farm conveyed." Upon this matter of the claim of two homesteads out of the same land, the court said:

"But both she and D. B. Merrifield cannot have a homestead in the land. It was decided in the case of Meguiar, Helm & Co. v. Burr, 4 Ky. Law Rep. 659, that joint owners of a tract of land, upon which they both live in separate buildings with their families, are each entitled to a homestead, although the land has not been divided. But this court has never gone so far as to determine that both the widow and the remainderman can, at the same time, have a homestead in the same land, nor do we think the statute can be so applied and extended. The theory of the homestead exemption is that the debtor requires a prescribed amount in value of land to be set apart for the support of himself and dependent family, but to accomplish such a beneficent object he must have the right to occupy and use it; and hence it is an indispensable requisite that a party claiming the exemption must be in the actual possession. But a party having merely an interest in remainder is without any right to the possession, and, in the meaning of the law, not in possession."

This case was approved and followed in the case of Roach v. Dance, 80 S. W. 1097, 26 Ky. Law Rep. 157.

A distinction between that case and this is sought to be established by reason of the fact that the bankrupt and his wife occupy the premises out of which he asks a homestead as one family, while in the Merrifield Case Merrifield and his family constituted one family and his mother another, although they resided together. But no sound distinction can be rested upon this difference. The foundation of the right of homestead is a present legal right of occupancy and possession, a possession in the debtor's own legal right as owner of the

land. A possession in the right of the wife's ownership is at most dependent upon the marital relation and in a large sense is an occupancy at sufferance. The legal principle upon which Merrifield v. Merrifield and Roach v. Dance must rest is that a homestead right, being a mere right of occupancy, cannot exist in land to which the debtor has not a present legal right of occupancy.

The order allowing a homestead must be set aside, and the report of the referee against the right of the homestead confirmed.

RUGGLES et al. v. PATTON.

(Circuit Court of Appeals, Sixth Circuit. February 20, 1906.)

No. 1,438.

1. APPEAL—FINAL ORDER—ALLOWANCE OF COMPENSATION TO RECEIVER.
   An order authorizing a receiver to pay to himself from funds in his hands as custodian for the court a specific sum for past services rendered as such receiver is a complete withdrawal of so much of such funds from the court's possession, and as such is a final order and appealable.
   [Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 399.]

2. RECEIVERS—ORDER ALLOWING COMPENSATION.
   An order allowing compensation to a receiver should be made only after notice and a hearing, at which the parties interested have an opportunity of contesting the claim.
   [Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 391.]

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

Knappen, Kleinhaus & Knappen and Dovel & Smith (Benton Hanchett, of counsel), for appellants.

Taggart, Denison & Wilson, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

LURTON, Circuit Judge. Under a bill filed in the circuit court by C. F. Ruggles, one of the appellants, against Edward Buckley, another of the appellants, and others, the appellee, John Patton, was duly appointed receiver. The object of the bill was to wind up an alleged partnership between Ruggles and Buckley. Before any conclusion of the litigation or disposition of the property in custodia legis, Hon. Francis J. Wing, District Judge for the Northern district of Ohio, sitting under a designation in the place of District Judge Wanty, made the following order:

"In this cause the receiver, John Patton, having served substantially one year as such receiver up to January 1, 1905, and not having received or withdrawn any compensation for his services, and it appearing to the court proper that he should be permitted to receive and to pay himself each year a suitable sum on account of such compensation, it is ordered that said

receiver may withdraw and pay to himself the sum of twenty thousand dollars ($20,000) for the year 1904, and at the rate of the same sum for each year or part of a year thereafter, while he remains receiver, on account of such compensation, for the whole period upon the final termination of the trust, if such further allowance be deemed proper."

From this decree this appeal has been prosecuted by the appellants named in the caption.

The motion of the appellee to dismiss the appeal as not from a final decree presents the whole substance of the errors assigned. If the order was interlocutory, it is not appealable until a final decree shall be made in respect to the receiver's compensation. Upon the other hand, if the order that the receiver shall pay to himself out of the funds in his hands as receiver the sum of $20,000 for his services for the year 1904 is a final determination of the particular matter, it is a final decree, and appealable, although the receivership shall still continue.

The question is in narrow compass. The receiver contends that the order is not final, because he construes it as a mere payment upon account, and that the fund paid to himself under the order will continue to be subject to the order of the court, and his bond responsible for obedience to any order settling his compensation at a less sum and recalling any sum received in excess of the compensation allowed upon a final settlement. If this is the correct interpretation of the order, it is plainly interlocutory, and not final, and, if not final, is not appealable. The order itself bears no such interpretation. It directs the payment of $20,000 for a definite service, the service of the receiver for the year 1904. It also directs that he be paid at the same rate for his future services. The only reservation over the subject of compensation for either past or future service is found in the direction that the order is without prejudice to the allowance of "further compensation" upon the final termination of the receivership. In other words the court in effect says:

"You shall have, and the fund shall immediately pay you, $20,000 for your services for the year past. You shall be paid at the same rate for future services, for I find that to be the value of your services upon the evidence in the record. It may turn out that your services will prove of even greater value. In that event the matter shall be open so far as to entitle you to a still further allowance; but in any event your compensation shall be now settled at a minimum of $20,000 for 1904, and the same for the future unless I see fit to increase it."

That this order applied to the court's receiver is no test of its finality. If the receiver presents any particular matter touching his action for the court's approval, and the court upon a proper hearing decides in favor of the receiver and approves his conduct, or discharges him from liability in respect of the particular matter, would it be said that the matter would remain open and subject to reconsideration, upon the application of any one interested or upon the court's own initiative, simply because the receivership was not then terminated? The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to whether the receivership was thereafter continued, but in the nature and char-

acter of the order itself. When Mr. Patton was ordered to pay to himself out of the funds in his hands as custodian for the court the sum of $20,000 for his services for 1904, that sum of money was just as absolutely withdrawn from the custody of the court as if he had been ordered to pay it to a third person. The fact that he was then the court's receiver, and that he continued to be the court's receiver, gave the court no more authority to call back a fund which he was directed to pay to himself, in the absence of a reservation to that effect, than it could exercise over any other party obtaining funds through an order of the court.

An instance in point of a final order in respect to a particular compensation to a receiver is found in Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559. Rayner was one of two receivers. He was also one of two trustees under the mortgage in course of foreclosure. As receiver he took active charge of the operation of the railway and applied for an annual allowance for his service as manager and superintendent of the railway. The matter was referred to a master, who reported an annual allowance of $10,000 per year. The report was confirmed, subject to exceptions filed within 30 days. None were filed, and Rayner received that allowance for that branch of his services throughout the receivership. The appeal in the case was from an order made at the conclusion of the case fixing compensation as trustees and receivers, exclusive of the salary paid to Rayner as superintendent and manager. Manifestly the allowance made subject to exceptions became final, in the absence of exceptions or upon their being overruled.

In the case styled In re Michigan Central Rd. Co., 124 Fed. 727, 731, 59 C. C. A. 643, the clerk of the Circuit Court applied for compensation as custodian of certain bonds upon a part of them being withdrawn. The Circuit Court made the allowance claimed, and directed the appellant to pay the amount fixed as commissions to W. D. Harsha, and upon default that execution should issue. An appeal was denied upon two grounds, one of which was that the decree was not final, inasmuch as the whole matter was not disposed of, as other bonds remained in custody of the clerk, which, when withdrawn, would entitle the clerk to a further allowance of compensation. We held the decree final so far as compensation had accrued and so far as there was a definite order to pay.

We think that the direction that the receiver should pay to himself $20,000 for a specific service already rendered was a complete withdrawal of that part of the funds from the court's possession. The case falls under the authority of In re Michigan Central Rd. Co., cited above; Trustees v. Greenough, 105 U. S. 527, 531, 26 L. Ed. 1157; Edgell v. Felder, 99 Fed. 324, 39 C. C. A. 540; Tuttle v. Claflin, 88 Fed. 122, 31 C. C. A. 419. The order appealed from was made without notice to the parties interested in the fund. In truth, it seems to have been made by the court upon its own motion and without application by the receiver. Nothing is better settled than that an allowance to a receiver by way of compensation for his services is not subject to the arbitrary determination of the court, but should be made upon

a hearing at which the parties interested have an opportunity of contesting the claim. In Re Michigan Central Rd. Co., already cited, we said:

"The power of the chancellor to fix an allowance out of a fund in court for the services of a special master, receiver, counsel, trustee, etc., is not uncontrollable, as it would be if orders making such allowances were not subject to review. In such matters great latitude may be properly accorded to the judge administering a property, and acquainted with the services and qualifications of persons rendering special services under the court's direction. Nevertheless, if wrong principles be applied in settling such compensation, or an allowance grossly excessive be made, it would be competent for an appellate court to correct the wrong. The most extravagant allowances in such cases, and the grossest misapplication of correct legal principles, might go unchallenged unless the matter were subject to review by appeal. Trustees v. Greenough, 105 U. S. 527, 528, 26 L. Ed. 1157; Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559; Mason v. Pewabic Mining Co., 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745."

If reviewable upon appeal, it follows that the order is erroneous, if made without notice. Any other practice is certain to lead to great abuse. Merchant's Bank v. Crysler, 67 Fed. 388, 14 C. C. A. 444.

We express no opinion in respect to the merits of the allowance. The court below should first act upon the matter after a hearing. The decree will be reversed, as irregular and erroneous.

UNITYPE CO. v. LONG.

(Circuit Court of Appeals, Sixth Circuit. February 24, 1906.)

No. 1,462.

SALES—CONDITIONAL SALE OF PROPERTY TO BANKRUPT—RIGHT TO RECLAIM.

A contract for the leasing of a machine for a term of three years for a total rental of $1,260, to be paid in monthly installments, for which notes were given, with an option to the lessee to extend for two years more at the same rental, or to buy the machine at any time during the three years for $1,700, less the amount paid in rental, is in effect a conditional sale, and within Rev. St. Ohio 1905, § 4155—2, which provides that in all cases where personal property is sold on installments, or leased on condition that it shall belong to the lessee whenever the amount paid shall be a certain sum, until such time the title to remain in the lessor, the condition shall be void as against creditors, unless the contract is recorded, and, where such contract was not recorded, the machine cannot be reclaimed by the lessor from the trustee in bankruptcy of the lessee.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1327–1331.]

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

For opinion below, see 136 Fed. 989.

J. E. La Dow, for appellant.

Edwin Mansfield, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a petition filed with the referee to reclaim a typesetting machine found in possession of the bankrupt. The petitioner (appellant) claimed as the owner and lessor. The trustee defended on the ground that there had been a conditional sale, and that the condition reserving the title was void for want of compliance with the Ohio statute. The referee found in favor of the petitioner, holding there was a mere lease. The court below reversed, finding there was no mere lease but a conditional sale, without compliance with the Ohio statute.

The agreement entered into between the petitioner below and the bankrupt was termed a "simplex typesetting machine lease." By it the lessor agreed to furnish and lease to the lessee one simplex typesetting machine—

"To hold for the term of three years; * * * and the said lessee hereby covenants to and with the lessor that he will pay for the same a rental of twelve hundred and sixty dollars ($1,260) for the entire term of three years, in installments of thirty-five dollars ($35.00) each, payable on the first day of each month until the twelve hundred and sixty dollars ($1,260) has been paid, and will further secure such payments by giving at the beginning of said rental term, his promissory notes in form acceptable to the lessor for the same; but the giving of said notes shall not be regarded as payment of the rent aforesaid."

The lessee agreed to maintain the machine in good operative condition, and, at the end of the term, to ship it back to the lessor, and during the term to insure it for the benefit of the lessor in the sum of $1,200. The agreement also contained the following provisions:

"The lessee further covenants and agrees that in case he, or any party holding under him, shall violate any of the provisions, conditions or agreements herein contained, the lessor may, at his option, terminate this lease, and retain and keep all rentals hereinbefore stipulated to be paid by the lessee in consideration and payment for the use theretofore had of said machine and its appurtenances."

"It is further covenanted and agreed by both parties hereto that this lease shall extend to and cover a further period of two years upon the same terms and conditions; provided, however, that the lessee may, if he shall so elect, and give notice in writing of said election to the lessor at least thirty days before the end of the first term of three years, abandon, discontinue and terminate this lease at the end of said first rental term and return said machine as heretofore provided, immediately upon the ending of the first term aforesaid."

"The lessee shall have the option of purchasing said machine and appurtenances in his possession for the sum of seventeen hundred dollars (provided all his covenants then matured shall have been fulfilled), at any time within three years after its erection by payment to the lessor of such cash as with the amount of rental theretofore paid shall equal seventeen hundred dollars."

The statute of Ohio regulating conditional sales reads as follows:

"(Rev. St. 1905, § 4155—2.) Section 1. In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented, hired or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring, or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title to the same to remain in the vendor, lessor, renter, hirer or deliverer of the same, until such sum or the value of such property or any part thereof shall have been paid, such con-

dition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless such condition shall be evidenced by writing."

Which shall be properly verified and filed with a designated officer.

By the next section of the act (Rev. St. 1905, § 4155—3), it is provided that it shall be unlawful for the persons who sold or leased, etc., the property to take possession of the same without tendering or refunding to the purchaser, lessee, etc., the sums of money paid after deducting a reasonable compensation for the use of the property.

The question of construction involved is whether, in view of the provisions of the so-called lease, the transaction came within the scope of the above statute. We are satisfied that the court below was correct in holding that it did. Although called a lease, the transaction was intended to be, and in effect was, a conditional sale; the vendor reserving the title until the final payment should be made, and the right of rescission, in case the purchaser should fail in the payment of any installments of the so-called rent, or an additional amount to make the total sum of $1,700. Hervey v. R. I. Locomotive Works, 93 U. S. 664, 673, 23 L. Ed. 1003.

It will be observed that the so-called lessee was obliged to insure the machine for the lessor in the sum of $1,200, which may be taken as the approximate value to the latter. The total rent payable for the term of three years was $1,260 and notes were required to be given in advance therefor. There was also the provision that the lease was to cover a further term of two years on the same conditions, unless the lessee, at least 30 days before the end of the term of three years, should terminate it by notice and return the machine. Coupled with this was the provision that the lessee should have the option of purchasing the machine for $1,700, "at any time within three years after its erection," that is, during the first term of three years, by paying the lessor such amount as with the rental already paid should equal $1,700. Read in connection with the preceding provision for the second term of two years, this so-called option of purchase was made practically compulsory. The lessee, having paid $1,260 for the three years, would only have $440 to pay in order to own the machine; but, unless he served notice before the end of the first term and returned the machine, he became obligated to pay $840 as rent for the two-year term, or $400 more than the value of the machine. Thus he was practically compelled to complete the purchase of the machine during the first term, or lose the installments he had paid.

The Ohio statute provides that in all cases where any personal property shall be leased to another on condition that the same shall belong to the person leasing it whenever the amount paid shall be a certain sum, or the value of such property, the title to remain in the lessor until such sum or the value of such property shall have been paid, such condition shall be void as to creditors, unless it shall be evidenced by writing, duly verified and filed in accordance with the statute. This agreement came clearly within these provisions. If this was a lease, the property was to belong to the lessee upon the pay-

ment of a certain sum to be made up substantially of the installments of so-called rent, and so the agreement was really a conditional sale. The lease was a mere subterfuge to avoid the statute. Jones v. Molster, 11 Ohio Cir. Ct. Rep. 432, 5 O. C. D. 251.

In the administration of the bankruptcy act, we have already held that a contract for a conditional sale of personal property, not filed in accordance with the provisions of section 4155—2 of the Revised Statutes of Ohio of 1905, is void as against the creditors of the bankrupt, whether their claims arose before or after the contract was made. Dolle v. Cassell, 135 Fed. 52, 67 C. C. A. 526.

The judgment is affirmed.

STANDARD VARNISH WORKS v. HAYDOCK.

(Circuit Court of Appeals, Sixth Circuit. February 24, 1906.)

No. 1,435.

BANKRUPTCY—FRAUDULENT PURCHASE OF GOODS BY BANKRUPT—ELECTION BY SELLER.

One from whom a bankrupt obtained goods by means of fraudulent representations, which were not paid for, has his election to confirm the sale and assume the position of a creditor for the price, or to repudiate the sale and recover the goods, but, having made such election, with knowledge of the facts, by proving his claim and voting as a creditor in the bankruptcy proceedings, he is concluded thereby, and cannot thereafter withdraw his claim and recover the goods.

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

Frank Seinsheimer and Roettinger & Gorman, for appellant.

Cobb, Howard & Bailey and Van Deman, Burkhardt & Shea, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The Decatur Buggy Company, an Ohio corporation, on April 9, 1904, made a general assignment for the benefit of its creditors. On the 19th of that month a petition of some of its creditors was filed in the court below, praying that the company be adjudicated a bankrupt; and on May 11th following it was, upon the hearing of said petition, so adjudged. The Standard Varnish Works, the appellant here, filed and proved a claim as a general creditor against the bankrupt for goods sold to it for the purpose of its business, and upon the footing of such a creditor participated in the proceedings at the creditors' meeting and voted at the election of the trustee, which, as we infer from the referee's report, occurred on May 31, 1904. Subsequently this appellant moved for leave to withdraw its claim, and the motion was allowed on June 17, 1904. Thereafter, on the same day, the appellant filed an intervening petition setting forth that the goods, the same goods on account of which it had filed and proved its claim as a creditor, had been purchased from it by the bankrupt upon false representations as to its

financial condition upon which the appellant relied in making the sale, and which representations were known by the bankrupt to be false at the time of the sale. And it was further alleged in said intervening petition that the bankrupt, at the time of said sale, had no intention of paying for the goods, or reasonable expectation of paying for them. Whereupon the petitioner averred that it was entitled to the possession of the goods, and prayed that the trustee be ordered to return those of them still in his possession, and that a claim for the balance be allowed against the estate. This petition was disallowed by the referee, who found that the facts regarding the sale were as claimed by the petitioner, but held that the petitioner was precluded from recovering the goods by proving its claim in the proceedings at the creditors' meeting and voting as a creditor. The district judge, upon revision of the order of the referee, confirmed the same, and the order of the District Court thereon is brought here by appeal.

As the referee properly said in his opinion, it was open to the petitioner, the purchase having been procured by fraud, to elect whether to confirm the sale notwithstanding, and maintain the position of a creditor for the price, or to repudiate the sale and recover the goods. But the vendor must make his election promptly on discovery of the fraud. This is the settled law. Upon this principle Judge Ray held, in Re Hildebrant (D. C.) 120 Fed. 992, that a vendor could not affirm the contract of sale as to part of the goods, and claim the price and disaffirm as to another part, and recover the goods in specie. And see Seavey v. Potter, 121 Mass. 297. And having made his election in such circumstances, the vendor makes it once for all. Kennedy v. Thorp, 51 N. Y. 174; Moller v. Tuska, 87 N. Y. 166; Heller v. Elliott, 44 N. J. Law, 467; Carter v. Smith, 23 Wis. 497. The petition did not state when the petitioner became aware of the falsity of the bankrupt's representations of its solvency and of its fraudulent purpose, or whether it was before or after the petitioner proved its claim and participated in the proceedings as a creditor. And if, as it has in some cases been held, the burden of proof that the election was made with knowledge of the facts is upon the party who urges the estoppel, it would be difficult to resist the conviction that the circumstances attending the assignment and the adjudication of bankruptcy were sufficient to have shown the petitioner that the bankrupt in procuring the goods had made false representations in regard to its solvency. Not only did the petition make no claim that the petitioner was ignorant at the time of proving its claim of the facts in regard to the representations of the bankrupt and of its intention in making the purchase, but the facts stated by the referee are sufficient, prima facie, to support the conclusion that the petitioner had knowledge of the essential facts when it voted for the trustee. In these circumstances, the election of the petitioner to prove its claim as a general creditor was final. There is good ground for saying that it was too late for the exercise of an election after the petitioner had joined the general creditors in shaping and carrying forward the bankruptcy proceedings and influencing their associates in their action. The suggestion that the proceedings probably would have been

the same without the petitioner's co-operation cannot avail. The assumption of the position of a general creditor toward the assets would naturally be a strong inducement to the other creditors in pursuing the bankruptcy proceedings, for this would imply a sharing of the assets, and this result would be defeated if their associates were permitted to turn about and reclaim the assets in specie. But, if that can be permitted in any state of facts, it is clear that there is no equity in this case to countervail the legal and logical result of such an election.

The order of the District Court must be affirmed, with costs.

PRIOLEAU v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 599.

ERROR, WRIT OF—REVIEW OF RULINGS—FAILURE TO EXCEPT.

An objection to evidence unaccompanied by any exception to its admission cannot be considered by the appellate court on a writ of error.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1503.]

In Error to the District Court of the United States for the District of South Carolina.

W. St. Julien Jervey, for plaintiff in error.

John G. Capers, U. S. Atty. (Lawson D. Melton, Asst. U. S. Atty., on the brief).

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

PER CURIAM. An inspection of the record in this case discloses the fact that there were no exceptions properly taken in the court below, upon which to base a bill of exceptions. It appears that an objection was taken to the testimony of the witness Lyde, but no exception was taken and allowed. This is equally true in regard to certain letters that were offered in evidence by the defendant in error, but there is not a single exception to any of the rulings of the court, and we are therefore unable to consider the same.

An objection to testimony unaccompanied by an exception cannot be considered by the court. Such being the case, there is nothing upon which to predicate a writ of error, and the case is therefore remanded, and the judgment of the court below affirmed.

Affirmed.

LAFFERTY MFG. CO. et al. v. ACME RY., SIGNAL & MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,127.

1. EQUITY—BILL OF REVIEW—LEAVE TO FILE.

Leave to apply to the Circuit Court for permission to file a supplemental bill in the nature of a bill of review for the purpose of introducing newly discovered evidence will not be granted by the Circuit Court of Appeals after it has determined the cause on appeal, unless the newly discovered evidence offered, had it been in the original record, would have probably changed the conclusion to which the court came and the decree entered thereon.

[Ed. Note. —For cases in point, see vol. 19, Cent. Dig. Equity, §§ 1091–1094.]

2. SAME—NEWLY DISCOVERED EVIDENCE.

The Circuit Court of Appeals will not grant leave to apply to a Circuit Court for permission to file a supplemental bill in the nature of a bill of review to bring forward newly discovered evidence where the proofs show that such evidence was in existence and accessible prior to the original hearing in the cause, and that the probable reason why it was not produced is that it was not deemed material by counsel.

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

On petition of appellee for leave to apply to the Circuit Court for permission to file a supplemental bill, in the nature of a bill of review, for the purpose of introducing newly discovered evidence, the court, at its April session, 1905, announced the following rule: That such leave will be denied, unless the newly discovered evidence offered, had it been in the original record, would have probably changed the conclusion to which the court came, and the decree entered thereon. The hearing on the petition was continued until the October session.

A. S. Pattison and Edward Rector, for the motion.

Thomas F. Sheridan, opposed.

Before GROSSCUP and BAKER, Circuit Judges.

GROSSCUP, Circuit Judge. In the opinion handed down in this case (138 Fed. 729) it was said:

"A mere substitution of one material for another, does not constitute invention. Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574; Gardner v. Herz, 118 U. S. 180, 6 Sup. Ct. 1027, 30 L. Ed. 158; Celluloid Mfg. Co. v. Tower, 26 Fed. 451. The mere fact that the cost of the article to the public is thereby cheapened does not give, to the substitution of one material for another, the quality of patentable invention.

"Two claims are made, however, to take the substitution of one material for another here shown, out of the general rule. The first is, that danger in the manufacture and use of the torpedo is thereby lessened; and the second, that the use of the paper cap, by putting paper against paper in the crimping process that makes the joint, results in the making of a better joint.

"The first of these claims is the one insisted upon most strongly by counsel for appellee. But to our minds, it is a claim not proven. We are unable to see, in the absence of proof of actual injury, that the one form of torpedo is more dangerous than the other. In the use of each, danger seems to be at a minimum. And the proof of actual injury offered is wholly inconclusive and unsatisfactory."

Counsel now bring to our attention affidavits tending to show that in the explosion of the old tin top torpedo, pieces of the tin are liable to be thrown about; that board fences along the Baltimore & Ohio Railroad show fragments of such torpedos imbedded in the wood; and that certain persons named in the affidavits, and giving affidavits, have been injured by such torpedos when in the vicinity of their explosion.

The patent sued upon was granted May 10th, 1892; the bill of complaint filed Oct. 7th, 1903; the hearing at Circuit June 27th, 1904; and the hearing on appeal Feb. 3rd, 1905. It is not shown that these tight board fences, with their supposed record of flying tin were not in existence before the bill was filed, or the evidence taken; and nearly all the instances of actual injury to persons shown, occurred before the bill was filed. Indeed, had counsel for the patent realized the materiality or effect of evidence of this character, means to procure such evidence, so far as the affidavits before us disclose, were at all times fully within reach. The petition seems to us to be for leave to open up the case, not so much to introduce evidence newly discovered, as to introduce old evidence the materiality of which has been newly discovered.

The disturbance of a final judgment between given parties on such a ground, would be contrary to all the adjudged cases. It would destroy the finality of nearly every decree handed down. In the interest of social order and peace, except in extraordinary instances disclosing inequity that due diligence could not have forestalled, a final decree is to be left undisturbed as the final settlement of the rights of those who were parties to the suit determined.

The petition is overruled.

CINCINNATI RY. SUPPLY CO. v. AMERICAN HOIST & DERRICK CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 20, 1906.)

No. 1,466.

1. PATENTS—CONSTRUCTION OF CLAIMS.

The law requires a patentee to define in his claim precisely what his invention is, and, when that has been done in plain terms, a court has no power to disregard such terms and either change or enlarge the claim by reference to the specification.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 141.]

2. SAME—INFRINGEMENT—WIRE ROPE CLAMP.

The Crosby patent, No. 388,840, for a wire rope clamp, in view of the prior art, is limited to a clamp with a groove and longitudinally extending wings forming a lateral support to retain the ropes in place, and is not infringed by a clamp not having such wings.

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

Chas. M. Peck, for appellant.

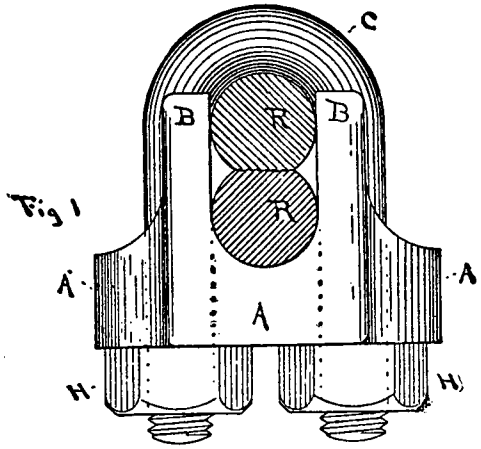
George P. Barton, De Witt C. Tanner, and George E. Folk, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a bill for the infringement of letters patent No. 388,840, dated September 4, 1888, issued to Oliver Crosby for a wire rope clamp. The court below found the patent valid, that it was infringed, and ordered an account of profits and damages. From this an appeal has been taken.

The Crosby clamp, as stated in the specification, was "especially intended to be used for the purpose of uniting or splicing two or more ropes." The following is a drawing of the device and its description taken from the specification: The drawing represents an elevation showing the ropes clamped in position.

The Crosby Clamp.

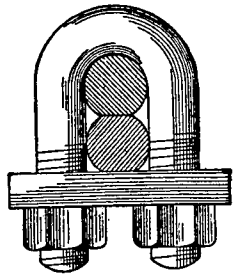


"A is a casting having a longitudinally extending groove formed therein, the said groove being U-shaped in cross-section of a width equal to the diameter of the rope to be clamped, and of a depth to admit two or more ropes therein, one above the other. The bottom of the groove is corrugated to fit the corrugations of the rope, R, in order to give the same a firm hold upon the clamp. Upon each side of the body of the casting, A, are lateral bolt lugs, AA, and the body of the casting in which the groove is formed extends for some distance upon each side and in each direction along the rope, forming the wings, BB. The ropes are placed in the groove one above the other, as shown in Fig. 1, the wings, BB, forming a lateral support to retain them in place, and they are then clamped by means of the U-shaped bolt, C, crossing the mouth of the groove and passing through the lugs, AA, and furnished at the ends with screw threads and nuts, HH."

Long before this patent was issued the John A. Roebling Sons' Company, then the largest manufacturer of steel wire rope and builder of suspension bridges in this country, was making, using, and selling a wire rope clamp, known as the "Roebling clamp." This clamp had a perforated bed plate, a U bolt whose threaded ends extended through the perforations of the plate, with nuts for clamping and compressing the ends of wire ropes which passed through the U bolt and were held by the bed plate substantially in the manner and for the very

purpose shown in the Crosby patent. Drawings of the Roebling clamp were printed in "Knight's American Mechanical Dictionary," edition of 1876, and in Roebling's catalogue for 1877. The following is a drawing of the Roebling clamp showing the ropes held in position by the U bolt and the bed plate:

Roebling Clamp



On April 16, 1872, letters patent No. 125,789 were issued to Thomas J. and George M. Clark for an improvement in rope clamps. This clamp was in two sections, each with two corrugated grooves, and having bolts to clamp the sections together, compressing and firmly holding the ropes. The grooves to receive and hold the ropes were "semitubular," or "semicircular," in shape, and were provided with corrugations so as "to form, as it were, teeth or projections to grasp the rope." The patent is important in this case only because the claim covers corrugations in grooves designed to clamp and hold fast ropes. The Crosby patent refers to this Clark patent and disavows any intention to claim anything shown therein.

Bearing in mind that the Roebling clamp contains all the features of the Crosby clamp, except the corrugated grooves (with wings) "of a depth to receive two or more ropes, one above the other," and that the Clark patent covers the corrugations in the groove, or a semicircular corrugated groove of a depth sufficient to receive one half of a rope, we are prepared to take up the claim of the Crosby patent, which reads as follows:

"I claim as my invention: In a wire rope fastening, a casting having a groove therein of a depth to receive two or more ropes, one above the other, longitudinally extending wings forming the sides of the groove, bolt lugs outside of said wings, and a U bolt passing over and across said groove and through said lugs and furnished with screw threads and nuts at the ends, substantially as and for the purpose herein specified."

Now, as we have pointed out, the only new thing in this clamp is the groove having longitudinally extending wings forming its sides, the groove with such wings being of a depth to receive two or more ropes, one above the other. Everything else is old, the bed plate, described as "a casting having a groove," etc., the lugs to receive the U bolt, which are nothing more than the perforations in the old bed plate, and the U bolt itself furnished with screw threads and nuts at the ends.

The law requires the patentee to define in his claim precisely what his invention is. This Crosby has done, and the court has no power to disregard the plain terms of the claim and either change or enlarge it by a reference to the specification. Merrill v. Yeomans, 94 U. S. 568, 573, 24 L. Ed. 235; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344; White v. Dunbar, 119 U. S. 47, 51, 7 Sup. Ct. 72, 30 L. Ed. 303; McCarty v. Lehigh Valley R. R. Co., 160 U. S. 110, 116, 16 Sup. Ct. 240, 40 L. Ed. 358; Penfield v. Potts, 126 Fed. 475, 61 C. C. A. 371, 379.

Crosby's invention being restricted, as indicated, to the groove with wings having a depth to receive two or more ropes, one above the other, the defendant's device does not infringe. It has a U-shaped bolt with a bed plate, but so had the Roebling clamp. The bed plate contains a corrugated groove, but so did the Clark device. But the defendant's groove is one deep enough to receive only one-half of the lower rope. It is semicircular in form, like the Clark groove. In the Crosby clamp, the wings, by extending the groove, form "a lateral support to retain the ropes in place"; that is, both ropes. They are then clamped by means of a U-shaped bolt. Now, the defendant's device has no wings furnishing a lateral support which will retain the ropes in place. The ropes are held in place, not by the bed plate with its deep groove, but by the U bolt and its sides. The function of the U bolt in the defendant's device is precisely that in the Roebling clamp. Crosby could not have obtained a patent for his device with a corrugated groove merely. It was necessary to add the wings and make the groove of a depth sufficient to admit two or more ropes. This feature is not used in the defendant's device.

Being satisfied that no infringement has been shown, the judgment of the lower court is reversed, and the case remanded, with directions to dismiss the bill.

W. F. BURNS CO. v. MILLS et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1906.)

No. 1,200.

PATENTS—INVENTION—SAVINGS BANK.

The Mills & Cunningham patent, No. 725,858, for a metal savings bank, the essential feature of which is a tube extending into the bank and having a circular row of integral teeth on its inner end, so that a bill inserted into the bank through such tube cannot be extracted because of engagement with the teeth, is void for lack of invention; tubes of practically identical form having been previously used in animal traps for a similar purpose.

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

The bill was to restrain infringement of letters patent No. 725,858, issued April 21st, 1903, to the appellees for a new and useful improvement in savings banks.

The claim sued upon reads as follows:

"In a device of the class described, the combination with the receptacle having an orifice in one of the walls thereof, of a rigid tube of circular cross-section extending inwardly from the orifice, and a circular row of integral teeth on the inner end of said tube, substantially as described."

The following is a drawing of the device:

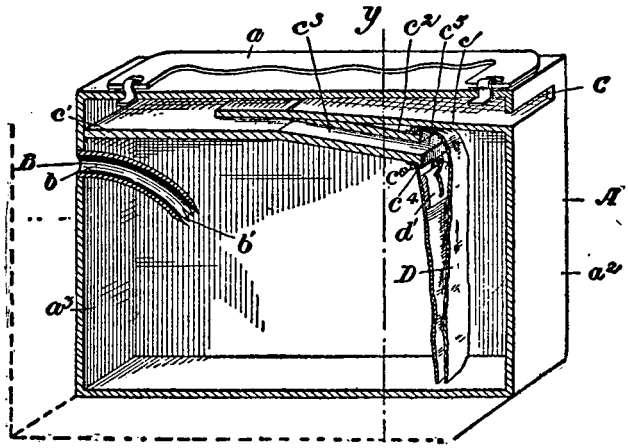


Fig. 1.

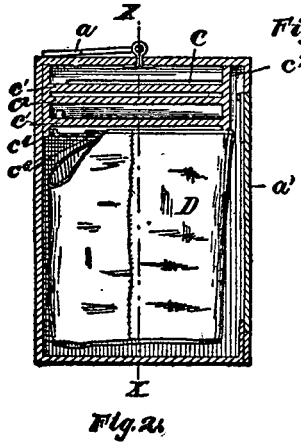


Fig. 2.

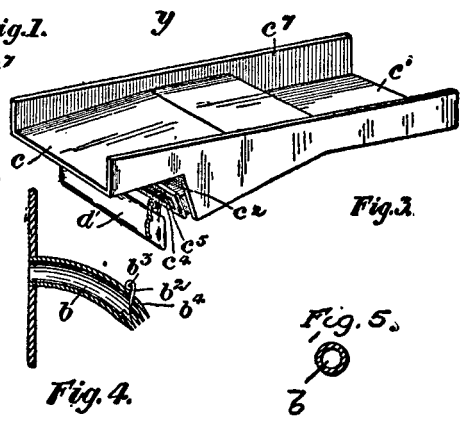


Fig. 3.

Fig. 4.

Fig. 5.

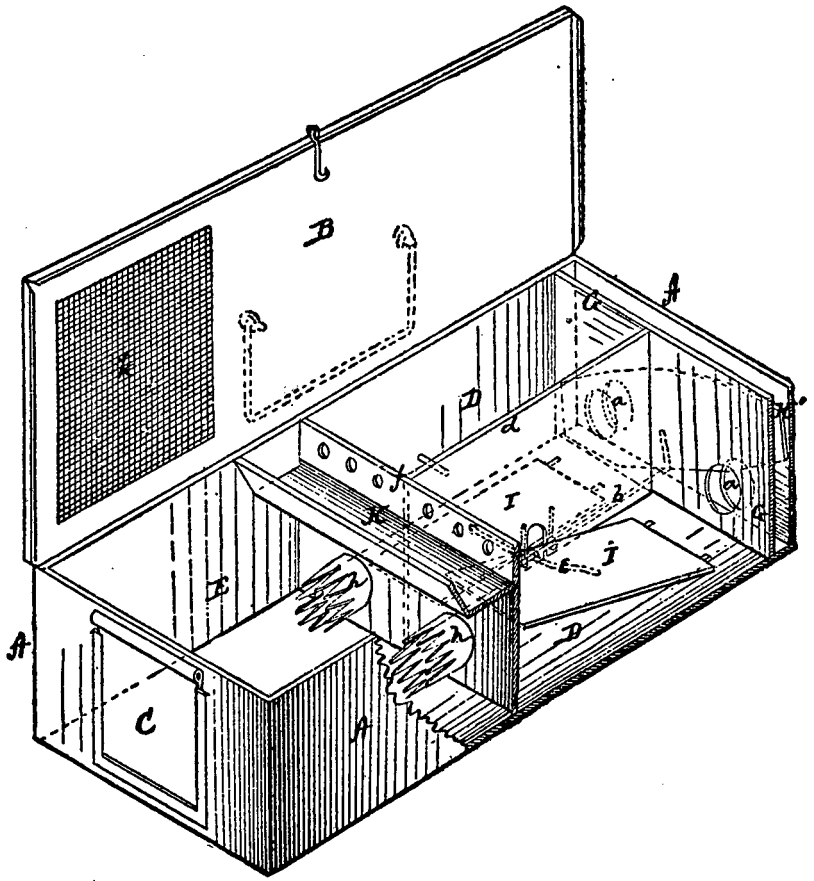
The letters patent state however, that "it is to be understood that a considerable number of changes may be made in the details of the device without departing from the spirit of the invention. For example, the inwardly extending tube B. might be placed in any suitable part of the bank, and not in the exact position shown in the drawings. Also this tube might be angular, instead of curved. The position of the device for preventing the removal of coins, might also be varied."

Other patents cited are as follows:

No. 117,005, July 11, 1871, B. C. Smith; No. 214,341, April 15, 1879, C. T. Yerkes, Jr.; No. 232,257, Sept. 14, 1880, E. L. Gobisch; No. 269,673, Dec. 26, 1882, J. H. Hotchkiss; No. 465,649, Dec. 22, 1891, E. W. Roberts; No. 572,811, Dec. 8, 1896, F. E. Krauth.

Some of these patents relate to savings banks, and show means making the extraction of coins once deposited impossible. But the means thus shown do not embody, mechanically, the circular row of integral teeth employed in the patent in suit.

In the improvement of animal traps, however, the device utilized by Mills and Cunningham, in almost identical mechanical form, is shown—the Smith patent No. 117,005, issued July 11th, 1871, being a good sample. A drawing of that patent is as follows:



The tube used by appellant is almost identical with the tube used by the appellees, so that the patent being sustained, no question of infringement is left.

The decree of the Circuit Court appealed from sustained the patent, and ordered an injunction and accounting.

Dwight B. Cheever, for appellant.

L. L. Coburn, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge, having stated the facts, delivered the opinion.

The basic conception of the patent in suit is, that though a bill may be readily pushed through a tube having at its inner end a circular row of integral teeth, such bill, once in, cannot be extracted, because of its engagement with the teeth. This, also, is the basic idea of the animal traps shown in the Smith and other inventions. Savings banks for home use, embodying mechanical means to prevent the coin deposited from being extracted, being old, the sole inquiry in the case under consideration is this: Is the transfer of the tube from the animal trap contrivances to the purposes of a home savings bank, so as to better enable such banks to become the depository of bills, patentable invention? Is the conception of a savings bank with such a contrivance the product of inventive imagination?

The chief argument urged in favor of an affirmative answer to these questions is, that since this toothed opening, in connection with savings banks, came into use, the demand for home savings banks have greatly increased; and from this it is argued that the readaptation of this old thing to the new use had great utility, and that there must have been invention in the conception of a transfer that had turned a thing not used at all, or very little, into a thing in great demand.

The difficulty with the argument is, that in all probability—though the record discloses nothing in that respect—effect is mistaken for cause, and cause for effect; for, from all that is shown, it is just as easy to turn the argument end for end, saying that because home savings banks have come, from other causes, into great demand, the utility of the toothed entrance, though well known in connection with animal traps, became for the first time obvious in connection with a savings bank. And thus turned, the argument, instead of being one in favor of creative imagination, becomes a showing merely of the mechanical skill, that when a thing springs clearly into demand makes such mechanical adjustments as are obvious.

In the absence of any help from the record on this phase of the case, we are disposed to believe that instead of the demand for home savings banks being created by the toothed mouth of the tube, a tube having such mouth was the obvious outcome of a demand created wholly by extraneous causes—created by the savings banks of the country entering on a policy that encouraged their depositors to lock up money from day to day, in their own homes, in the little banks distributed to them by the savings banks. And, stated in this order, the evolution of the device under consideration is an evolution that would have come about by the mere application of mechanical skill.

The decree of the Circuit Court is reversed, and the case remanded with directions to dismiss the bill for want of equity.

HARRINGTON et al. v. ATLANTIC & PACIFIC TELEGRAPH CO. et al.

(Circuit Court, S. D. New York. January 25, 1906.)

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT ARISING UNDER PATENT LAWS.

Where a suit involves the question of infringement of patents, it is one arising under the patent laws and within the jurisdiction of a Circuit Court of the United States by virtue of Rev. St. § 629, cl. 9 [U. S. Comp. St. 1901, p. 504], although it also involves the question of the ownership of the patents or other contract rights.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 832.

Jurisdiction of federal courts of suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

2. TRUSTS—ESTABLISHMENT AND ENFORCEMENT—FOLLOWING TRUST PROPERTY.

To carry out an agreement between complainants, who were owners of certain patents, and the controlling stockholder in defendant corporation, acting in its behalf for the transfer of the patents to the corporation in exchange for a stated amount of its stock, an absolute assignment of the patents was made to such stockholder, but accompanied by written directions that they should not be conveyed to the corporation until it delivered to him the stock, and also directions for the distribution of the stock by him between complainants and others, for whom they were trustees. He assented to the arrangement, but thereafter conveyed the patents to the corporation, ignoring the conditions, which were never performed. *Held*, that he took and held the title to the patents as trustee only; that his assignment to the corporation in violation of the trust, of which the corporation had knowledge, was ineffective to convey the title or to protect it from a suit for infringement because of its use of the patented devices; and that such a suit was one arising under the patent laws, within the meaning of Rev. St. § 629, cl. 9 [U. S. Comp. 1901, p. 504], of which a federal Circuit Court was thereby given jurisdiction, although it incidentally sought other relief by compelling a reconveyance of the patents.

3. PATENTS—INFRINGEMENT BY CORPORATION—LIABILITY OF STOCKHOLDER.

The owner of the majority of the stock of a corporation, who controlled its affairs and who transferred to it certain patents in violation of a trust under which they had been conveyed to him by the owners, is equally liable with the corporation for its infringement of the patents by the use of the patented devices.

In Equity.

Butler, Stillman & Hubbard (John Notman, of counsel), for complainants.

Dillon & Swayne and Rush Taggart, for defendants.

HAZEL, District Judge. This action was brought to restrain infringement by the Atlantic & Pacific Telegraph Company (herein called the "Company") and Jay Gould in his lifetime of a large number of United States letters patent granted to George Harrington, assignor, and Thomas A. Edison, inventor, and for an accounting and damages, together with such other relief as the complainants may equitably be entitled to receive. The bill was filed in this court in May, 1876, nearly 30 years ago. In December, 1892, Jay Gould died, and on or about the 20th of December, 1895, on the application of the complainant Edison, this suit was revived as against his executors and

trustees under his last will and testament. Pending this bill, and on or about the 5th day of December, 1892, George Harrington, one of the original complainants, died, and on March 10, 1895, Josiah C. Reiff, by order of the court, was made a party complainant in his stead. The complainants claim that the principal purpose of the bill is to establish the liability of the company as an infringer of said patents, and also to determine the liability of the testamentary executors and trustees of Jay Gould, who in his lifetime, it is claimed, actively participated in the alleged infringing acts and inspired the same. Although the case has been pending undetermined many years, it cannot truthfully be asserted that the patience, courage, and anticipation of the litigants have been exhausted or the final settlement deferred because of objectionable rules of procedure or any tardiness of justice. As stated, parties to the suit have died and others have intervened, yet whatever delay or procrastination may be presumed is not attributable to any causes other than such as were created and suffered by the mutual acts of the parties themselves.

At the threshold of the case the court is confronted by the question of lack of jurisdiction; it being contended by the defendants that this is not a case arising under the ninth clause of section 629 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 504]. This section in plain terms confers original jurisdiction upon the Circuit Courts of the United States "of all suits at law or in equity arising under the patent or copyright laws of the United States." Concededly, the requisite diversity of citizenship does not exist herein, the original complainant Harrington having been a citizen of the District of Columbia; and accordingly the point that requires discussion is whether this action is one arising under the patent right laws, or whether the bill simply involves contractual rights in relation to the patents in question. The joint and separate answers of the defendants raise no issue regarding the validity of the patents. It is, however, contended that the principal question to be decided arises out of the contracts hereinafter mentioned, and that the rights under the patents are merely incidental to the relief demanded in the complaint; such relief being in the nature of a demand to set aside the title because of the fraud of the defendants. To solve the problems presented it is necessary to preface the material facts; for, even though contract rights are involved, if the question of infringement of patents is also presented, the court is not deprived of jurisdiction. This principle was enunciated in Littlefield v. Perry, 88 U. S. 205, 22 L. Ed. 577, Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910, and Atherton Machine Co. v. Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72.

The complainant Edison was the original inventor of an apparatus and improvement relating to the rapid transmission of communication by telegraph. Such devices and improvements specifically relate to recording and copying messages, chemically preparing paper and perforators for a new and novel method or system of automatic telegraphy, and a so-called duplex and quadruplex telegraphy. Ac-

cording to a written instrument in evidence Edison assigned a two-third interest in such patents and inventions to Harrington, the original complainant, retaining a one-third interest. Under the terms of the written arrangement, Harrington exclusively controlled the inventions and had power and authority to dispose of them whenever he deemed it advisable to do so. And he was empowered to assign the respective interests in such patents and inventions owned either by Mr. Edison or himself and such other owners as became associated with them in projecting and developing the same. Sales or transfers of the property rights mentioned under the agreement were to inure to the benefit of the owners. The bill alleges that 39 different patents were granted by the Commissioner of Patents to secure to the patentee the monopoly of the inventions and improvements for automatic telegraphy. The earlier patent, No. 121,601, was dated December 5, 1871, and the latest, No. 171,273, was granted December 21, 1875. The numbers of the various patents, together with the date of each and a titular statement of the particular character of the improvements, are set forth in the complaint.

It is alleged, inter alia, that the defendant company is infringing the various patents for said system of automatic telegraphy, and that in its behalf it is falsely claimed to have the right to use such system, together with a telegraph line between New York and Washington, owned by the Automatic Telegraph Company. The oral and documentary evidence found in the record abundantly shows that, though the titles to the patent in suit were in Harrington, certain other individuals named in the bill were associated with him to exploit and install the said automatic system of telegraphy. Indeed, the court is convinced that, on account of financial assistance received from such associates, they were entitled under the agreement to participate in the profits of the enterprise in proportion to the amount contributed by them; in fact, Mr. Harrington was trustee for his said associates conjunctively with himself, and as such held title to the patents. At the time of the transfer to Mr. Gould, as hereafter stated, Harrington was president of the Automatic Telegraph Company and with his associates managed and controlled said company. Under a contract of purchase from a company known as the National Telegraph Company, the Automatic Telegraph Company had the right to use, and at that time did use, the telegraph line of the latter from New York to Washington. In the conduct of its business the Edison patents in suit and also the patents of one Little, comprising the automatic system of telegraphy, were used. In this situation the complainant Reiff in the month of December, 1874, negotiated with Jay Gould, apparently at the latter's solicitation, for the sale and transfer to him of the automatic telegraph system, with the telegraph line and apparatus, officers, etc., above mentioned, including any similar patents that Mr. Edison might thereafter invent. The proofs show that Gould had actual knowledge of the existing arrangements between Harrington and Edison and their associates, and that they were jointly interested in promoting the contemplated installation of a new and rapid method of telegraphy. He was fully

informed on the subject. In explanation of his desire that the company should acquire the ownership of the line and property of the Automatic Telegraph Company and the patents covering its system, it is claimed that, as the owner of a majority of the capital stock of the former, he intended to inaugurate a departure in telegraphy so as to better enable competiton with the Western Union Telegraph Company. During the progress of the negotiations between Reiff and Gould, the latter declared that he represented the company, while the former stated that he represented Mr. Harrington. Additional negotiations quickly following resulted in a memorandum, dated December 30, 1874, expressing the understanding of the parties; and, whatever were the ultimate relations, the said memorandum concededly became the basis for subsequent negotiations between Harrington on the one side and Gould on the other. The memorandum is in these words:

"578 Fifth Avenue, N. Y., Dec. 30th, 1874.

"It is hereby understood that the undersigned will heartily co-operate in concluding an alliance between the A. & P. Telegraph Co. and the Automatic System on the general basis following:

"A. & P. to increase her capital to $15,000,000.

"Automatic interest to receive $4,000,000.

"To remain in treasury, $1,000,000.

"Total, $5,000,000.

"The 14,000 shares A. & P. now in the Co.'s treasury to be distributed to the A. &. P. stockholders as a dividend.

"Automatic System covering patents, contracts, etc., to be turned over to A. & P. Co.

"Management to be mutual and subject to approval of Mr. Jay Gould and Col. Thos. A. Scott.

"Gen. T. T. Eckert to be president.

"T. A. Edison to be electrician.

"D. H. Craig to organize the news department.

"The Automatic are to conclude the pending contracts with Erie, Penna. R. R., and B. & O. and turn them over to A. & P.

"The A. & P. Tel. Co. to assume the liabilities under said contracts.

"Automatic to have representation on executive committee.

"[Signed] Josiah C. Reiff.
"Jay Gould.
"John McManus."

Another paper was signed at this time. It reads as follows:

"N. Y., Decr. 30, '74.

"It is understood that in the negotiation between the undersigned, Jay Gould is to receive 1–10th of results to McManus & party, & to receive 1–10th of results of future interests at home & abroad.

"Josiah C. Reiff.
"Jay Gould.
"John McManus."

As indicative of the intention of Gould to reorganize the company, and to abandon the use of the Morse system of telegraphy, and to adopt the automatic system, the testimony shows that on the evening of December 30, 1874, after the memorandum was made, Gould exhibited it to Gen. Eckert while en route to interview Edison in relation to the proposed plan and for the purpose of purchasing his interest in the duplex and quadruplex patents. Subsequently a

reorganization of the company was effected; the witness Eckert, an erstwhile officer of the Western Union Telegraph Company, becoming its president. The above negotiations were not only afterwards approved by Harrington, but thereafter he transferred the automatic system, including the duplex and quadruplex patents, and the rights of the Automatic Telegraph Company, conditionally to Gould. The deeds and transfers are dated January 1, March 9, and April 9, 1875, respectively.

The crucial question, decisive of the jurisdiction of this court, is whether such transfers and assignments were absolute conveyances of the patents and property rights therein specified, or whether, with the knowledge of the Atlantic & Pacific Telegraph Company, they were dependent upon certain assignments or an allotment of shares of stock of the last-mentioned company. This phase of the controversy requires careful consideration of the facts. The Harrington assignment, dated the 9th of April, 1875 (approved April 15, 1875), expressing a nominal consideration, specifies the various patents and in terms absolutely conveys the entire Harrington interest. It is shown, however, that with the deeds a separate written instrument was delivered. Such document is in these words:

"New York, April 16, 1875.

"Sir: I hand you herewith a specific assignment of each and every patent and application for patents, covering all of T. A. Edison's inventions for automatic telegraphy, and whereby the full and complete title invests.

"The consideration to be paid therefor is thirty-one thousand eight hundred shares of the stock of the Atlantic & Pacific Telegraph Company.

"I will thank you to withhold the within assignment until the Atlantic & Pacific Telegraph Company shall deliver to you the said shares of their stock, when the assignment will be delivered to them.

"These shares you please hold subject to delivery to the following named parties:

John McManus, Reading, Pa.	43 shares
Seyfert, McManus & Co., Phila.	4,698 "
Wm. H. Seyfert, Phila.	320 "
Wm. J. Palmer, Colorado	540 "
John Elliott, Riggs & Co., N. Y.	200 "
H. C. Dallett, Jr., Phila.	60 "
E. Corning, Albany	80 "
James Dallett, Trustee, Phila.	120 "
Alex. Morten, N. Y., 80 Broadway	40 "
J. J. Marsh, Haverhill, Mass.	60 "
Sam'l B. Parsons, Flushing	500 "
J. C. Reiff, New York	7,057 "
A. & P. Telegraph Co.	1,400 "
T. A. Edison	3,000 "
J. C. Reiff, Sec'y	1,428 "
Geo. Harrington	12,254 "
	31,800

"The receipts of said parties shall be your full acquittance.

"Very respectfully, Geo. Harrington.

"Jay Gould, Esq.:

"Of the above sums there is the amount of $40,000 (about) currency, or about 1,600 shares (a little less) to be deducted from the account of J. C. Reiff, and redistributed to J. C. Reiff, Geo. Harrington, S. B. Parsons, Wm.

J. Palmer, Edison and McManus. This redistribution, as it shall be agreed to, will be handed to you in the form of a paper signed by Reiff, Parsons, and Palmer, and should be approved by Edison.

"With such paper please deduct and add to respectively as that paper will show."

The approval of Edison also accompanies the above letter, and reads as follows:

"New York, April 16, '75.

"I, Thomas A. Edison, owner of one-third of my several inventions for automatic telegraphy, sold with my consent and approval to Mr. Jay Gould, do hereby make an allowance to Geo. Harrington and J. C. Reiff, from my one-third share of the proceeds obtained for said patents, for their time, trouble, and services in connection with said inventions, and authorize such further deductions from my share as with the two-thirds controlled by Mr. Harrington, shall be required to reimburse the several parties by whom money may have been advanced for automatic purposes, upon the basis of four in A. & P. stock to one of cash; that is to say, in the several amounts as herein set forth.

"Thos. A. Edison."

This writing, considered in connection with the evidence, in my opinion, constituted Gould a mere trustee. It carried with it no power or authority to assign the patents and rights in the deeds mentioned to the company, unless the imposed conditions were either waived or performed. Later, on April 10, 1875, the Automatic Telegraph Company approved the assignment to Gould and authorized a transfer of its rights in the automatic telegraph system. Such conveyance was also accompanied by a writing in effect directing that delivery of the assignments be withheld until the titles were perfected and certain shares of the capital stock paid to the National Telegraph Company and to certain individuals whose names appear in the writing.

Complainants contend, as already indicated, that a trust relationship was established by virtue of the assignments to Gould for the beneficiaries named in the memorandum accompanying the deeds. That it was the intention of the persons directly concerned to continue Gould successor to Harrington as trustee is fairly established by the elicited facts and circumstances. The weight of the evidence in its entirety favors this view, and shows that the conveyances of the automatic system to Gould were as to an intermediary to hold the title until the imposed conditions were performed. The proofs are singularly clear and convincing that Gould understood the purpose of the conveyances to him. The uncontradicted testimony shows that on April 8, 1875, a committee representing the interests of the complainants called upon Gould and declared their willingness to leave the matter of the disposal of the automatic telegraph system to him, believing that he would be able to secure the fulfillment of their desire to sell out their interests to the company. In reply, Gould is claimed to have assented and indicated, in effect, that the interested parties could look to him to see to it that the sale would be perfected and the conditions performed. Indeed, Harrington and Reiff testified that Gould remarked in substance that he would accept the trust and see that it was carried out. This testimony, in con-

nection with the delivery of the deeds, accompanied by specific instructions to withhold the assignment until the company delivered the shares of stock, warrants the conclusion that the trust was accepted. On July 19, 1875, Gould transferred to the defendant corporation the patent rights, including the quadruplex patents, for a nominal consideration. The conditions upon which the deeds were delivered to him were ignored and have not been performed. To advert in detail to all the testimony which requires me to hold that the company accepted the assignment with full knowledge of the rights of complainants and their associates is not necessary. The initiatory memorandum of the negotiators tersely states that the Automatic interests were to receive $4,000,000 of stock of the increased capital of the company. Although Eckert denies seeing the memorandum, in my opinion, the evidence preponderates to the contrary. That Gould, though not a trustee of the defendant corporation, controlled its affairs, is not seriously controverted. Furthermore, Eckert on January 24, 1875, took charge of the affairs of the company, and soon afterwards he took possession of the Automatic Telegraph Company, its offices and properties, and the company advanced money to pay its debts. Thereafter he continued negotiations with the railroad companies mentioned in the memorandum for the completion of contracts to extend the lines and increase the facilities of the automatic system, and the capital stock of the company was increased.

It is urged that complainants violated the understanding by omitting to conclude the pending negotiations; but the evidence on this point indicates that prior to the transfer Eckert waived such stipulation and at his suggestion the complainants discontinued such pending negotiations. The complainants were relieved by the acts of Eckert from further responsibility. The proofs show that Harrington received from Gould the sum of $113,000 in full of his interest in the patents and properties in suit. The testimony upon this point is direct and unequivocal; Harrington testifying that on account of the condition of his health he planned a trip to Europe, and therefore suggested that Gould purchase his individual interests. This suggestion, or offer of sale, was subsequently accepted. The interest of one Parsons, amounting to $12,500, was also purchased by Gould, so say nothing of additional amounts paid or advanced by him to others on account of his bargain. The amounts of money paid by him were subsequently repaid by the company. The purchase of the Harrington and Parsons interests, in view of the evident intention to keep the said patents and the system as an entirety, does not, in my judgment, because of the trust relations, operate to conclude the cestuis que trust from now claiming that such patents were infringed. The company operated the automatic system of telegraphy until 1877, when it was abandoned. In August, 1875, and May, 1876, notice was given by complainants to Gould and the company to discontinue its use and to reconvey the same to Harrington and Edison. This, however, was not done.

The defendants contend that the company merely had an option to buy the automatic system on the terms contained in the memoran-

dum; that possession was simply for the purpose of experimentation, and not pursuant to any other understanding or intention. But the negotiations between the parties and their subsequent acts do not indicate any presumption of that character. The allegations of the bill, perhaps, in a general way indicate an option as a result of the suggested alliance between the companies, but the evidence irrefutably shows an intention to carry out the arrangement and sale in accordance with the writing delivered simultaneously with the deeds. The accompanying conditions and stipulations must equitably be given the effect of retaining to the complainants their equity in the patent rights which are the subject of this controversy. Nor did the payments to Harrington, Edison, and Parsons for their interests, giving consideration to the evidential facts, operate as an absolute conveyance to Gould. It is a plain principle that a court of equity will look beyond the terms of the deed to the real intendment of the parties. In Peugh v. David, 96 U. S. 332–336, 28 L. Ed. 127, the Supreme Court says:

"As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible * * * The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice."

See, also, Horn v. Keteltas, 46 N. Y. 605; Barry v. Hamburg-Bremen Fire Ins. Co., 110 N. Y. 1, 17 N. E. 405.

Having stated the essential facts and my conclusions thereon, I come again to the principal objection insisted on by counsel for the defendants. As already stated, the question of jurisdiction depends upon whether this suit arises under the patent laws or whether the issues merely involve the violation of contractual obligations. In the view I take of this controversy, the adjudications cited by defendants to sustain this point are of doubtful application. The cases to which attention is directed were chiefly concerned with contract rights. See Wilson v. Sandford, 10 How. 99, 13 L. Ed. 344; Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357; Albright v. Teas, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295. And in White v. Rankin, 144 U. S. 629, 12 Sup. Ct. 768, 36 L. Ed. 569, the distinction between such cases and those wherein the infringement is of the essence of the bill is clearly pointed out. That the defendant corporation operated the automatic system and the properties in question under a subsisting contract is not claimed by complainants. The gravamen of the bill is based, apparently, upon the wrongful and fraudulent appropriation by the defendants of their patents. True, the prayer for relief, among other things, embodies a request that the defendants be decreed to reconvey to complainants their title; but this request for relief is collateral to the primary relief demanded. Atherton Machine Co. v. Atwood-Morrison Co., supra; Littlefield v. Perry, supra; Ex-

celsior Wooden Pipe Co. v. Pacific Bridge Co., supra. If in this case the bill stated a subsisting contract, which in equity could be set aside because of fraud or other sufficient causes, a different question would be presented. The proposition that the bill cannot be maintained against the defendant Gould, because the allegation of infringement is principally directed against the defendant company, is without merit. The facts amply show, not only a trust relationship between Gould and the equitable owners of the patents, but also that the former participated and profited in the infringing acts. In short, he instigated the tort or trespass and effectuated a wrongful appropriation of complainants' patents. He invaded rights which the laws were designed to protect. He controlled the transactions of the company and was a principal in the wrongdoing, and hence his representatives cannot now be heard to disclaim responsibility from the consequences of the acts which are the subject of the complaint. National Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co. (C. C.) 19 Fed. 514; Peters v. Union Biscuit Co. (C. C.) 120 Fed. 679; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Tootle v. Coleman, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120; Saxlehner v. Eisner, 140 Fed. 938.

There was some discussion at the hearing and in the briefs submitted about the ownership of the duplex and quadruplex inventions; they not being specifically mentioned in the memorandum. Notwithstanding the deed from Edison to Gould conveying these inventions, I think that the evidence establishes that such patents were included in the general arrangement by which the patents relating to the automatic system were held, and that was the understanding of the parties. This view finds corroboration in the deed of January 1, 1875, from Harrington to Gould, covering these patents. My conclusion, after careful consideration of the law and facts, is that the assignments in question to Gould and from him to the company are inoperative; that this case arises under the patent laws, and hence is properly brought in this court. Such being the interpretation of the bill and my conclusion upon the facts, infringement is not controverted.

The patents having expired, a decree may be entered for an accounting with costs. So ordered.

THRESHER v. GENERAL ELECTRIC CO.

(Circuit Court, N. D. New York. February 7, 1906.)

1. PATENTS—SUIT FOR INFRINGEMENT—PLEA.

In a suit in equity for infringement of a patent, the defense of noninfringement cannot be made by plea, except under extraordinary or very special circumstances, and while it may be within the discretion of the court to permit the defense of prior invention to be raised by plea to justify such practice, it should appear with reasonable certainty that the determination of the plea will end the case.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 521.]

2. SAME.

In a suit in equity for infringement of a patent, a plea alleging that prior to the alleged invention by complainant of the device covered by the patent another invented and disclosed the device made and used by defendant which is claimed to infringe and with reasonable diligence made an application for a patent therefor which is still pending is bad, since it does not go to a single point, nor reduce the case to one point, but to two points, viz., possible prior invention, if the two devices should be shown to be the same, and possible noninfringement, if they should be shown not to be the same.

In Equity. On motion to strike off defendant's plea.

Church & Church, for complainant.
Charles Neave, for defendant.

RAY, District Judge. The bill of complaint is filed to restrain alleged infringement by defendant of complainant's letters patent No. 736,461, dated August 18, 1903, and which relate to electrical motors and brakes. The bill is in the usual form and contains the usual allegations. The material part of the bill alleging infringement is in the following words:

"And your orator further shows unto your honors, that the defendant, General Electric Company, * * * without the license of your orator and against his will, made, used and sold, and is now making, using and selling, electric motors and brakes containing and embodying the invention and improvement secured exclusively to your orator by said letters patent; that each of said electric motors and brakes so made, used or sold by the said defendant, contains the invention secured to your orator by said letters patent and is covered by the claims of the same, and was and is in violation and infringement of said letters patent," etc.

It will be noted that the bill of complaint does not describe the infringing machine or apparatus or give it any name. The infringement may lie in the use of one or of a dozen machines each differing from the other. The defendant files a plea, the material part of which reads:

"Prior to the alleged and pretended discovery or invention of said Alfred A. Thresher, as alleged in said bill of complaint, one Edward W. Robinson of Schenectady, N. Y., did, at the expense of and while in the employ of the defendant and in the course of his duties to the defendant under such employment, invent the improvements in electrical motors and brakes, the manufacture, use and sale whereof by the defendant is complained of as an infringement of letters patent No. 736,461, granted to said Thresher, and with reasonable diligence did adapt and perfect the same and disclose his said invention to others, and on the 22d day of April, 1904, he filed in the United States Patent Office an application for a patent for his said invention, as a substitute for and a continuation of an application filed by him on April 3, 1903 for the said invention, of which said invention and applications therefor the defendant, General Electric Company, is the sole owner, by duly executed instruments of assignment here in court to be produced, and is diligently prosecuting the said application of April 22, 1904, but the granting of letters patent upon said application has been delayed because said application has been put in interference in the Patent Office with said patent to Thresher No. 736,461, and the said interference is now before the Commissioner of Patents upon an appeal taken by said Thresher from the decision of the board of examiners in chief awarding priority of invention to said Robinson."

The substance of this plea is that prior to the discovery of the invention of the complainant described in his patent one Robinson invented the improvement in electrical motors and brakes complained of as an infringement of complainant's patent, and with reasonable diligence perfected and disclosed his invention to others and applied for a patent thereon, which application is now pending, and that by assignment the defendant has become and is the sole owner of such invention. If Robinson invented anything prior to complainant's invention which is an infringement of complainant's patent it is quite plain that Robinson was and is the first inventor of the device in question and entitled to the patent, and that Thresher is an infringer, or will be, when defendant shall have obtained his patent for the Robinson invention. The Robinson invention, if first discovered and invented, etc., by him, is not an infringement of complainant's patent, for complainant's patent is void. It seems to me that the plea alleges "prior invention" by Robinson, not of the device patented by Thresher and described in his bill of complaint directly, but of the device referred to therein as an infringing device, and therefore indirectly and inferentially of Thresher's device. In any event the plea sets up the defense of noninfringement, for if Robinson invented, used, and disclosed the device referred to, and applied for a patent therefor in due time, all prior to Thresher's discovery of the patented device, the use by defendant of the Robinson device cannot infringe complainant's patent.

The words used in the plea, "one Edward W. Robinson * * * did * * * invent the improvements," etc., must be held to mean that the alleged infringing structure was a patentable invention and that Robinson was the first inventor and in due time, etc., applied for a patent, and I think the language broad enough to cover each and every alleged infringing device used by defendant. If the same invention as complainant's then prior invention is pleaded; if a patentable invention but not the same as complainant's, whether a prior invention or not, then noninfringement is pleaded. The plea does not reduce the case to a single point, but to two points, viz., possible prior invention and possible noninfringement. If either of these contentions should be sustained by the proofs in support of the plea the complainant will fail in his action. Should the proofs fail to sustain the plea, then defendant may answer and plead prior invention by some other person, no invention in view of the prior art, anticipation, noninfringement, etc. The whole matter would be open to investigation, except it would be determined that the device of defendant alleged to infringe was not the prior invention of Robinson, the defendant's assignor. Even infringement by other devices than Robinson's as well as by Robinson's would be an open issue. Suppose the proofs under the plea should establish to the satisfaction of the court that Robinson invented a device prior to complainant's invention of his device, but it should also appear that Robinson's patentable device is not the one or ones used by defendant and charged as an infringement? The case would be where it was before the plea was filed and a long and useless delay would have been caused. When we go into the question of whether

or not Robinson's device is a patentable device, an invention, and when and by whom first invented, etc., we open a very broad field, and I cannot see that the case would be reduced, practically, to but a single point, and that the necessity for taking evidence at large, substantially, would be avoided.

When, in an equity action, the bill as a whole fails to state facts which, if confessed, do not entitle the complainant to any relief a demurrer is the proper pleading. That is the demurrer is upon matter defective contained in the bill itself. Farley v. Kittson, 120 U. S. 303–315, 7 Sup. Ct. 534, 540, 30 L. Ed. 684. It is there said:

"The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by the fifty-eighth of whose ordinances for the administration of justice in chancery, 'a demurrer is properly, upon matter defective, contained in the bill itself, and no foreign matter.'"

When, in such an action, some one fact, or set of facts going to one point of the case and absolutely necessary to be proved to make the case, is alleged, and there are also other facts that must be proved to establish other necessary points, a plea may be allowed denying such facts going to that point or setting up facts not suggested by the bill which if established absolutely controvert the allegation as to that point, or nullify it. But the plea must go to the one point, or reduce the case to one point, and must be such that if sustained it will necessarily end the case. Fletcher, Eq. Pl. & Practice, § 240; Cheney v. Patton, 134 Ill. 422, 25 N. E. 792; Wood v. Mann, 1 Sumner, 506, Fed. Cas. No. 17,951; Meeker v. Marsh, 1 N. J. Eq. 198; Farley v. Kittson, 120 U. S. 303, 314, 315, 316, 7 Sup. Ct. 534, 30 L. Ed. 684; United States v. California, etc., Land Co., 148 U. S. 39, 13 Sup. Ct. 458, 37 L. Ed. 354. In the last case cited the Supreme Court said:

"In Farley v. Kittson, 120 U. S. 303, 314, 315, 316, 7 Sup. Ct. 534, 539, 30 L. Ed. 684, the nature and functions of a plea were fully discussed. It was said: 'But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitford, Pl. (4th Ed.) 14, 219, 295; Story, Eq. Pl. §§ 649, 652.'"

This will avoid the necessity of going into and taking evidence at large, that is, on all the questions presented by the bill. But, in a patent case, a plea is not the proper mode of presenting an absolutely affirmative defense, one of several, such as prior invention, or anticipation. Such a plea presents for trial the questions who first invented the patented device and is the alleged infringing device the same in substance as complainant's, or does it embody his device? It may assert simply or go to show that defendant's advice is a patentable device and not the device of complainant, or one that embodies complainant's, and was a prior invention, in either of which cases noninfringement would be established.

In the following cases it has been held that the defense of noninfringement cannot be raised by plea except under extraordinary or very special circumstances, and in some of them that pleas to the bill in

equity for infringement of a patent are inappropriate: Sharp v. Reissner (C. C.) 9 Fed. 445; Hubbell v. De Land (C. C.) 14 Fed. 471–474; Korn v. Wiebusch (C. C.) 33 Fed. 50; Union Switch & Signal Co. v. Philadelphia & R. R. Co. (C. C.) 69 Fed. 833–835; Chisholm v. Johnson (C. C.) 84 Fed. 384; Knox Rock Blasting Co. v. Rairdon Stone Co. (C. C.) 87 Fed. 969.

In the case last cited, Stevens, D. J., said:

"It has been several times decided that a defense by plea is inappropriate to this class of cases [patent cases] unless in very special cases."

In Hubbell v. De Land, supra, the court said:

"Argument can hardly be needed to show that the question of the infringe- of a patent is not the proper subject of a special plea."

In Korn v. Wiebusch, 33 Fed., at page 51, Coxe, D. J., now of the Circuit Court of Appeals, Second Circuit, cited and approved this and also said:

"The issue tendered by the plea is whether or not the defendants infringe the claim of the patent construed in connection with the specifications, the file wrapper and contents, and in the light of the prior art. This is the controversy which usually arises when the defendant denies that he makes, uses, or vends the patented device. In other words, the defendant seeks to try the question of infringement upon a plea. It is clear that there is no authority for such practice."

In Hubbell et al. v. De Land, supra, at page 474, the court said:

"Argument can hardly be needed to show that the question of the infringement of a patent is not the proper subject of a special plea."

In Hubbell v. DeLand, a patent case, a motion to strike off the plea was denied, but there the plea set up that it appeared by a comparison of the reissued letters patent sued upon with the original that the reissued letters patent were for an entirely different thing than that mentioned in the original letters; that the claim in the reissue was unlawfully expanded so as to embrace improvements covered by other patents issued after the granting of the original patent, and before the reissue, and therefore the reissued letters patent were void.

In Union Switch & Signal Co. v. Philadelphia, etc. (C. C.) 69 Fed. 833, the court held:

"Where a bill claims under several separate patents, alleging that the subject-matter of each is conjointly used by defendants in one and the same connected machine, mechanism, or apparatus, the defendants cannot take issue upon this averment by means of a plea, but the same should be averred by answer."

And at pages 835 and 836 said:

"The defense set up amounts to a denial that the defendants infringe, as is alleged in the bill; that is to say, by conjoint use; and, as was urged by counsel in Sharp v. Reissner, 9 Fed. 447, where noninfringement broadly had been pleaded, expense to both parties might be avoided by having the single point first and separately investigated and determined. Yet the learned court there pointed out that the allowance of such a plea might, on the other hand, increase expense; and held, upon reasoning which is perfectly satisfactory to me, that the plea there interposed was bad, remarking, as may now be remarked, that 'no authority is cited where a plea like the present one has been * * * allowed in a suit for the infringement of a patent.'"

Attention is called to Westervelt et al. v. Library Bureau (C. C.) 114 Fed. 487, where the plea was to the whole bill and went to the question of prior invention. In that case issue was joined on the plea and evidence taken which was held not to support the plea. So far as appears the question was not raised whether it is proper in a patent case to raise the question of prior invention by a plea of prior invention. Quite likely it is within the discretion of the court to permit the plea of prior invention in a suit in equity for the infringement of a patent. But to justify the practice it should appear with reasonable certainty that the determination of the plea will end the case. In trying the question of prior invention we necessarily take and consider evidence as to whether or not invention is disclosed in view of the prior art, as well as to who was the inventor if invention is disclosed, and also as to whether the invention is the same as complainant's. This involves not only an examination of the whole prior art, but a construction of the claims of complainant's patent, and, possibly, other matters. It seems to me bad practice to permit pleas of this character which result in delays and embarrassments, and in many cases, possibly, in trying the case in sections. I find here no special or extraordinary circumstances justifying the plea.

In Arrott v. Standard S. Mfg. Co. (C. C.) 113 Fed. 389, it was held that the defense of prior invention and use in a suit in equity for the infringement of a patent, which defense under Rev. St. § 4920 [U. S. Comp. St. 1901, p. 3394], is provable on notice in writing in the answer, cannot be raised by plea.

The motion to strike off the plea is granted. Defendant may have 30 days after service of the order entered pursuant hereto in which to answer.

NATIONAL CASH REGISTER CO. v. UNION COMPUTING MACH. CO.

(Circuit Court, D. New Jersey. February 19, 1906.)

1. PATENTS—INFRINGEMENT—CASH INDICATOR AND RECORDER.
   The Koch patent, No. 398,625, for a cash indicator and recorder, claim 3, must be narrowly construed, and, as so construed, *held* not infringed.

2. EQUITY—DEFENSE OF LACHES—HOW RAISED.
   Laches is a defense which need not be pleaded, but may be raised upon the argument, or, when found to exist, the court itself may be passive and deny relief.

   [Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 395.]

3. PATENTS—SUIT FOR INFRINGEMENT—LACHES.
   Unexcused and unexplained delay in bringing suit for infringement of a patent for 11 or 12 years after notice of such infringement, and when in the meantime the business of the alleged infringer had been transferred to another, constitutes acquiescence in the infringement, if any, or culpable laches, and estops the complainant from relief in equity.

   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 468.

   Laches as a defense in suits for infringement of patents, see notes to Taylor v. Sawyer Spindle Co., 22 C. C. A. 21; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.]

In Equity. On final hearing.

Frank Parker Davis, Edward Rector, and J. B. Hayward, for complainant.

Rush Taggart and Alan D. Kenyon, for defendant.

CROSS, District Judge. The bill of complaint charges the defendant with infringement of letters patent No. 398,625, issued February 26, 1889, to William Koch, and duly assigned to the complainant, for a cash indicator and recorder, and asks for the usual relief in such cases. The answer denied the validity of the complainant's patent for want of invention, and also denies infringement. The only claim involved is No. 3 which is as follows:

"(3) The combination, in a cash-indicating machine, of two or more groups of keys, a series of two or more indicating wheels, each bearing numbers or characters, corresponding with the keys in one of said groups, and which are mounted to be read in their normal order from left to right at the front of the machine, and a second series of duplicate wheels mounted to be read in similar order from left to right at the rear of the machine, the corresponding wheels in the two series being geared to move in unison and to be actuated simultaneously by the movement of the one key appropriate thereto, substantially in the manner and for the purpose herein set forth."

The defendant claims that its machine does not infringe this claim, because it has no keys, and because, even if it has what may be called keys, it does not have two or more groups of keys as called for by claim 3 of the complainant's patent. It will be instructive at this point to examine the file wrapper of the patent in suit to learn the history of claim 3. As originally presented, it was known as claim 4, and was in the following form:

"(4) In a cash-indicating machine, duplicate indicating wheels, geared to move in unison and display simultaneously the same number or characters at the front and rear of the machine, substantially in the manner and for the purpose herein set forth."

The claim in this form was rejected by the patent examiner in a letter dated June 30, 1888, citing patents of McCulley and Taylor, numbered respectively, 200,076 and 380,831. Koch thereupon, on July 16, 1888, struck out claim 4, and substituted therefor a new claim, numbered 3, expressed as follows:

"(3) In a cash-indicating machine, a duplicate series severally embracing two or more indicating wheels all geared to move in unison, and display simultaneously both at the front and rear of the machine, a duplicate series of two or more numbers or characters to be read alike in the same order from left to right in both series, substantially in the manner and for the purpose herein set forth."

This claim was likewise rejected July 27, 1888, for lack of clearness in expression, and for the further reason, using the language of the examiner, that "the subject-matter of this claim, is, however, fully met in the Taylor patent of record." After this rejection, and on July 30, 1888, Koch canceled the amended claim, and substituted a new claim 3, which is the one involved in this suit, whereupon the patent was allowed. He furthermore, on July 16, 1888, while his application was pending, amended his specification in several respects, one of which amendments reads as follows:

"Nor do I claim broadly duplicate indicating wheels geared to move in unison and display simultaneously the same numbers at front and rear of the machine; my invention consisting in the novel combination and arrangement of a duplicate series at front and rear of the machine, each comprising two or more wheels geared and arranged to be simultaneously operated, so that the several numbers in both series shall simultaneously read correctly in the same order from left to right."

The defendant insists that the amendments thus made by the patentee to his claim necessarily narrowed it, so that the only novelty shown, and that upon which the Patent Office allowed the claim, consisted in the two or more groups of keys with their differential action. Whether Koch intended such limitation or not, or whether he incorporated the matter relating to the keys, their character and manipulation, in order to show novelty or not, the fact remains that they are included in the claim in such a way as to constitute them an element of the combination, and their presence cannot be ignored. Water Meter Co. v. Desper, 101 U. S. 332, 337, 25 L. Ed. 1024; Fay et al. v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979.

Complainant's expert has testified that the matter pertaining to the group of keys was inserted, not to overcome the Taylor patent, but to confine the claim to the cash register art. In this, however, he is clearly mistaken, as the claim was thus confined from the beginning and continued to be so confined when the amendment referred to was made. If, then, in the combination disclosed by claim 3, any device which is not the equivalent of the two or more groups of keys called for by the claim has been substituted by the defendant, such substitution does not constitute infringement. Koch's whole device consists in the corresponding wheels in the two series being geared to move in unison and be actuated simultaneously for the purpose expressed by the movement of one appropriate key; this one key thus moved being a single key of one of the groups of keys called for by the claim. Considering the amendments made to the claim while it was under consideration by the examiner, and the disclaimer made by the patentee, it seems to me that the claim is restricted and should be narrowly construed and limited to substantially the devices claimed.

The defendant maintains that its machine is not an infringement of the plaintiff's, because it does not have keys at all, least of all groups of keys. The keys of the Koch patent are individual keys, like those of a piano or typewriter, and are independently actuated. They appear in groups of nine, each key of a group representing only a part of the value or denomination represented by the entire group. Each key moves independently of every other key in its group and independently of every key in every other group. These keys, while operating independently and having the same length of stroke, nevertheless operate differentially, through other mechanism, the appropriate indicating wheels. A key, when moved, moves the corresponding indicating wheels the same distance; that is, if key 5 is struck, the corresponding indicating wheel will move the requisite distance to disclose the figure 5. For keys, the defendant has substituted what are called "segmental levers," which move upward and downward through

slots on the curved front of the machine. The movement of one of these levers a greater or less distance imparts a corresponding movement to the indicating wheels. These segmental levers are the only parts of the defendant's machine which correspond to the keys in the Koch patent; that is, they move the indicating wheels in the defendant's machine, which is the function of the keys in the complainant's machine. Attached to these segmental levers, on opposite sides and at alternate intervals, are what complainant's counsel calls "keys," but which the defendant's counsel calls "handles" or "segments." There is marked upon each of these handles or segments a denomination or value which in some respects corresponds to the denomination or value marked upon the keys of the Koch patent. These handles or segments only serve, however, as guides to the operator to indicate how far, or over what distance, the lever to which they are attached, should be moved. Without these handles the lever could be moved so as to show upon the indicating wheels any particular number or denomination required; but in this case more care would be requisite. With the operator's finger upon a guide, there is no danger that the operator will overrun the number he desires to show; for instance, by putting his finger upon handle 7, and moving the lever downward until his finger strikes the base or guard, he would have moved the lever just far enough to indicate upon the indicating wheels attached to that lever the figure 7. As already stated, it seems clear that the segmental lever, rather than the segments or handles, performs the function of the Koch key. If this be so, there are no groups of keys disclosed in the defendant's machine. There is at the most a single group of levers, but not two or more groups of levers. Each lever, it is true, has nine projections or handles appearing alternately upon either side of it, and each of these has a different numeral on it, but obviously one of these handles cannot be moved without moving all the others, and the lever as well; nor do they move, nor does the segmental lever move, the same distance when the figure 5 is desired to be shown that they do when the figure 7, 8, or 9 is desired. Furthermore, if the lever is moved at all, every segment or handle necessarily moves the same distance.

In the defendant's machine the differential effect is not produced by mechanism at all, but entirely by the manual act of the operator, who moves by his hand and at his pleasure the segmental lever a greater or less distance, while in the Koch patent the differential is produced entirely by mechanism. If the operator upon the Koch machine desired to disclose upon the indicating wheels the figure 5, he must depress key 5, and that key only; while upon the defendant's machine, to accomplish the same result, he need not necessarily touch handle 5, but he may use any other handle, or the segmental lever itself, but in using the latter he will be required, for reasons already stated, to exercise more care. The handles are unnecessary. Their function could be as readily obtained by a notch in the side of the lever, or even by a mark upon its face; hence, while the handles are a convenient, and possibly the most convenient, guide, they are nothing

more. Again, as stated in the brief of the defendant's counsel, these segmental levers "do not each represent one digit, or value of a denomination, or decimal place, as does each key of the Koch patent, but each segmental lever represents an entire denomination or decimal place."

Considerable stress has been laid by counsel upon the appropriate name wherewith to characterize what we have called "handles" or "segments." Their terminology is, however, of small importance. It matters little whether they are called "keys," or "segments," or "guides," or "handles," since, by whatever term they are called, the real question remains: Do they employ the same means, operating in the same way, to effect the same result, that is produced by the keys of the Koch patent? For it may be admitted that the keys or handles and segmental levers of the defendant's machine produce substantially the same result as the keys produce in the complainant's patent, without admitting that the defendant is infringing upon the complainant's device. They may attain the same result, and yet accomplish it by radically different mechanism. To constitute infringement, the two devices must perform the same function in substantially the same way. The complainant's expert claims that there are 36 keys in the defendant's machine and that they are arranged in four groups. He evidently reaches this conclusion by calling each segmental lever, with its handles, a group of keys. I think it has been satisfactorily shown, however, that the segmental levers with the numbers thereon, are not, when taken either collectively or singly, the equivalent of the keys referred to in the patent in suit. This is not only the opinion of defendant's expert, but a close examination of the two devices seems to sustain him. It is true that the parts of the defendant's segmental levers, which have been called "handles" or "segments," were, at the commencement of their manufacture, in a comparatively few instances, and for a short time, called "keys" by the defendant's predecessors in business. This fact, however, is quite unimportant, and has, moreover, been satisfactorily explained. In the cash register art, they are generally otherwise known and designated. In this connection it may be added incidentally that the complainant in its business, in referring to the defendant's device, has, as will be referred to later, called the segmental lever and handles of the defendant's machine a "ladder." It seems unnecessary, however, to discuss the matter further. I have reached the conclusion that the defendant's machine does not infringe the complainant's, since it does not use two or more groups of keys operated by a single key, as required by claim 3 of the complainant's patent.

It is furthermore urged by counsel for the defendant that the complainant should not be permitted to prosecute this suit further because of its delay in instituting it. Laches is a defense which need not be pleaded. It may be raised upon the argument, or the court may, when it appears, be passive and refuse relief. Sullivan v. Portland R. R. Co., 94 U. S. 806, 811, 24 L. Ed. 324; Woodmanse & Hewitt Mfg. Co. v. Williams, 68 Fed. 489, 493, 15 C. C. A. 520; Westinghouse Air Brake Co. v. New York Air Brake Co. (C. C.) 111 Fed. 741. It appears in the case at bar, and is not denied, that the defendant's prede-

cessor began making the machine, which is now alleged to be an infringement of the defendant's patent, in the latter part of the year 1890, or the beginning of the year 1891, and that knowledge of the fact that it was making and selling such machine was brought to the attention of the complainant in 1892 and 1893. This state of facts appears, not only by the testimony of witnesses, but also by exhibits in the form of circulars issued by the complainant to its agents. These exhibits show that the complainant, 11 or 12 years prior to the commencement of this suit, had knowledge that the defendant was making and vending the machines which are now claimed to be an infringement of the patent in suit. They show that the complainant did not then regard the segmental lever and handle attachments of the defendant's machine as an infringement of their key system. This is a fair and necessary inference, not only because the circulars do not disclose any such claim, but also for the reason that the complainant contented itself therein by rather contemptuously characterizing the defendant's device as a "ladder," and pointing out with considerable detail its defects and inefficiency as compared with their own. The question therefore is: Should the complainant at this late day be permitted to change its base and claim a construction of its patent different from that which it seems then to have claimed? We must either assume this change of construction or else find the defendant guilty of gross laches in not having asserted its known right with reasonable promptness. It has already been said that the alleged infringing machines were put upon the market as early as 1891, were known to the complainant in 1892, and that as early as 1893 it had one or more of them in its possession. These facts are not denied, and their consideration leads to the conclusion I have already indicated. The bill of complaint should be dismissed upon this ground, even if there were no other. There is no branch of equity jurisprudence where such an unexcused and unexplained negligence is, or ought to be tolerated, and the rule has very often been applied in patent cases.

In the case of McLaughlin v. People's Railway Co. et al. (C. C.) 21 Fed. 574, a demurrer was sustained for 13 years of laches. In Edison Electric Light Co. v. Equitable Life Assurance Co. (Fed.) 55 Fed. 478, the fact that the patent in suit had been infringed for 11 years was set up by a plea, and the plea was allowed. In the case of Kittle v. Hall (C. C.) 29 Fed. 508, the court, after stating that the case was not free from doubt, declined to dismiss a bill for 7 years' delay in bringing suit; such delay having been partially accounted for and excused. Where a patent had laid dormant for 15 years, having been infringed by the defendant with complainant's knowledge for 7 years without protest, the bill was dismissed. Westinghouse Air Brake Co. v. New York Air Brake Co., supra. See, also, Covert v. Travers Bros. Co. (C. C.) 96 Fed. 568; Meyrowitz Mfg. Co. v. Eccleston et al. (C. C.) 98 Fed. 437; Richardson v. D. M. Osborne & Co. et al., 93 Fed. 828, 36 C. C. A. 610; Woodmanse & Hewitt Mfg. Co. v. Williams et al., supra; Calhoun v. Southern Cotton Oil Co., 121 Fed. 1018, 57 C. C. A. 327. Under the authority

of these cases, I think the knowledge acquired by the complainant that the defendant's predecessor was manufacturing what is now alleged to be an infringing machine, coupled with its acquiescence therein, for a period of 11 or 12 years, without protest or suit, and that during that period the business of the alleged infringer was acquired by the defendant herein, should estop the complainant from maintaining its present suit. In view, therefore, of the unexcused and unexplained delay of the complainant in bringing the suit, the bill should be dismissed.

The view which I have taken of this case renders it unnecessary for me to pass upon the validity of the complainant's patent. Under the evidence, however, it is a grave question whether, because of the prior art, its patent could be upheld.

MYGATT v. McARTHUR et al.

(Circuit Court, S. D. New York. February 7, 1906.)

1. PATENTS—INVENTION—REFLECTOR FOR INCANDESCENT LAMPS.
The Goodchild patent, No. 634,295, for a reflector for incandescent lamps which fits over and is removably supported by the flaring upper portion of the lamp bulb, is void for lack of patentable invention, in view of the prior art.

2. SAME—DESIGN PATENT—LAMP REFLECTORS.
The Mygatt design patent, No. 35,755, for a design for a reflector for artificial lights, was not anticipated, and discloses invention. Also *held* infringed.

In Equity. Suit to restrain alleged infringement by defendants of two patents (U. S.), one a mechanical patent, and the other a design patent, but each relates to reflectors for artificial lights. The complainant alleges that defendants infringe both patents by the sale of the one article, a reflector for artificial lights.

Howard Taylor (Francis H. Kinnicutt, of counsel), for complainant.

Thomas Ewing, Jr. (George H. Gilman, of counsel), for defendants.

RAY, District Judge. The mechanical patent in suit, No. 634,295, dated October 3, 1899, to Goodchild, "Reflector for Incandescent Lamps," is much more formidable in words than in substance or complexity of construction. It has three claims, reading as follows:

"(1) The combination with the bulb of an incandescent lamp, of a light-reflector, which fits snugly but removably over the external surface of the downwardly-flared upper part of said bulb and is supported wholly and directly thereon, substantially as and for the purpose set forth.

"(2) The combination with the bulb of an incandescent lamp, of a removable reflector, B, inclosing and snugly fitting the external surface of the upper, downwardly-flared portion of the bulb, said reflector being supported wholly and directly on the bulb and extending down about to the point where the bulb is largest in diameter, substantially as set forth.

"(3) The combination with the bulb, A, of an incandescent lamp, of a removable, glass reflector, embracing and housing the bulb, and supported

wholly on the downwardly-flaring upper portion of the same, said reflector fitting the outer surface of the bulb and having an outwardly-turned marginal lip at its lower edge, substantially as set forth."

In the specifications we find the following:

"This invention relates to reflectors used in connection with the bulbs of incandescent electric lights. Among the various forms of reflectors for this class of lamps, one is provided by silvering the upper part of the bulb down to a point near the largest diameter of the same, leaving the lower portion of the bulb clear all around. Another construction, which is designed, mainly, for a shade, incloses the upper half of the bulb all around with a shade of colored glass, which is afterward united integrally with the glass of the bulb by heat. These devices perform their functions, but, being integral with or inseparably connected with the bulb, are necessarily discarded with the bulb when the filament of the latter is burned out. The object of the present invention is to provide a reflector of the form of the downwardly-flared upper part of the bulb and adapted to fit rather snugly about such part of the same; said reflector being supported wholly on the bulb by the downwardly-flaring shape of the latter, and having a suitable reflecting-surface, such as a silvered-surface, for example. * * *. The reflector, B, is constructed to fit quite snugly over and incloses the upper part of the bulb; but it may be readily lifted off and replaced, the smaller end thereof being of sufficient size to pass over the socket-plug, a. The reflector is supported wholly on the bulb and by contact with its flared surface. At its lower edge the reflector may have a projecting marginal lip, b, and the reflecting-surface may extend out and over this lip. * * * An advantage of this reflector is that, while it is readily removable and may be taken from a discarded bulb and put on a fresh one, thus obviating the loss of a reflector with each bulb, yet it does not require (as do most reflectors) some special form of lamp having means for securing it to the metal socket or plug, as it drops over and is supported entirely on the bulb itself. This adapts it to any ordinary incandescent bulb, and also enables it to be produced very economically."

Reflectors for artificial light of all appropriate shapes, and of the shape of the one in suit, are very old and very common. The round hole in the top for the insertion of the upper end of the lamp is also very old and common. We find in the prior art such reflectors so constructed as to admit the glass lamp chimney, which is always round and made of larger circumference, near the flame of the lamp, and the chimney, passing through the hole in the reflector, allows the latter to rest upon it and to be supported thereby. When the shade or reflector is of noncombustible material, nothing more is necessary; but, when the shade or reflector is of some combustible material, a rim is added at the opening, which prevents contact with the heated chimney and prevents combustion. As these incandescent lamps are bulb like in form and have a neck smaller than the lower portion, and are also round like a lamp chimney, the neck portion passes through the opening in the upper part of the reflector until the swell of the lamp prevents further entrance. Then the round hole is filled by the round lamp, and the one fits the other, and the reflector is necessarily supported by the lamp. If the reflector is too heavy, it will pull the lamp from the contact socket, and this is the only or main reason why the reflector is usually attached to the contact socket into which the lamp fits. The idea of a round substance, whether hollow or solid, fitting into a round hole or aperture or opening, is very, very old. This court is unable to find invention in this combination or construction. In view of the prior art, the mechanical patent does not disclose invention, and is void.

The design patent, No. 35,755, dated February 18, 1902, "Design for Reflector for Artificial Lights," issued to Otis A. Mygatt, is as follows:

"Be it known that I, Otis A. Mygatt, residing at New York, in the county of New York and state of New York, have invented and produced a certain new and useful design for a reflector for artificial lights, of which the following is a specification; reference being had therein to the accompanying drawing. The design relates to the form or configuration and the surface ornamentation of a transparent reflector for artificial lights. The figure is a side elevation of the reflector embodying the design. The reflector is composed of transparent glass, and the form is that of the frustum of a cone, A, surmounted by a ring, B, of substantially ogee form, as shown. The outer surface of the reflector is practically covered by spirally-arranged projecting ribs extending from near the top of the frustum to near the lower edge thereof and terminating at the lower edge in small beads, D. What I claim, and desire to secure by letters patent, is—the design for a transparent reflector for artificial lights, as shown and described."

This court recently considered and held valid a similar design patent, No. 32,685. See Mygatt v. Zalinski (C. C.) 138 Fed. 88. That decision has been acquiesced in. This is a different design, but all that was said there on the question of validity applies here. So of infringement. Defendant makes the same thing, uses the same design, except that a slight cut is made around the reflector about half way from the upper to the lower edge of the reflector. This slight change which slightly impairs the design of complainant's patent, but appropriates it bodily, does not avoid the charge of infringement. The defendant calls its reflector a "hood," but a change of name does not avoid infringement. The defense of anticipation is not made out.

The design patent is valid, and is infringed by defendant. The complainant is entitled to a decree accordingly, and for an accounting, with costs.

THE PHŒNIX.

(District Court, S. D. New York. October 14, 1905.)

TOWAGE—NEGLIGENCE IN STARTING WITH BARGE IN ICE—MUTUAL FAULT.

A tug *held* chargeable with negligence in starting to tow, on a hawser, a blunt-bowed sternless barge heavily loaded with sand, out of a harbor through a channel cut in the ice and filled with floating ice, where there was obvious danger of injury to the barge because of her shape and the fact that she was wider than the tug, and liable for one-half the loss by the sinking of the barge and cargo from contact with the ice; the barge being also in fault for assenting to the towing.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Towage, § 21.]

In Admiralty. Suit against tug to recover for sinking of tow by floating ice.

James J. Macklin, for libelant.
John F. Foley and Howard S. Harrington, for claimant.

ADAMS, District Judge. This action was brought by the J. B. King Transportation Company, the owner of barge No. 6, to recover the damages sustained by the barge, and her cargo of about 800 tons of

sand, from sinking through contact with ice while being towed by the steamtug Phœnix out of the harbor of Hempstead, Long Island, bound to Staten Island, on the night of the 6th of February, 1904.

The libelant alleges negligence in towing the barge through the ice in the harbor when starting on the voyage, contending it was negligent to tow at all in such darkness as prevailed that night and in continuing on at a high rate of speed in too narrow a channel. The claimant denied any negligence and alleged unseaworthiness but has since withdrawn the charge in the latter respect and it simply remains to determine whether there were any circumstances to indicate fault in the towing so far as it progressed.

The barge was scow shaped and about 27 feet wide. On that night the harbor was completely frozen over but a channel had been cut through earlier in the day by another tug, leaving a space of 35 to 40 feet wide running from the wharf, where the boat was loaded, to the open channel. The boat had been towed light through this channel in the afternoon of the same day and no injury received by her from the broken ice, with which the channel was filled. She was then loaded, so that she was drawing about 15 inches, by the libelant, her loading being completed late the same night. About 11:15 o' clock the tug was notified that the boat was ready to proceed. She was then taken on a short hawser, so that there were 45 or 50 feet between the tug and the barge, and the towage commenced, the tug proceeding at less than half speed, so slowly that about 40 minutes were occupied in covering a distance of about a mile or a mile and a half. Such undisputed fact precludes any further attention being given to the question of excessive speed and it only leaves for consideration whether there was any lack of proper precaution on the part of the tug in starting or in the method of towing. The existence of darkness does not seem to be a factor in the case, and no legitimate fault can be found with the manner of towing.

It was not clearly apparent that there would be any great danger in attempting the voyage to an ordinary sound boat carefully towed on a hawser, but there can be no question in this case about the risk. The master of the tug said, what is obvious to anyone, that there is always danger in going through ice. This is especially so to a stemless round-bowed boat, as was the case here.

The boat had withstood contacts with the ice in entering the harbor but that was no reliable indication that when loaded, she would go out safely, as in fact she did not, because after proceeding a short distance, a considerable hole was made in her bow by the ice, which resulted in her sinking.

The construction of the barge was such that she was unfit to be towed in the ice, as the master testified he notified the tug's master. This was denied by the latter and it is not easy to determine where the truth lies, but in any event, it was sufficiently obvious to any careful person, that the towage would be at great risk of injury to the barge on account of her form and the heavy ice she would have to be taken through. It is true that the tug's master placed the boat behind the tug, in the expectation that the latter would receive the brunt of the

contacts and shield the barge from injury but the tug was not as wide as the barge and could not adequately protect her, as the result showed, especially as she sheered 5 or 6 feet outside of the tug.

The claimant cites The Packer (C. C.) 28 Fed. 156. That was a case of towing in ice and the tug exonerated in a careful opinion by Judge Wallace, but peculiar circumstances existed there. It is stated in the opinion, that the voyage of the boat was interrupted by ice and the master became impatient, soliciting the agent of the Packer's line to procure him a tug and proceed. This the agent was reluctant to do, fearing danger, but he yielded to the urging of the master and directed the Packer to undertake the service. It appears that the master was experienced and fully aware that the attempt involved risk to his boat, which risk he promised to assume. Of course it was said that such assumption would not relieve the tug from the effect of its negligence but it was held that the tug was not liable because the master did everything that a prudent and intelligent navigator would ordinarily have deemed necessary and the tug could not be held for the master's mere mistake of judgment. The circumstances here were different. It was obvious that the risk would be encountered from the start. There was no chance, as in The Packer, of escaping the ice and they here pushed right into it with the disastrous result. I can not regard the tug's proceeding as anything but negligent. Simply towing in ice has been held to impose liability upon the tug in several cases. The Tugboat James A. Wright, 3 Ben. 248, Fed. Cas. No. 7,190, by Blatchford, J.; The Steamtug U. S. Grant, 7 Ben. 337, Fed. Cas. No. 16,804, by Benedict, J. These authorities were cited by Judge Coxe in The M. J. Cummings (D. C.) 18 Fed. 178, 184. The towing must be regarded as having been particularly hazardous in this case on account of the construction of the boat. The precaution taken of putting her astern was not sufficient on account of her width being greater than the tug's. It was perfectly obvious that she would have to be towed through heavy ice in the beginning of the voyage and there was a strong probability of danger.

The last time I had occasion to consider the liability of a tug for the results of injuries to her tow from ice was in Burke v. Tugs R. G. Townsend and S. L. Crosby (decided June 6, 1905) 140 Fed. 217. The tugs there were held solely liable for injuries to a blunt-bowed stemless boat towed alongside, against the wishes of the master, who said his boat was unfit to encounter ice and only consented to be taken upon assurance from the tug of there being no danger.

Here it seems to be clear that the boat participated in the negligence. It is said by the master that he did not consent to be towed and warned the tug of the danger but this contention has not been satisfactorily sustained. The tug's master denies that any such conversation took place and it seems probable that those interested in the barge were quite willing that she should be subjected to such risk as existed. The libelant was the owner of the cargo and needed it at Staten Island. Its representative at Hempstead stood by when the towing arrangements were being made and acquiesced in the starting.

Decree for the libelant for half damages, with an order of reference.

UNITED STATES v. CHICAGO, P. & ST. L. RY. CO. et al. (two cases).

(District Court, S. D. Illinois. January 19, 1906.)

Nos. 10,652, 10,653.

1. RAILROADS—SAFETY APPLIANCE ACT—JOINT ACTION TO RECOVER PENALTY.
In a joint action against two or more railroad companies to recover the penalty for violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], there may be a recovery against all or any of the defendants as the proofs warrant.

2. COMMERCE—SAFETY APPLIANCE ACT—VIOLATION.
A railroad company, which hauls over its line within a state a car of another company employed in moving interstate traffic consigned to a point in another state, which car is not equipped with the appliances required by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], is liable for the penalty imposed by said act.

This is an action begun by the United States attorney, upon the direction of the Attorney General, at the request of the Interstate Commerce Commission, in accordance with section 6 of the act of March 2, 1893, as amended, to recover a penalty of $200 for violations of that statute.

Inspectors of safety appliances in the employ of the Interstate Commerce Commission reported that on December 14, 1904, two coal cars of the Litchfield & Madison Railway Company, loaded with coal, consigned to points in the state of Missouri, were hauled over the line of the Chicago, Peoria & St. Louis Railway Company of Illinois, from Madison, in the state of Illinois, to East St. Louis, in said state, and delivered to the Terminal Railroad Association in a defective condition. The defect on coal car 2,734 was on the "B" end; the lock block being missing from the Kelso coupler thereof and the coupler thus being totally inoperative. The defect on coal car 2,171 was on the "B" end thereof; a grab iron being broken off and missing from that end of the car. Prior to July 1, 1904, the Chicago, Peoria & St. Louis Railway Company of Illinois had operated the Litchfield & Madison Railway Company under a general lease, but on that date said lease was canceled. There was an arrangement or agreement in effect on December 14, 1904, whereby the cars of the Litchfield & Madison Railway Company delivered at the Madison yard of said railway company were hauled by the Chicago, Peoria & St. Louis Railway Company of Illinois in its trains from Madison to East St. Louis, for which service the Litchfield & Madison Railway Company paid its share of maintenance of said line, based upon its share of the total wheelage and 50 per cent. of 5 per cent. interest on the cost of said line. This line of the Chicago, Peoria & St. Louis Railway Company of Illinois from Madison to East St. Louis is about 3 miles in length. The facts are further set forth in the opinion of the court.

W. A. Northcott, U. S. Atty., H. A. Converse, Asst. U. S. Atty., and L. M. Walter, Special Asst. U. S. Atty.

Wilson, Warren & Child, for defendants.

SANBORN, District Judge (after stating the facts). In case No. 10,653 the amended declaration states that both defendants are corporations organized under the laws of Illinois, and on December 14, 1904, were common carriers engaged in interstate commerce by railroad, and operated jointly a line of railway in St. Clair county, Ill., and on that day hauled on their joint line of railway coal car No. 2,171, marked "L. & M.," meaning "Litchfield & Madison," which car was

not provided with grab irons on one end, called the "B" end thereof; that said car was then and there used in moving interstate traffic, being coal from Staunton, Ill., to St. Louis, Mo., and not being a four-wheel car or an eight-wheel standard logging car. Judgment is demanded for $100 for said offense, the declaration being in debt. In the other case against the same defendants the amended declaration states the same facts of joint operation and hauling on joint line of defendants' coal car No. 2,734, having a defective uncoupling mechanism on the "B" end thereof, so faulty that in handling the car it could not be uncoupled without the necessity of a person going between the end thereof and the car to which it might be coupled; stating also the same interstate commerce haul and the same character of car. This action is in debt, and judgment is demanded for $100 against both defendants, as in the other case. In each case defendants plead nil debet.

Act Cong. March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], provides:

"That it shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 4 of the act provides that it shall be unlawful under like circumstances for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. It is under this act that the declarations were filed.

It appears in evidence that on December 14, 1904, the defendant the Litchfield & Madison Railway Company owned and operated a railroad from Litchfield, Ill., to Madison, Ill., some 3½ miles north of East St. Louis. At the same time it appears that the Chicago, Peoria & St. Louis Railway Company owned and operated a railroad from Pekin, Ill., to Granite City. The southern terminal of the latter road is a short distance from East St. Louis. The Chicago, Peoria, & St. Louis Railway Company also owns a track from Madison to East St. Louis, over which all freight cars destined for interstate commerce between the road of the Litchfield & Madison Company to points in Missouri are hauled by the Chicago, Peoria & St. Louis Railway Company. The arriving south-bound trains of the Litchfield & Madison Road are taken by the Chicago, Peoria & St. Louis Railway, or by its engines, to East St. Louis, and there are delivered to the St. Louis Bridge & Terminal Company, which is an ordinary terminal railroad company between trunk lines operated across the St. Louis Bridge between East St. Louis, Ill., and St. Louis, Mo. It appears also that the Illinois Central Railroad Company uses the track of the Chicago, Peoria & St. Louis Railway Company between Madison and East St. Louis. This statement of facts applies to the date in question, December 14, 1904. On the date just mentioned two eight-wheeled coal cars were delivered by the Litchfield & Madison Company at Madison to the Chicago, Peoria & St. Louis Railway Company for hauling to

East St. Louis, destined for delivery to the Terminal Company, and loaded with coal consigned to points in Missouri, and the cars were actually afterwards moved from Illinois to Missouri, pursuant to the terms of the bills of lading. One of these cars had a defective broken coupling, which would not work automatically or without going between the cars. On the other one the grab iron, which is a support some 24 inches long, fastened onto the end of the car, designed to aid the brakeman to loosen the knuckle of the coupling joint, had been broken or torn off, so as to leave only a small portion of one end of the iron remaining on the door. These cars were inspected by agents of the Interstate Commerce Commission at Madison and also at East St. Louis, and the Terminal Company thereupon repaired them on December 15, 1904, and then transported them into Missouri.

The only question presented is whether the defendants are jointly liable under the acts of Congress for hauling or permitting to be hauled or used on the line from Madison to East St. Louis these cars in the condition described. It clearly appears that the line upon which they were so hauled belonged entirely to the Chicago, Peoria & St. Louis Railway Company, and that the hauling was done entirely by that company; the Litchfield & Madison Company having nothing to do with the cars after they were stopped at Madison and delivered to the Chicago, Peoria & St. Louis Railway Company, as herein stated. Under the case of Chaffee v. United States, 18 Wall. 518, 538, 21 L. Ed. 908, I am of opinion that judgment can be rendered against both or either of the companies under these declarations. It also appears clearly that the Litchfield & Madison Company is not within the terms of the act in this particular case, because the haul shown was that of the other company alone, and that no judgment should be taken against it for the penalty provided, but that the plaintiffs should recover the prescribed penalty of $100 in each case, with costs against the Chicago, Peoria & St. Louis Railway Company only.

Judgment is ordered accordingly.

GIRARD TRUST CO. v. McKINLEY-LANNING LOAN & TRUST CO. et al.

(Circuit Court, E. D. Pennsylvania. February 6, 1906.)

No. 13.

1. TRUSTS—COMPENSATION—COMMISSIONS—WHEN EARNED.

Commissions to a trustee holding securities to secure debentures of an insolvent corporation are given as compensation, not only for the collection of such securities, but for the distribution of the proceeds, and will not be allowed on sums collected and remaining in the hands of the trustee until their distribution.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 449.]

2. RECEIVERS—ALLOWANCE OF FEES FROM TRUST FUND.

Fees are not allowable to a receiver appointed for an insolvent mortgage company or to his counsel out of the proceeds of securities pledged in trust by the company to secure its debenture holders, which were collected by the trustee and did not come into the hands of the receiver and in respect to which he performed no service; the amount collected being less than the claims of the debenture holders.

In Equity. On exceptions to master's report on trustee's account. See 135 Fed. 180.

Charles C. Townsend, Cornwell, Gheen & Cornwell, and George Wharton Pepper, for exceptions.

A. H. Wintersteen and George L. Crawford, opposed.

J. B. McPHERSON, District Judge. The facts upon which the decision of this controversy mainly depends will be found in the opinion delivered by this court (135 Fed. 180) upon exceptions to the interlocutory reports of the master, and a restatement is also contained in the present report. Not long after the court's decision upon the interlocutory reports, a petition was presented, asking that the Girard Trust Company be appointed an additional receiver, and on March 13, 1905, the appointment was made. In May, the Girard Trust Company filed an account of its doings as trustee up to the date of March 13, 1905, and the account was referred to the master, "to examine and report thereon and to recommend what decree or decrees should be entered by the court touching the matters and things set forth in said report, and the property administered and under administration as shown in said account, including distribution of moneys on hand." In obedience to this direction, the master prepared a report, which has been excepted to by the McKinley-Lanning Loan & Trust Company, and by certain of the debenture holders; and it is these exceptions that are now before the court for consideration.

The question of most importance, namely, whether any of the expenses incurred in collecting the assets that were deposited with the accountant as security for the debenture holders can be lawfully charged against the fund collected, was decided by the master and by the circuit court adversely to the exceptants, at the time when the interlocutory reports were under review. I do not think it necessary to add anything now to what will be found in the two reports of the master upon this subject, and I see no reason to change the opinion that I have already expressed.

No objection is made to the amount of fees that have been awarded to counsel for the accountant, if any amount whatever is properly payable out of the fund; but the sum claimed by the accountant itself as commissions is averred to be excessive. It is the ordinary charge of 5 per cent. upon the money collected, and, in view of the difficulty and complexity of the business, scattered as it was over several distant states, and involving the care, oversight, management and collection, respectively, of many small mortgages and pieces of real estate, I am unable to pronounce the charge too high. But the other branch of the first exception, which objects to the present allowance of commissions upon that part of the fund which the master recommends should be retained by the accountant for possible use in the continuing business of administering the trust, and for future distribution, stands upon a different footing. In my opinion, it will be time enough to consider the allowance of commissions upon this sum when the money comes to be actually distributed; for commissions are compensation, not only for collection, but also for distribution, and, until a

fund is actually distributed, the accountant's duties, for which commissions are to be paid, have not been completely discharged. Moreover, when several accounts are required before the final distribution of an estate can be made, it is obvious that the total amount of compensation to which the accountant is entitled cannot be properly determined until the whole work is done, for it is only upon a complete survey of the accountant's labor and conduct that the total amount of compensation can be properly determined. In a given case, it is conceivable that the accountant might not even have in his hands the sum whose distribution he is asking the court to defer, having already misapplied it; and it is also conceivable that his subsequent conduct with reference to the sum which the court may permit him to retain might be such as justly to forfeit his commissions thereon. Of course, no such suggestion is applicable to the present case, but I am speaking of what I believe to be the general rule upon the subject, and stating what I think is one reason why it should be observed. Upon the amount, therefore, which the accountant is permitted to hold in its hands, no commissions for the present will be allowed.

I agree also with the exceptants in the position that no allowance can be made out of the fund now being distributed to the original receiver and to his counsel. During the period covered by this account, the original receiver collected a very small sum of money from another source, and he had no necessary duties to perform, so far as I can see, with reference to the securities by which the present fund was produced. No doubt he was entitled to redeem them, if he had been able to pay the sum due thereon by the McKinley-Lanning Loan & Trust Company; but he could not redeem them, and his only other right in connection with them, as it seems to me, was to claim such equity as might exist after the proceeds had been applied to the debentures for which these securities were primarily pledged. It is not averred that the present fund embraces any such equity, and I do not see, therefore, how the receiver or his counsel can be entitled to any allowance out of this fund thus devoted to another purpose. If general assets of the mortgage company shall hereafter be collected, the question of compensation for the receiver and his counsel may again be urged against such a fund, and perhaps a different question may then be presented.

The brief of counsel for the exceptants disclaims any intention of criticising the amount of the fees charged by the master, and this subject need not, therefore, be discussed. It is argued, however, that a portion at least of the master's charges, and also of the counsel fees claimed by the accountant, should be borne out of whatever funds may come into the hands of the receivers from the general assets of the company, and that all the charges and fees should not be assessed against a fund which was primarily intended for the benefit of the debenture holders. I am therefore asked to charge only one-half of the counsel fees and one-half of the master's charges against the present fund, leaving the rest to stand over, and to be charged against any general assets of the company that may be hereafter collected. Whether this would be equivalent to postponing them indefi-

nitely or not, I am not able to say. At present, the general fund is only $200 or $300, and not much more is in immediate prospect. I think, therefore, that it would be more equitable to charge these fees now against the fund in hand, but to state distinctly, that if a general fund of sufficient size should hereafter be collected, and if it should appear, upon further consideration, that such general fund is properly chargeable with any portion of these fees, the proper adjustment may then be made. If it should appear that the general fund should pay part of these charges, the proper proportion could then be diverted from that fund and restored to the debenture holders.

A decree may be drawn in accordance with this opinion.

THE W. C. KIRK.

(District Court, D. New Jersey. January 23, 1906.)

COLLISION—VESSELS AT WHARF.

While a barge 20 feet wide was discharging on one side of a creek 40 feet wide, a canal boat 17 feet wide was placed alongside to discharge upon the other side, and left during the night, and when the tide receded the vessels sagged together, and the barge was injured. *Held*, that the canal boat should not have been left in such close proximity to the barge, and was in fault; also that the barge was in fault because during the afternoon and after the canal boat was placed she moved farther up, where the stream was narrower, which brought her closer still to the other vessel.

In Admiralty. Suit for collision.

David O. Watkins and J. Boyd Avis, for libelants.

Francis C. Lowthorp, for claimant.

LANNING, District Judge. The libelants' barge Idella, loaded with crushed stone for the city of Woodbury, was tied up to the libelants' wharf in Woodbury creek at the city of Woodbury, for the purpose of discharging her load, early on the morning of April 24, 1903. She was 80 feet long and about 20 feet in width. The creek at the point where the barge was moored is only 40 feet in width. During the day the canal boat W. C. Kirk, composed of two boxes—a bow box and a stern box, each loaded with coal—was brought up the stream. Before reaching the place where the Idella was located the two boxes were separated and the stern box taken in by the side of the Idella and tied to the wharf on the opposite side of the stream and unloaded, without accident. This box was then removed and the bow box of the canal boat brought up and tied to the wharf opposite the Idella. The Idella and the bow box of the W. C. Kirk remained at their respective wharves during Friday night. The bow box was 17 feet in width. As the tide receded early Saturday morning the Idella and the bow box of the W. C. Kirk came into contact, and the Idella was injured by the pinching she received.

The proofs satisfy me that the W. C. Kirk ought not to have been taken in by the side of the Idella and left there during the night. The two boats were very close together at high tide, and those in

charge of the canal boat should have foreseen the probability of accident as the tide receded. Those in charge of the canal boat were clearly guilty of negligence. But the proofs also satisfy me that late on Friday afternoon the Idella was moved by the libelants' employés several feet farther up stream than she had previously been. By this movement the Idella was taken into a narrower part of the stream, and therefore closer to the W. C. Kirk. At that time the employés engaged on the W. C. Kirk were unloading the bow box, but there could have been no reasonable expectation on the part of those in charge of the Idella that the bow box would be unloaded in time to remove her from her place at the wharf before the next day. This movement on the part of those in charge of the Idella was consequently an act of negligence. Both parties being guilty of negligence, there must be a division of damages.

There will be a reference to a commissioner for the purpose of ascertaining the damages. The final decree, when entered, will be for one-half of the damages proven.

BLACK v. WIEDERSHEIM.

(Circuit Court, E. D. Pennsylvania. January 25, 1906.)

No. 65.

CORPORATIONS—MORTGAGE TRUSTEE—LIABILITY FOR BREACH.

A trustee in a corporation mortgage, which provides that he shall not "be liable or responsible for any other cause, matter or thing except his own willful and intentional breaches of the said trust herein expressed and contained" is not liable to bondholders for omissions to act through mistake or misconception of his duty.

On Motion to Take Off Nonsuit.

Horace L. Cheyney, for plaintiff.

Henry La Barre Jayne, Charles Biddle, and Birney & Woodard, for defendant.

J. B. McPHERSON, District Judge. This is an action of trespass, brought against the trustee under a corporation mortgage by a bondholder, charging the trustee with several breaches of duty, whereby the value of the plaintiff's bonds has been altogether lost. A compulsory nonsuit was entered at the trial for reasons that are not stated on the stenographer's notes, but his omission is unimportant, for I remember distinctly having reserved the right (although the reservation was probably superfluous) to consider any other reason that might be afterwards urged in support of the nonsuit. At that time I had not examined the mortgage, but I find in it now a provision that in my opinion makes it unnecessary to discuss any other point in the case. The concluding paragraph of the mortgage is as follows:

"And it is hereby expressly covenanted and understood by and between the said parties to this indenture, their successors, heirs, executors, administrators and assigns, that this trust is accepted upon the express condition that the said trustee, his heirs, executors, administrators and assigns, shall not

be in any way responsible or liable for the breaches of the party of the first part herein contained, nor for any money or property except what actually and in fact comes into his hands or possession by virtue of the provisions hereof, nor shall the said trustee be liable or responsible for any other cause, matter or thing, except his own willful and intentional breaches of the said trust herein expressed and contained."

With this provision in mind, I have read the testimony with care, and I can find no evidence that should have been submitted to the jury of a "willful and intentional breach of trust." The defendant may perhaps have made mistakes, or may have misconceived his obligations, but to call the omissions to act of which the plaintiff complains "willful and intentional breaches" of his trust seems to me to be impossible.

The motion to take off the nonsuit is refused.

UNITED STATES v. PITTSBURGH, C., C. & ST. L. RY. CO.

(District Court, S. D. Ohio, E. D. December 18, 1905.)

No. 55.

COMMERCE—SAFETY APPLIANCE ACT—CAR USED IN INTERSTATE COMMERCE.

A car employed in moving interstate traffic and not equipped with an appliance required by Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], was received from another company by defendant railroad company and hauled from one of its yards to another for the purpose of being put in a train and forwarded to its destination in another state. *Held*, that in such movement the car was being used in interstate commerce within the meaning of the act, and that defendant was liable for the penalty imposed thereby for its violation.

This is an action begun by United States Attorney McPherson upon the direction of the Attorney General at the request of the Interstate Commerce Commission, in accordance with section 6 of the act of March 2, 1893 (27 Stat. 532, c. 196), as amended by act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175] to recover a penalty of $100 for violation of that statute.

United States Safety Appliance Inspectors H. W. Belnap and J. J. Coutts on July 25, 1905, reported that the defendant on that date had accepted Kanawha & Michigan box car No. 852 from the Toledo & Ohio Central Railway Company, and hauled same over defendant's line in the city of Columbus from its Franklinton yard to its Twentieth street yard with the grab iron, opposite the uncoupling lever on the "B" end of the car, missing. It was alleged that none had ever been applied. This car contained lumber destined to Wilkinsburg, in the state of Pennsylvania. The principal facts are further set forth in the opinion of the court.

Sherman T. McPherson, U. S. Atty., for plaintiff.
W. O. Henderson, for defendant.

THOMPSON, District Judge, after stating the facts, delivered the following opinion:

This is an action brought to recover of the defendant the statutory penalty of $100 for the violation of section 4 of the act of Congress

approved March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), known as the "Safety Appliance Act," and the acts amendatory thereof, because of the use of a car in interstate commerce not provided with a grab iron on the "B" end thereof. The parties having, by written stipulation filed with the clerk, waived a jury, the cause was submitted to the court by agreement of the parties upon the facts stated in the report of Government Inspectors H. W. Belknap and James J. Coutts, made to the Interstate Commerce Commission, a copy of which was presented to the court by the parties and filed herein.

The contention of the defendant is that the car in question was not in use at the time of the alleged violation of said section 4. The statement of the inspectors in relation thereto is as follows:

"This car was delivered to Penna. Co. by the T. & O. C. in this defective condition. Accepted by the Penna. Co., at their Franklinton Yard and taken to the Twentieth Street Yard to be put in a train for movement East."

When it was moved from the Franklinton yard to the Twentieth street yard, to be put in a train for movement East, it was used in interstate commerce, within the meaning of the safety appliance act, as interpreted by the Supreme Court in Johnson v. Southern Pacific Company, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and there will be a finding and judgment in favor of the plaintiff, as prayed in the petition.

EDWARD HILL'S SONS & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1906.)

No. 3,713.

CUSTOMS DUTIES—CLASSIFICATION—OLEIC ACID—RED OIL—SOAP STOCK.

So-called red oil or oleic acid, which is used otherwise than as soap stock, *held* not to be within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], of "oils * * * commonly used in soap making, * * * fit only for such uses," but to be dutiable as an acid not specially provided for, under section 1, Schedule A, par. 1, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,807 (T. D. 25,648), which 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.

Charles Duane Baker, Asst. U. S. Atty.

HAZEL, District Judge. The importers, objecting to the conclusions of the Board of General Appraisers that the importation is oleic acid or red oil, contend that such article is entitled to free entry under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], as "Crude Soap Stock." The free

list provides that "grease and oils (excepting fish oil), such as are commonly used in soap making * * * and which are fit only for such uses, n. s. p. f.," shall be exempt from duty. It is practically admitted by the importers that, aside from a slight difference in color, the article from a scientific point of view is oleic acid. If its sole use were a manufacturing ingredient of textile soap, as claimed by the importers, doubtless the principle of United States v. Wells, 77 Fed. 411, 23 C. C. A. 210, would apply, for, as stated in that case, "the manufacturing use must prevail over the scientific or commercial nomenclature." Several witnesses for the government, however, testified to various uses to which the article in question may be put, and it is fit for uses other than soap making. To entitle the importation to free entry, the burden rests upon the importer to show the contrary or that it is useful simply for the specific purpose. This they have failed to do. The rule invoked by the government that the decision of the board will not be disturbed upon the facts if it is fairly sustained, even though the court inclines to a different opinion, is thought to be controlling here. In re Buffalo Nat. Gas Fuel Co. (C. C.) 73 Fed. 191.

Therefore the decision of the board affirming the collector and holding the merchandise dutiable at 25 per centum ad valorem, under paragraph 1 of the existing tariff act section 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], as an acid not otherwise specially provided for, is approved.

B. P. DUCAS CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1906.)

No. 4,003.

CUSTOMS DUTIES—CLASSIFICATION—CASEIN INDUSTRIELLE—LACTARENE.

So-called casein industrielle, which is produced by drying the substance left after drawing off the whey from skimmed milk that has been allowed to sour, held to be "lactarene," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 594, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1684].

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 certain imported casein industrielle, so-called.

Comstoc & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

HAZEL, District Judge. The protestants claim that the merchandise which was invoiced as casein is, in fact, albumen, not specially provided for, or lactarene, and accordingly entitled to free entry under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 468, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679], or paragraph 594 (30 Stat. 199

[U. S. Comp. St. 1901, p. 1684]), respectively. The importation was assessed for duty by the collector at 20 per centum ad valorem as an unmanufactured article under section 6 of the existing tariff act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]). There was insufficient testimony before the board in support of the importer's claim. But the uncontradicted testimony taken in this court shows that casein is more commonly known in trade and commerce as lactarene, an albumenoid of milk. The proofs are that the commodity is produced by allowing skimmed milk to sour, and then the whey is drawn off and the material dried. It is chiefly used for coating paper, a mordant in calico printing, sizing, veneers, glue stock, etc.

Because of the additional testimony in this court, I think the merchandise is entitled to free entry under paragraph 594. So ordered.

HUTTIG SASH & DOOR CO. v. FUELLE et al.

(Circuit Court, E. D. Missouri, E. D. March 1, 1906.)

1. INJUNCTION—COLLATERAL ATTACK—VIOLATION—ENFORCEMENT.
An order of a federal court, granting a temporary injunction, or refusing to dissolve it, is reviewable only by appeal, and cannot be attacked in or reconsidered by the same court in contempt proceedings for its disobedience, unless the court was without jurisdiction to grant the injunction.

2. EQUITY—HEARING BEFORE MASTER—ADMISSIBILITY OF EVIDENCE.
It is the duty of a master, in taking testimony in a suit in equity, to take and transmit to the court all the evidence offered, although in making his findings he may disregard such as he deems inadmissible.
[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 901.]

3. SAME—REVIEW OF FINDINGS.
Findings of fact by a master are to be taken as prima facie correct, and should be sustained, if supported by substantial evidence.

4. INJUNCTION—CONTEMPT PROCEEDINGS FOR VIOLATION—PERSONS NOT PARTIES.
While persons who were not parties to a suit in which an injunction was issued cannot be committed for contempt for violation of the injunction, they may be punished for contempt in knowingly aiding and abetting its violation by parties who are bound thereby or conspiring with them for its violation.

5. SAME—EVIDENCE CONSIDERED—INJUNCTION AGAINST BOYCOTT.
In a proceeding for contempt against defendants for violation of an injunction previously granted in the cause and against others for aiding, abetting, and assisting them in such violation, the following facts were shown: Complainant was engaged in the manufacture of doors, sash, and other woodwork for the furnishing of houses, and defendants were members of a labor union of carpenters and joiners and were enjoined from conducting a boycott against complainant directly or indirectly, by causing notice to be given to contractors or others not to purchase its products under threats to cause their workmen to leave their service or from attempting to induce such workmen to quit because of such purchases. For 15 months the injunction was obeyed, and then the respondents, those not parties to the suit being members or officers of the same labor organization, with knowledge of the injunction, commenced sending out to owners, architects, and contractors monthly booklets containing a list of the so-called "fair" mills in which complainant's name did not appear, and a letter requesting that all contracts should contain a clause

that only union made furnishings should be used, and a statement that, unless such materials were used, union men would refuse to handle them. Respondents also, by threatening to call a strike of their workmen, induced certain contractors to sign a contract to buy only from mills listed as "fair" for a term of two years. No statement was made to such persons at the time that complainant was excepted from the prohibition, nor was it mentioned in the booklets. *Held*, that both the obtaining of the contracts and the circulating of the booklets were plain violations of the spirit, if not the letter, of the injunction, and subjected respondents to punishment for contempt; those who were parties to the suit, for violation of the injunction, and the others, for knowingly aiding and assisting in such violation.

Proceedings for Contempt for Violation of Injunction and for Aiding and Abetting the Same.

The complainant, a corporation engaged in manufacturing woodwork, sashes, doors, blinds, and other materials used for interior furnishings of houses, instituted this action to restrain the defendants, comprising the most active members of the Carpenters' District Council of St. Louis, Mo., and as such the business agents and representatives of the United Brotherhood of Carpenters and Joiners, a voluntary association, the membership of which includes several thousand artisans and skilled laborers engaged in the occupation of wood workers, carpenters, cabinet makers, and joiners, many of them engaged in the same kind of labor as that which complainant is required to employ in its manufacturing establishment. It is charged that complainant has a large number of employés in its mill who are well satisfied with their employment, some of whom are members of the associations or unions represented by the district council of which the defendants are officers, while many of them are not such members. That the defendants, as the officers and representatives of the associations which they represent, which for convenience may be called "unions," in order to create a monopoly in their trades and occupations, assume to and do exercise the authority of compelling individual members of those unions to refuse to work with any persons in their respective callings not members of their union; and also prevent any of its members from working for any contractor, builder, or any other person who purchases from any person, firm, or corporation supplies or materials, like those produced and sold by complainant, who employs in his establishment persons not members of a union; and not only do they refuse to permit the members of their union to work on such contracts, but, being affiliated with other unions whose members are engaged in various other lines of industry connected with the building trade, they also prevent others from working on any contract if materials are used which were purchased from a mill or manufacturer who employs men not affiliated with any of the unions, and which are called "unfair" establishments. That by reason of the fact that complainant employs in its factory many persons not members of any of those unions, the defendants conspired and confederated with other members of the council and associations to compel complainant to employ only members of the association, or union men, or require such of its employés as are not members thereof to become such members and subject to the rules of defendants' association as to compensation, hours of work, and other rules prescribed by them. That, upon complainant's refusal to accede to these demands, it was advised by defendants that, if it failed to comply, they would boycott it and prohibit all their members to handle any material produced by it or perform services for any contractor or builder who might buy materials or supplies of any kind from complainant, and further threatened that, owing to their affiliation with similar unions engaged in other lines connected with the building trade, they would cause the members of such other unions to refuse to accept or continue any employment with any person who might purchase materials from complainant. That, in pursuance of said conspiracy, defendants have sent circular letters to contractors and builders who are customers of complainant, advising them that complainant was unfair to organized labor, and for this reason its products had been boycotted. That, in

addition to these circulars, the defendants had called and sent its agents in person to contractors and builders and advised them of complainant's boycott, and that it was their intention to require all members of their unions or other unions with which they affiliated, to decline to accept or continue employment with any persons who might buy material from complainant. That in many instances contractors, who had large numbers of union men in their employ, and had bought materials from complainant, were threatened with strikes by defendants, whereupon such contractors and builders refused to buy any more material from complainants, to its great loss and injury; while in other instances, owing to such threats, contractors had to enter into contracts with defendants not to purchase any material from complainant. That the defendants are insolvent, and any judgments at law recovered against them for damages sustained by their unlawful action could not be collected. They therefore pray for an injunction against the defendants.

On April 28, 1904, the late Circuit Judge Thayer issued an order requiring the defendants to appear on May 14, 1904, to show cause why an injunction pendente lite, such as was prayed for in the bill, should not be granted; but in the meantime a temporary restraining order was issued, enjoining and restraining the defendants from boycotting the complainant and from giving notice, verbally or written, either in person or through the agency of others, to any person, firm, or corporation to decline to purchase materials of any sort from complainant, under threats that if such purchases are made they will cause persons in the employ of persons thus notified to withdraw from their service; and they were likewise enjoined and restrained from attempting to induce any person or persons whomsoever to decline employment or cease employment under any person, firm, or corporation because such person, firm, or corporation may have purchased or purposed to purchase materials from the complainant, and from making such attempt through the agency of others; that they be likewise enjoined and restrained from attempting to put any persons, firms, or corporations in fear of sustaining loss by threatening to induce persons in their service to quit their employment if they continue to make purchases from the complainant. They were also restrained from stationing persons at or near the place of business of the complainant, for the purpose of following said company's wagons which are engaged in making deliveries of materials, for the purpose of ascertaining the identity of said company's customers and thereafter threatening their servants and employés and inducing them to quit their employment, unless they withdrew their patronage or ceased to do business with the complainant. Upon the return day the defendants filed a return to the order to show cause and an answer to the bill, denying all the material allegations of the bill, and moved for a dissolution of the restraining order. On September 13, 1905, before a final determination of the cause, complainant filed a motion for a rule upon the defendants James A. Shine and Alvin Hohenstein, and also upon Thomas J. Crowe, George J. Bohnen, and Frederick W. Mellville, who were not defendants in the cause at that time, but who were made defendants on that day by the filing of a supplemental bill, to show cause why they should not be committed for contempt in violating the temporary restraining order theretofore granted.

In this petition, the complainant, after setting out the granting of the restraining order, as hereinbefore stated, and that the same had been duly served upon the defendants, charged that James A. Shine and Alvin Hohenstein, two of the defendants duly served with the injunction, had violated said temporary restraining order, and that the other persons hereinbefore named, with full knowledge and notice of the issuance of said temporary restraining order and of the terms thereof, had aided, abetted, and assisted said defendants in so violating the same. That the violation of said restraining order consisted of the fact: First, that said parties had issued and circulated, and caused and procured to be issued and circulated, in the city of St. Louis, among contractors, builders, and other purchasers and users of planing mill materials such as produced and sold by complainant, notice to the effect that all such persons must refuse to buy or obtain such from complainant, and must refuse to use or permit the use of such of com-

plainant's manufacture, under threats that if they failed so to do members of the United Brotherhood of Carpenters and Joiners would not be permitted to accept service or continue in service with the persons so doing; second, that they notified one B. J. Charleville, a contractor and builder in the city of St. Louis using, in the prosecution of his enterprises, materials of a similar kind to that produced and sold by the complainant, that complainant was a so-called "unfair" mill, and that members of the United Brotherhood of Carpenters and Joiners would not be permitted to make use of materials purchased from or manufactured by complainant, and by threats to said Charleville that said parties would cause and procure persons in his employ to withdraw from his service, and would prevent his obtaining other persons to replace them, if he made use of materials manufactured or sold by complainant, caused, induced, and procured the said Charleville to execute a written contract whereby he undertook and agreed, in effect, not to buy any materials thereafter from complainant or of complainant's manufacture; third, that said defendants also notified the Fisher Architectural & Iron Company, contractor and builder and making use of materials of the kind produced and sold by the complainant, that complainant was a so-called "unfair" mill, and that, if said architectural company should make use of materials manufactured by complainant, members of the United Brotherhood of Carpenters and Joiners would not be permitted to work for it, and unless the said company would sign a contract to the effect that thereafter it would buy and use no materials of complainant's manufacture, said parties would cause carpenters in the employ of said company to quit the service, and would prevent others from accepting service with it.

Bohnen, Crowe, and Mellville were not enjoined, nor served with a copy of the injunction granted against the other defendants, but are charged merely with aiding, abetting, and assisting the others in the violation of the restraining order. All the parties filed a response to the rule to show cause, denying all the allegations charging a violation of the injunction. Whereupon the matter was referred to one of the standing masters in chancery of the court, with directions to take testimony in the proceedings for contempt, and ascertain and report the facts, with his conclusions thereon, and to return into court the testimony so taken and his findings of facts made thereon, together with all papers in the cause. A great deal of testimony was taken before the master, who made an elaborate report, finding that all the parties were guilty of a violation of the restraining order in the manner charged in the motion for the rule. Exceptions were duly taken by the defendants to the findings of the master.

George S. Johnson, H. R. Marlatt, and Block & Sullivan, for complainant.

John B. Dempsey and C. H. Fauntleroy, for defendants.

TRIEBER, District Judge (after stating the facts). At the hearing of the exceptions to the master's report, counsel for the defendants attacked the propriety of the granting of the restraining order, and also objected to some of the testimony which had been admitted by the master, although a considerable part of that testimony which was objected to was not considered by the master in preparing his findings of facts.

As to the first proposition, it is sufficient to say that this court is not an appellate court, with power to review the actions of the other judges of this court. If defendants felt themselves aggrieved by the action of the judge who originally granted the injunction, they had a complete and adequate remedy by appealing to the Circuit Court of Appeals for this circuit or the Supreme Court of the United States. Act June 6, 1900, c. 803, 31 Stat. 660, U. S. Comp. St. 1901, p. 550.

As to the admission of the improper evidence by the master, it was cured by his disregarding it when making his findings of facts.

In this connection, it may be advisable to call the attention of the profession to the rule laid down by the United States Circuit Court of Appeals for this circuit in Dowagiac Mfg. Co. v. Lochren et al. (lately decided) 143 Fed. 211, where it was held that the proper rule of practice in taking testimony before a commissioner or examiner, or before a master empowered to determine the admissibility of evidence under the equity rules, is to elicit and transmit to the court, not only the evidence which is confessedly competent, relevant, and material, but also that which is deemed incompetent, irrelevant, and immaterial, to the end that, if the reviewing court is of the opinion that the evidence deemed inadmissible should have been received, it may at once consider it and render a final decree without the delay of re-referring the case to procure the rejected evidence. To this general rule the court says there are two exceptions:

"They are, that it is the duty of the court or chancellor eliciting the evidence to consider and determine the claim of privilege of a witness or other party and to refuse to compel him to produce evidence in violation of it, and that, if it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its production, it may refuse to do so."

Any other rule would be productive of delay. Suppose that the master should have sustained the objections of the defendants and refused to allow the witnesses to answer the questions objected to, and the court should afterwards hold that it was error for him to do so, or, if the trial court should sustain the master in his findings, and upon appeal to the appellate court that court should hold that the evidence should have been admitted, it would necessitate a re-reference to the master in order to take that proof; while, on the other hand, if the evidence is improperly admitted, the court, or upon appeal the appellate court, can disregard it and make a final determination of the cause without a re-reference. In view of the importance of this case, the master was right in permitting all the evidence offered to be taken, in order that the court may determine its admissibility.

In passing upon findings made by the master, it is the well-settled rule that such findings are prima facie deemed to be correct, and if there is substantial evidence to sustain his findings of fact, although there may be a serious conflict in the evidence, the findings of the master should be sustained. A master has the advantage of hearing the testimony and of seeing the demeanor of the witnesses on the stand, while the court, upon the hearing of the exceptions, has only a transcript of the evidence, with no opportunty to see the witnesses and notice their demeanor while testifying.

Another question, which should be determined before passing upon the merits of the case and determining the exceptions to the master's report, is whether this court has jurisdiction in this proceeding of Bohnen, Crowe, and Mellville, who were now parties to the original suit and had never been restrained by any order of the court. In Re Reese, 107 Fed. 942, 47 C. C. A. 87, the United States Circuit Court of Ap-

peals for this circuit had occasion to pass upon this identical question, and the rules there laid down are so clear and convincing that it is unnecessary for the court to refer to any other authorities on this subject. Judge Adams, who delivered the opinion of the court, there held:

"That contempt being a crime, it follows that one accused thereof must be tried on the charge made and no other, and hence one not a party nor bound by an injunctional order cannot be tried and convicted on a charge of contempt proceeding wholly on the theory that he was a party, bound by the order, and his commitment sustained on the ground that he was otherwise guilty in interfering with its enforcement."

In that case Judge Adams calls attentions to the fact that:

"Reese was not charged in the motion for commitment with aiding, abetting, or assisting, or combining, confederating, or conspiring with the defendants, or either of them, nor was he charged with doing the acts complained of as their servant or agents."

He then proceeds:

"It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference with, and obstruction to, the orderly and effective administration of justice, and as such is and ought to be treated as contempt of the court which issued the order."

Among the cases cited by the learned judge in his opinion, and which throws considerable light on this question, is Wellesley v. Mornington, 11 Beav. 180, 181. There were two cases before the court. In the first case, reported on page 180, the motion was to commit for contempt for a breach of the injunction to which he was not a party, and the Master of the Rolls, Lord Langdale, held that the objection was fatal to this form of notice of motion, but he proceeds:

"But I by no means think that, because Batley is not enjoined in his character of servant and agent, he cannot be punished for knowingly aiding and assisting Lord Mornington in doing that which the court has expressly prohibited."

Thereupon another motion was filed against Batley to commit him for contempt "in being party and privy to, and in aiding and assisting the breach of, the injunction which restrained the defendant from cutting timber; Batley at the time knowing that these acts were forbidden." Upon these allegations being proved, the Master held it would have been his duty to commit Mr. Batley for his contempt in intermeddling with these matters, had it not been waived by the complainant.

As the motion in this case specifically charges that these parties, "having full knowledge and notice of the issuance of the said temporary restraining order and of the terms thereof, have aided, abetted, and assisted said defendants in so violating the same," the court has undoubted jurisdiction in this proceeding, under the rule laid down in Re Reese, supra.

As there are a number of facts which are undisputed, it may be advisable to state them now before those facts as to which the evidence

is conflicting are reviewed. These undisputed facts are: That prior to the institution of this suit the district council of the United Brotherhood of Carpenters and Joiners, of St. Louis, had distributed and sent to contractors and builders certain circulars advising them of the employers in cabinet shops and planing mills who are recognized by the unions as "fair" to organized labor. One of the cards, dated January 1, 1903, is as follows:

"Carpenters' District Council of the United Brotherhood of Carpenters and Joiners of America.

"Office, 1306 Olive Street, Third Floor. Kinlock 'Phone A209.

"St. Louis, Mo., July 1, 1903.

"The following employers in cabinet shops and planing mills are recognized by Local No. 1100, 1596 and the C. D. C. as fair to organized labor, and we recommend them to our friends. Be sure and give no work to firms opposed to organized labor."

Then follows a list of the firms, but that of complainant is not among them. The card then proceeds:

"All shops and planing mills not on this list in St. Louis and vicinity are classed as unfair, until further notice. All lists prior to July 1, 1903, are hereby canceled."

The next in date is the following circular letter:

"Carpenters' District Council of the United Brotherhood of Carpenters and Joiners of America.

"Office, 1306 Olive Street, Third Floor.

"St. Louis, July 14, 1903.

"To All Contractors, Architects, and Owners—Dear Sir: On June 13, 1903, the management of the Broadway Planing Mill, known as the Charles A. Olcott Planing Mill, located at 3300 North Broadway, locked out all members of the United Brotherhood of Carpenters. On June 16th the Carpenters' District Council decided to refuse to work on any building where the North Broadway mill furnished material of any description. Therefore, all contracts which have been or will be let after the above date, the carpenters will refuse to handle the material. This will apply to all unfair mills. A list of all union mills can be had by application to this organization.

"Yours, etc., Carpenters' District Council,

"George C. Newman, Secretary."

Another circular letter issued thereafter, but also before the institution of this action, is as follows:

"Carpenters' District Council of the United Brotherhood of Carpenters and Joiners of America.

"Office, 1306 Olive Street, Third Floo

"To All Contractors, Builders, Architects, and Owners: On or about July 14, 1903, this council informed you of the fact that certain planing mills in St. Louis were unfair to this council and would furnish a list of such unfair mills on application to this council. And furthermore we furnished you with a list of planing mills, cabinet shops, and stair builders which were fair to this council, and asking you to patronize only such firms. These notices and lists in a great many cases have been ignored and no attention paid to them. Therefore, this council takes the liberty to inform you that our members will refuse to use any mill work furnished by any mill or shop that is unfair to this council. Below you will see a list of planing mills, cabinet shops, and stair builders rated as fair by this council.

"Respectfully, Carpenters' District Council,

"George C. Newman, Secretary."

Then follow the names of 26 firms engaged in operating planing mills, cabinet shops, and stair builders, but the name of complainant is not among them.

After the granting of the injunction herein none of these, or similar circulars or lists, were sent out until shortly before the institution of these proceedings for contempt, when the circulars hereinafter set out were circulated. The only circulars published and circulated between the time of the granting of the injunction in this cause and those circulars hereinbefore set out were cards called "Steward Lists," which merely contained a list of union cabinet shops, union stair builders, and union planing mills, but without any explanations or requests not to purchase supplies from firms not on the list, nor any threats of strike or boycott for purchasing material from such other firms. The name of complainant does not appear on these "Steward Lists." In June, 1905, the district council requested the chief officers of the organization to send some one to St. Louis for the purpose of assisting them in organizing new unions and "straighten some matters out." Thereupon the respondent Bohnen, who was one of the national organizers of the brotherhood, arrived there to assist in "unionizing" the mills. Shortly after the arrival of Bohnen, in August, 1905, a booklet was issued and circulated among all contractors and builders, having printed on the title page the following:

"List of St. Louis union mills and manufacturers of interior woodwork, decorations, stairs, trim parquet flooring, wood turning, stair, office, bank, and bar fixtures. August, 1905. Subject to monthly correction."

This booklet contained a list of all manufacturers of wood material in the city of St. Louis which were declared "fair"; the name of the complainant not appearing among them. On the first page of this booklet the following letter is printed:

"To Owners, Architects, Contractors, and Builders of St. Louis and Vicinity—Gentlemen: In order to avoid any labor trouble on jobs you are interested in, we deem it necessary to request you to stipulate in all your contracts a clause guarantying employment of recognized union men; also a clause requiring in the execution of all contracts for carpenter work the employment of union made trim mantels, parquet flooring and other shop made carpenter work. We desire to inform you that unless this material has been constructed under strict union conditions we shall refuse to handle it. It being a well-known fact that the agents of unfair and nonunion firms resort to misstatements in order to obtain contracts in this city, we recommend that before placing contracts with any firm not on this list you communicate with this organization regarding the union standing of said firm.

"We respectfully call your attention to the following firms, manufacturers of interior woodwork, etc., who are working under an agreement with this district council. This list is, however, subject to revision monthly, and contracts let therefrom will only be protected if let within the month for which the list is issued. Later lists can be obtained on application to James A. Shine, Secretary Carpenters' District Council, 1306 Olive Street."

In September, October, and November, 1905, booklets identical with that issued in August, with the exception of some slight changes in the list of firms and the month to indicate when it was issued, were published and circulated by the district council. In August, 1905, one of these booklets, the one published in August, was handed to Charleville, the contractor and builder mentioned in the motion for

the contempt proceedings, by the respondent Mellville, at a place where he was then erecting a building under contract. At the same time he was informed by Mellville that he (Charleville) was using "unfair" mill work, and that for this reason he would have to call his men off the building. Charleville remarked that this would ruin his business. Thereupon three other men came up whom he recognized as the defendant Shine and the respondents Bohnen and Crowe, and, after repeating what had been said to him about "unfair" material, an engagement was made for him to meet the council at its office on Olive street. There all the parties to this contempt proceeding were met by him, when he was informed by Bohnen that, if he would sign an agreement to buy only from "fair" mills, he would be permitted to finish the work without interference. A booklet was then handed to him, with the statement that it contained a list of the mills considered "fair" by the union, on which complainant's name did not appear. He thereupon signed the following contract:

"Articles of agreement made this seventeenth August, 1905, between B. J. Charleville, of the first part, and Carpenters' District Council, of St. Louis and vicinity, of the United Brotherhood of Carpenters and Joiners of America, of the second part:

"Whereas, the party of the first part is desirous of employing carpenters belonging to the labor unions of the party of the second part at union rates of wages, and to have the name of the party of the first part in the list of union owners or contractors of the party of the second part; and

"Whereas, the party of the first part desires to obtain and use union made trim, meaning doors, mantels and other shop-made carpenter work, on such buildings or parts of buildings the party of the first part may have such materials used upon; and

"Whereas, the party of the second part consists of union carpenters whom it desires to have perform all the carpenter work required by the party of the first part at union rates of wages, and to have its members make all trim which may be required by the party of the first part:

"Now this agreement witnesseth, that in consideration of the sum of one dollar, by each party to the other paid, the receipt whereof is hereby acknowledged and in consideration of the party of the second part furnishing in a reasonable time after demand, except in case of strikes, all carpenters that may be required by the party of the first part on such work as the party of the first part may have to perform within the city and county of St. Louis within two years from the date of these presents and to furnish in a reasonable time after demand, except in case of strikes, such union carpenters as may be required for making trim which may be required by the party of the first part, all of said carpenters to agree to work at the union rates of wages prevailing at the time of said employment, and further in consideration of the party of the second part placing the name of the party of the first part in its list of union owners or contractors, the party of the first part hereby agrees during two years from the date of these presents to employ union carpenters exclusively and none other than union carpenters and to pay union rates of wages prevailing at the date of such employment of carpenters and to employ union trim in all buildings or repairing work which the party of the first part may do or cause to be done within the city and county of St. Louis during two years from the date of these presents.

"And the party of the first part further agrees to insert or cause to be inserted in any contracts the party of the first part may give out during two years from the date of these presents for work within the city and county of St. Louis to be performed by carpenters, a clause or provision requiring in the execution of said contract or contracts, the employment of union carpenters at union rates of wages prevailing at the time of said employment and to have used or employed only union trim, made within the city or

county of St. Louis, or if not made in said city or county, to be made at St. Louis union rates of wages.

"This contract in all its parts is to run for the term of two years from the date hereof and is to apply only to work on, or trim used or intended to be used on buildings, or on parts of buildings within the city and county of St. Louis.

"And as a further consideration for this contract it is agreed that none of its terms as to trim are to apply to the following buildings now in course of construction, the contracts for the same having been let prior to the date of this agreement:

No. of Houses	—1.	Miss Ellen Gerahty, Chamberlain & Goodfellow Ave.
" " "	—5.	Cleveland Realty & Improvement Co., Lafayette & Compton Ave.
" " "	—1.	Dr. Walter Johnson, Grand & Flora Boulevard.
" " "	—1.	Dr. E. P. Ward, Shenandoah & Oregon Ave.
" " "	—1.	Mrs. Ida Graves, Hartford St. W. of Grand Ave.
" " "	—3.	Finity Realty Co., Juniata, W. of Grand Ave.
" " "	—1.	Jos. Duchik, Allen West of McNair Ave.
" " "	—1.	Ernest Hoelke, Allen West of Mississippi Ave.
" " "	—2.	Geo. Feltrop, Magnolia & Vandeventer Ave.
" " "	—1.	Mark N. Little, 3653 Russell & Spring Ave.
" " "	—1.	A. Bronk, N. S. Russell, W. of McNair Ave.
" " "	—1.	Miss E. Weber, Illinois and Potomac Sts.
" " "	—2.	Henry Schwinker, Longfellow & Geyer.

"In testimony whereof, witness our hands and seals this 17th day of August, 1905.

B. J. Charleville,
"Jas. A. Shine,

"For Carpenters' District Council of St. Louis and Vicinity.

"State of Missouri, City of St. Louis—ss.:

"On this 17th day of August, 1905, before me personally appeared B. J. Charleville and James Shine, the latter secretary and agent of Carpenters' District Council of St. Louis and vicinity, and both to me being personally known, acknowledged the above and foregoing instrument as their free act and deed, and the said Shine declared himself as acting by and with authority of the said district council.

"In testimony whereof I have hereunto affixed my seal and signature at my office in St. Louis the day and year last above mentioned.

"[Seal.] Jno. B. Dempsey, Notary Public.

"My term expires Aug. 4/06."

The evidence hereinbefore quoted is practically undisputed. To set out the other testimony in this case, which is very voluminous, would serve no useful purpose. Nor is it necessary to set out in this opinion the findings of facts made by the master and the exceptions thereto, as the court, in view of the important issues in this case, has carefully read over all the testimony and made its own findings of facts, aided by the master's findings, which have been given that consideration which they are entitled to, under the well-settled rules of law governing the effect that will be given to the findings of a master who has had an opportunity to hear the witnesses testify orally and seeing their demeanor while so doing. Nor is it necessary for the court in this proceeding to determine the measure of proof applicable to cases of this character, whether it need only be clear and convincing, or whether it must be sufficient to convince beyond a reasonable doubt, as the findings made by the court are established by proofs which satisfy the court beyond a reasonable doubt.

The court finds that the defendants Shine and Hohenstein were

parties to the original proceedings and had actual notice of the restraining order, and that the other respondents, although not parties to the original proceedings, nor included in or served with a copy of the restraining order, had actual knowledge thereof before July 1, 1905; that the booklets issued in August, September, and October, 1905, containing lists of St. Louis union mills, etc., hereinbefore given in full, were distributed among the contractors and builders of St. Louis generally during the months for which they were issued by or under the direction of all the parties to this proceeding, and that in none of these booklets or lists did anything appear to indicate that complainant was exempt from the prohibitions to use materials from manufacturers of building materials whose names did not appear on those lists and which were classed as "unfair"; that from the time the restraining order was issued until August, 1905, which was after the arrival in St. Louis of Bohnen, who came there as one of the national organizers of the Brotherhood of Carpenters and Joiners, no circulars or notices of any kind were sent out by any of the respondents of defendants in the original suit containing any warnings that any materials purchased from mills or manufacturers whose names did not appear on any of the lists issued by the council would not be handled by members of the union; that, whenever inquiries were made of either of the respondents whether complainant's materials were included in the prohibition of the council, the inquirers were advised that the members of the council, being under a restraining order of this court enjoining them from interfering with the products of complainant, the prohibitions or threats contained in their lists or circulars did not apply to it, but that before the institution of these proceedings for contempt this fact was not made known to any of the builders or contractors in the circulars or booklets issued by defendants, nor otherwise communicated to them, except when specially interrogated on the subject; that before and at the time of the execution of the contract between Charleville and the council, which contract has been set out in full in this opinion, Charleville was not informed that the prohibitions contained therein did not apply to complainant, but thereafter, when respondents were informed by Charleville that he was using at one of his buildings material purchased from complainant, that information was imparted to him; that the contract between Charleville and the district council was entered into by Charleville solely by reason of his fears, founded upon statements made by the respondents, which, under the peculiar circumstances then existing, amounted to threats of a strike unless he obligated himself not to use any materials manufactured by mills not on the council's lists as "union mills"; that when the August, 1905, booklet was handed by respondents to the Fisher Company (A. A. Fisher Architectural & Building Company), no notice was given to them that the complainant, whose name did not appear thereon, was exempted from the prohibitions contained therein, but that such notice was only communicated to them after the institution of these proceedings for contempt; that the respondents endeavored to induce the Fisher Company to enter with them into a contract similar to that entered into by Charleville, and that no mention

was made to him at that time of the fact that, owing to the restraining order issued in this case, material purchased from complainant could be used by it without a violation of the terms of the contract; that at that time the Fisher Company was not using any materials manufactured by complainant, but that in purchasing materials it would call for bids from many mills and purchase from the one offering the material at the lowest price, regardless of whether it was a union mill or not; that in August, 1905, Beckmeyer & Schroeder, contractors, were handed a copy of the August booklet by one of the agents of the council, in the presence of the respondents Hohenstein, Shine, Bohnen, and Crowe, at the place where he was then engaged in erecting a house with union carpenters, and he was then notified that the union men would be withdrawn because he was handling material from the mill of Fox Bros., an "unfair" mill and not on the council's list; thereafter, in order to carry out their contracts, they entered into a contract similar to that of Charleville without any notice from respondents that complainant, whose name was not on the list, was not included among those mills from whom he must not purchase material.

At the hearing before the master objections were made to the admission of the evidence of Beckmeyer in relation to the interference of respondents with the building contracts of his firm. The objections were based upon two grounds: First, that the firm did not handle any of complainants materials at that time; second, that in the petition for these proceedings that transaction is not mentioned. Objections were also made to the admission of Fisher's testimony upon the ground that at that time he did not handle any of complainant's materials.

It may be assumed that in a proceeding of this kind a party cited for contempt cannot be found guilty for any other violations of an injunction than those specifically set forth in the motion or petition, which should be treated as an information in a criminal proceeding; and it may also be assumed that a person cannot be guilty of a violation of a restraining order such as was issued in this case by interfering with one who does not deal with the party in whose behalf the order was granted. Still, the evidence objected to is admissible for the reason that it tends to prove the intent of the parties, which must be established in order to justify a finding of guilty, and upon the further ground that the restraining order in this case enjoined defendants from "giving notice, verbal or written, to any person, firm, or corporation to decline to purchase materials of any sort from complainant under threats that if such purchases are made they will cause persons in the employ of persons thus notified to withdraw from their service."

As shown by the testimony of Fisher, and common sense would naturally suggest it without any direct testimony to that effect, contractors would buy their material at the lowest price possible, and would for this reason solicit bids from a number of manufacturers. It would be nothing unusual for mills to obtain contracts as the lowest bidders at one time and be unsuccessful at other times. In the absence of an effective "boycott," complainant might be able to ob-

tain in 1906 contracts as the lowest bidder from builders and contractors who in 1905 were able to purchase cheaper from others, but, if contractors could be prevented from dealing with certain manufacturers under any and all circumstances, all opportunity to obtain contracts would be effectively denied to them. It would be a sad commentary on the courts of justice if parties under injunction could indirectly do those things which they are restrained from doing, and yet be not subject to punishment for violating the injunction, because they only violated the spirit of the order of the court and not its letter. This is not the law. 16 Am. & Eng. Enc. of Law (2d Ed.) 437. The language used in the restraining order is too plain to leave any doubt in the mind of any one as to what was intended to be accomplished. It shows clearly that its object was to protect complainant not only from interference with its then customers, but any others who might in the future desire to deal with it. Upon these grounds the evidence was clearly admissible, and has been considered by the court in making its findings of facts.

Do the facts found by the court constitute a violation of the restraining order in this case?

The granting of the restraining order, and thereafter the refusal of the court to dissolve it, were judicial determinations that the concerted action of this organization in attempting to compel manufacturers to "unionize" their business, and to effect such purpose by sending out circulars threatening parties who purchase the products of complainant with strikes, is unlawful and should be enjoined. As long as the injunction is in force, it is the duty of every one to obey it implicitly, and any violation thereof by direct or indirect methods is a violation of the order of the court, which must be promptly put an end to, or it will bring the courts into contempt. These principles of law are elementary and require no citation of authorities. What would be the object of appealing to the courts for redress if its orders could, without fear of punishment, be disregarded? It is a mistaken idea to suppose that parties can resort to subterfuges and thereby successfully evade the orders of a court of justice.

As found by the master, as well as the court, defendants, for more than 15 months after the granting of the restraining order, abstained from sending out any circulars threatening contractors and builders who should use materials bought from mills not on these lists and therefore to be classed as "unfair to labor" with strikes or refusals on the part of its members to handle such material. This compliance and obedience to the order of the court shows conclusively that the defendants understood and knew the meaning and object of the restraining order. Evidently some of the members of the council were dissatisfied with this condition, but, instead of appealing to the court for a modification of its order, or appealing to a higher court, which, under the acts of Congress, might have been done without waiting for a final decree, and upon such appeal could have secured a speedy hearing, as the act specially provides that such appeals "shall take precedence in the appellate court" (Act Feb. 18, 1895, c. 96, 28 Stat. 666, [U. S. Comp. St. 1901, p. 550]), they applied to the chief officers of their organization for aid and advice to enable them to carry out

the objects which this court had restrained them from seeking to accomplish. It was for that purpose that Bohnen, one of the national organizers, came from New York to St. Louis in June, 1905. After remaining a few days he left the city, returning in July, and almost immediately thereafter the August booklet was circulated among the contractors and builders of St. Louis. No one will contend for a moment that these booklets were not for all practical purposes the same as the circulars sent out by the defendants prior to the institution of this action, and the circulation of which was restrained by the court. These booklets contained a list of the firms and dealers who were working under an agreement with the district council and a notice that any material not constructed under strict union conditions would not be handled by members of that union. As the lists in these booklets comprise all the firms whose materials may be handled without danger of a strike, it follows as of course that all firms engaged in the manufacture of these articles in St. Louis whose names are not therein mentioned are "unfair," and that their products will not be handled by union artisans.

All of the respondents participated, not only in publishing and circulating these booklets, but in attempting to induce contractors and builders to comply with their requests by entering into solemn contracts not to use any material from any but union firms, which, of course, excluded complainant, as its name did not appear on any of the lists.

The only defense attempted is that verbal notice was always given by the respondents to the contractors and builders that, owing to the injunction issued in this cause, complainant was not included among the "unfair" firms, and dealings with it would not be punished with a refusal to handle its material by union men. But the evidence establishes beyond a reasonable doubt that this fact was never mentioned to any contractor or builder unless he made special inquiry on the subject. Is it reasonable to suppose that every one of the several hundred contractors, builders, owners, and architects to whom these booklets were sent would make such inquiry about this particular firm, when there are many others engaged in the same business whose names did not appear on the council's lists and for this reason are supposed to be "unfair"? If any of the contractors, builders, architects, or owners to whom these booklets were sent had been advised that complainant was not included, without their making special inquiry on the subject, it would have been an easy matter to have produced them as witnesses. If the intention of respondents was to obey the mandate of the court—not only its letter, but its spirit—it would have been a very easy matter to have inserted the facts relating to complainant in their circulars or booklets. Their failure to do so must satisfy any reasonable person that the respondents violated the order of the court, and did it after calm and due deliberation.

For these reasons, the findings of the master that all of the respondents are guilty of violating the restraining order issued in this case must be affirmed.

UNITED STATES v. UNION BRIDGE CO.

(District Court, W. D. Pennsylvania. February 9, 1906.)

No. 1.

1. NAVIGABLE WATERS—ALLEGHENY RIVER.
The Allegheny river is a navigable waterway subject to the jurisdiction of the United States, having been declared a navigable stream by the Legislatures of Pennsylvania and New York in 1798 and 1807, respectively, and included in the plans and covered by appropriations of the national government for the improvement of interstate waterways and of the harbor of Pittsburgh for many years.

2. SAME—OBSTRUCTIONS TO NAVIGATION—CHARTER RIGHTS FROM STATE.
A company which built a bridge over the Allegheny river under a charter from the state of Pennsylvania containing no specifications as to the character of the structure, but expressly providing that it should not obstruct the navigation of the river, and that the piers should be constructed in such manner as to meet the requisitions of the law in regard to obstruction of navigation, holds the franchise granted subject to such conditions, and may be required at any time by any authority having lawful jurisdiction to so alter its bridge as to meet the enlarged requirements of navigation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 86, 91.]

3. SAME—POWERS OF CONGRESS—REQUIRING REMOVAL OF OBSTRUCTIONS.
The power conferred on Congress by the Constitution to regulate commerce with foreign nations and among the several states includes the power to determine what shall or shall not be deemed in the judgment of the law an obstruction to navigation in any waterway used in carrying on such commerce, and, such power being without any limitation as to the means or manner in which it shall be exercised, Congress may pass legislation requiring the removal of obstructions and commit the enforcement of such law to one of the administrative departments whenever such department shall determine the fact that an obstruction exists in violation of the law.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 2, 149.]

4. SAME—STRUCTURES AUTHORIZED BY STATE.
In the absence of legislation on the subject by Congress, a state may lawfully authorize the building of any structure in the navigable waters within its limits, but the right so granted is held subject to the right of Congress at any time to require the removal or alteration of such structure as an obstruction to navigation, where such waterway is used as a means for carrying on interstate or foreign commerce.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 2, 149.]

5. SAME—ACT REQUIRING ALTERATION OF BRIDGES—CONSTITUTIONALITY.
Act March 3, 1899, c. 425, § 18, 30 Stat. 1153 [U. S. Comp. St. 1901, p. 3545], which provides that on a determination by the Secretary of War that any bridge "now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters," after notice to the parties interested, he shall require the same to be altered so as to render navigation through or under it reasonably free, and making the willful failure to obey such order a misdemeanor, is within the power of Congress and is not unconstitutional as taking the property of the bridge owner for public use without compensation.

6. SAME.

The right of the United States to require the removal or alteration of a bridge as an obstruction to navigation of an interstate waterway is not affected by the fact that it made no objection when the bridge was built, or that it was built under authority from the state, nor do such facts render the government liable to compensate the owner for his loss, where the consent of Congress was not asked; the owner being chargeable with notice of its power over such waters and its right to exercise the same at any time.

On Motion to Impose Sentence and Motion in Arrest of Judgment.

Albert Bettinger, John W. Dunkle, U. S. Atty., and R. W. Gibson, Asst. U. S. Atty.

William B. Rogers and John McCleave, for Union Bridge Co.

BUFFINGTON, District Judge. This is a proceeding by the United States against the Union Bridge Company, in the nature of a criminal information, for failure to alter a bridge which is an alleged obstructon to navigation. On the trial thereof no issues of fact were raised. The points of law submitted by the government were affirmed pro forma, those submitted by the bridge company denied pro forma, and a verdict of guilty, under the charge of the court, rendered by the jury. Motions were then made; one by the government to impose sentence, and one by the bridge company in arrest of judgment. In its charge the court stated an opinion would be filed later as part thereof, which is now done.

The obstruction here involved consists of a bridge over the Allegheny river just above its junction with the Monongahela at Pittsburgh. The Allegheny river rises in Pennsylvania, flows north into New York state, and thence back into Pennsylvania. The latter state, by Act March 21, 1798 (3 Smiths' Laws, p. 320), enacted the Allegheny, from the New York state line to its mouth, a navigable stream, and the state of New York, by Act March 31, 1807, did likewise in its counties of Genesee and Allegheny. The Allegheny is the principal branch of the Ohio; its volume being six times greater than that of the Monongahela. It is included in the general plan for the improvement by the national government of local interstate waterways and the harbor of Pittsburgh. The government has built or has now in process of construction a system of locks and dams on the Allegheny which will slackwater the stream for 27 miles from its mouth. The Davis Island dam, situate five miles below Pittsburgh on the Ohio river, raises the water in the Allegheny and Monongahela at their junction six feet above their normal depths, and backs its water to the first dams of the Allegheny and Monongahela slackwater systems, respectively. These waters form the harbor of Pittsburgh, the importance of which harbor will be appreciated from the fact that the tonnage in water transportation passing from it the past year exceeded that of the Suez Canal for the same period. From its size, interstate relation, and its being a part of this really great harbor, it will be seen that the Allegheny answers the requirement of a navigable stream (The Montello 78 U. S. 411, 20 L. Ed. 191), and is also one over which the national government has assumed jurisdiction. The Union Bridge is a pier-supported, wooden structure. It crosses from Pittsburgh to Alle-

gheny City, and is the first bridge on the Allegheny. It was built in 1874-75 by the Union Bridge Company, a corporation chartered by the state of Pennsylvania March 13, 1873 (P. L. 274), and was opened for travel July, 1875. In pursuance of the agreement of counsel at the argument that all federal acts pertinent to the cause should be considered by the court, we have examined the federal legislation affecting the Allegheny river prior to the building of this bridge. By the act of April 30, 1824 (4 Stat. 22, c. 46), Congress inaugurated the system under which appropriations were annually made providing for surveys and the report thereof to Congress during the period later referred to herein, viz., from 1828 to 1838. That act provided:

"That the President of the United States is hereby authorized to cause the necessary surveys, plans, and estimates, to be made of the routes of such roads and canals as he may deem of national importance, in a commercial or military point of view, or necessary for the transportation of the public mail."

By virtue of this act, Congress by resolution of December 9, 1828, authorized the examination of "the Allegheny river from the city of Pittsburgh to the mouth of French creek, at Franklin, with a view to a slackwater navigation." Such survey, a distance of 121 miles, was made by the War Department and the report thereof made, which survey and report were on June 8, 1832, reported to Congress and form H. R. Document No. 265 of the first session of the Twenty-Second Congress. This report showed the river could be made navigable to Franklin for a 4½-foot stage, all the year around, by a slackwater system, for 85-ton boats, which the report states was the type in use on the Ohio. By H. R. Document No. 343, second session of the Twenty-Fifth Congress, it appears that another survey was made in 1836–37, in pursuance of a resolution of Congress, and the same was reported to that body on March 23, 1838. This survey was an interstate one. It began in Pennsylvania, extended through New York state, and thence to connect with the prior survey, in all a distance of 274 miles. An examination of the report of the war department engineers shows that this survey was made in pursuance of a plan to connect the great river system of the west and southwest with the New York state canals then building. In that report the present navigation of the Allegheny was illustrated by the draft and capacity of the steamboat New Castle then engaged in that river trade. "This steamboat," the report says, "has carried and towed sixty tons. She has carried eighty passengers and three hundred and fifty bushels of coal and drew two and a half feet of water. * * * The steamboat New Castle has ascended, without great difficulty, from Pittsburg to Olean, and could even, under present circumstances, make regular trips between these places whenever there is sufficient depth of water to pass the chutes of the various dams which have been illegally erected across the river by indiviudals, to the serious injury of the navigation." The navigable depth to be obtained by the improvement of the Ohio was considered the desired standard for the Allegheny, and confidence was expressed that "there is no longer a doubt of the practicability of deepening the channels of the Ohio river on

the bars, so as to afford at least 3½ feet water at its lowest stage from the Mississippi to Louisville. * * * It is a navigation equal to this and upon the same plans, as near as circumstances will permit their application." The report stated "that we wish to secure to the Allegheny river; and I entertain not the slightest doubt of the entire practicability of the undertaking." It will thus be seen that in this project, which had in view connecting the canal system of New York state with the entire river systems of the west and southwest, the Allegheny river was an important interstate link, for, as the report stated, "if the Allegheny river should be improved from Olean to Pittsburgh, a water communication is opened for a distance of more than twelve thousand miles, extending far into the heart of one of the most fertile regions of the globe." The report shows that the notes, maps, profiles, and plans of this work were burned, and no steps were taken toward slackwatering the stream until shortly after the Union Bridge was built; but this early work by Congress evidences an assumption by the national government, at least to the extent of survey and examination, of jurisdiction over the Allegheny as a proper subject of interstate navigation improvement.

It will also be noted that the use of the Allegheny was included by the government in its plans for the creation of a deep-water harbor for Pittsburgh. This is fully set forth in the report of Maj. Merrill of December 2, 1874, found in Chief of Engineers' Report of 1875, vol. 2, p. 687. Briefly stated, that report shows a public agitation for many years for a deeper harbor for Pittsburgh; long study and investigation as to the proper type of dams by the war department engineers; the approval of the movable dam system; the determination to place such a dam so as to slackwater the harbor and the necessity of using the Allegheny for such harbor. The movement culminated in the passage of the act of March 3, 1875, by virtue of which the Davis Island experimental dam, then and still the largest movable dam built, was constructed, and forms the harbor of the city. In view of the public interest and agitation over this proposed improvement, the fact that the Allegheny was to be used as part of the harbor, the deterrent effect of the public notice by the engineer in charge, referred to hereafter in Judge Taft's opinion, that this bridge would obstruct navigation, becomes more significant.

By act of Congress of March 3, 1899 (30 Stat. 1153, c. 425, § 18 [U. S. Comp. St. 1901, p. 3545]), it was provided as follows:

"That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so as to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the

end of such time, the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporations, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed. Provided, that in any case arising under the provisions in this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

The proceedings in this case were had under this act, and as their regularity, their conformity thereto, and the fact that the bridge company had a legal hearing thereunder are questioned, we deem it proper to here recite such proceedings in extenso. Under date of August, 1902, sundry citizens, corporations, and associations in and about Pittsburgh presented a petition to the Secretary of War, setting forth the incorporation of the Union Bridge Company by the state, the building of the bridge in question, alleging it was an unreasonable obstruction to the navigation of the Ohio, Monongahela, and Allegheny rivers, and praying him to investigate. It was, moreover, suggested that on such investigation action be taken against the owners of the bridge in accordance with the act above quoted. After presentation thereof to the Secretary, the petition was on September 23, 1902, referred for report to W. L. Sibert, captain of the corps of engineers in charge of government work in the Pittsburgh district. On October 13, 1902, Capt. Sibert, in response thereto, reported, among other things, to the chief of engineers, the location, height, and pier riprapping of the bridge, that it was an unreasonable obstruction to navigation, and suggested that the interests of navigation "demand that this bridge shall have a channel span giving a clear height of 70 feet above the pool made by the Davis Island dam. This height is necessary at the Union Bridge in order to make a harbor at Pittsburgh for its immense shipping." On October 16, 1902, the petition and the report of Capt. Sibert were returned to the Secretary of War by the chief of engineers with the statement:

"I recommend that the papers be returned to Capt. Sibert with instructions to hold a public hearing, after due notice to all interested parties, as required by the law and the orders of the War Department of Sept. 16, 1891."

On October 18, 1902, this recommendation was approved by the Secretary of War, and on October 23d a reference to Capt. Sibert was ordered. Pursuant thereto notice of such hearing was given to all interested parties, that to the Union Bridge Company being served on November 3, 1902, reading as follows:

"Whereas, the Secretary of War has good reason to believe that the bridge connecting the cities of Pittsburgh and Allegheny, at or near the mouth of the Allegheny river, known as the Union Bridge, is an unreasonable obstruc-

tion to the free navigation of the Allegheny river at the Pittsburgh harbor. on acount of insufficient height and width of span, and of wide and high riprapping at the piers, it is proposed to require the following changes to be made in said bridge by the 30th day of November 1903, to wit: That the bridge be so altered as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second, or right-handed, span to give a clear headroom over the Davis Island pool of not less than 70 feet, and the first span of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. In order to give you an opportunity to be heard as required by the act of Congress approved March 3, 1899, you are hereby notified that a hearing will be had before me, at room 409, Post Office Building, on the east side of Smithfield street, between Third and Fourth avenues, in Pittsburgh, Pennsylvania, at 10 o'clock a. m., on the 14th day of November, 1902, where and when you will be given an opportunity to be heard in the matter. As all the papers will be laid before the Secretary of War for his decision it will perhaps best suit your purpose to submit in writing whatever you may wish to present."

Hearings were had on the day fixed and subsequent adjournment, which were attended by the Union Bridge Company through its attorney and several of its officers, by parties and counsel representing railroad and passenger bridges crossing the Allegheny farther up stream, by commercial bodies of Pittsburgh, by persons and companies engaged in river transportation and by counsel for the City of Pittsburgh. From the minutes it appears that at the opening of such hearing Capt. Sibert announced its objects were, first, to ascertain the fact whether this bridge was an unreasonable obstruction to navigation; second, whether the changes presented in the notice of hearing are such as navigation interests demand; third, whether the time specified in which the changes should be made is reasonable. At the hearing the bridge company presented an answer in which it stated, inter alia:

"The proposition embodied in the notice from the government will require the removal of the present structure. If carried out, it will result in the entire suspension of the operations of this company, because the investment cannot yield any adequate return for the capital."

No question or issue of the bridge being an obstruction to navigation was raised by the answer. Attention being specially called to this, the bridge company, through its counsel, stated:

"I purposely omitted that because I thought it was a question largely in the discretion of the government, and as I said, I did not care to occupy an antagonistic position, but to suggest our situation to the government."

And in passing it will be noted that no effort was made by the bridge company to question then or at the jury trial the fact that this bridge was an unreasonable obstruction to navigation. On December 8, 1902, Capt. Sibert returned to the chief of engineers a record of his proceedings, together with a recommendation of a notice to alter the bridge to be given the bridge company. This recommendation was approved by the chief of engineers and adopted by the Secretary of War, Hon. Elihu Root, who, on January 20, 1903, issued an order

which was served on the bridge company, on January 26, 1903, as follows:

"Take notice that, whereas, the Secretary of War has good reason to believe that the bridge of the Union Bridge Company, a corporation existing under the laws of the state of Pennsylvania, across the Allegheny river, and connecting the cities of Pittsburgh and Allegheny, Pennsylvania (said bridge being known as the Union Bridge), is an unreasonable obstruction to the free navigation of the said Allegheny river (which is one of the navigable water ways of the United States) on account of insufficient height and width of span, and of wide and high riprapping at the piers; and whereas, the following alterations, which have been recommended by the chief of engineers, are required to render navigation under it reasonably free, easy and unobstructed, to wit: Alter said bridge so as to give two navigable spans extending riverward from the left abutment, of not less than 394 feet clear width each; the second span from the Pittsburgh shore to give a clear headroom over the Davis Island pool of not less than 70 feet at the pier and 62 feet at the abutment; also that the piers of the altered structure shall have no riprapping or other pier protection above an elevation of 10 feet below the surface of Davis Island pool, and that all parts of the old structure not comprised in the new construction and in conformity with the above requirements shall be wholly removed. And whereas, eighteen (18) months from the date of service of this notice is a reasonable time in which to alter the said bridge as described above: Now, therefore, in obedience to, and by virtue of section 18, of an act of the Congress of the United States entitled, 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, I, Elihu Root, Secretary of War, do hereby notify the said Union Bridge Company to alter the said bridge as described above, and prescribe that said alterations shall be made and completed on or before the expiration of eighteen months from the date of service hereof."

Act March 3, 1899, c. 425, 30 Stat. 1153 [U. S. Comp. St. 1901, p. 3545].

The bridge company took no steps to alter, change, or remove the bridge and in this shape the matter rested until July 23, 1904, three days before the expiration of the 18 months' time provided in the notice, when its counsel presented a petition to the then Secretary of War, Judge Taft, describing itself therein as the Union Bridge Company, "owning and operating the Union Bridge, over the Allegheny river at Pittsburgh, Pennsylvania, under and by virtue of the authority of the United States Government," setting forth the making of the order to alter, that it would expire July 26, 1904, and praying such time to be extended and a day fixed to present reasons for a rehearing. In pursuance of this petition, the Secretary of War, having temporarily suspended from time to time the order to alter the bridge, heard the arguments of counsel for the bridge company, and thereafter, on July 21, 1905, delivered an opinion as follows:

"The Union Bridge is an unreasonable obstruction to commerce of the Allegheny river. If the bridge were not there, the winter refuge which the stretch of the Allegheny river up to the next bridge would offer for the fleet of boats, which usually are moored in the Monongahela, would be a very great advantage for the navigation and commerce on the Ohio river and its tributaries. The two rivers, the Allegheny and the Monongahela, because they rise in different sections of the country, have their ice breaks at different times in the early spring. The mouth of the one offers very desirable refuge to the vessels that are exposed to danger from the breaking up of ice in the headwaters of the other. The Union Bridge at the mouth of the Allegheny was

erected at a time when the Secretary of War was not given specific control over navigable streams, and was not authorized to inhibit the construction of bridges which were likely to obstruct navigation, but it appears that an army engineer, Col. Merrill, in charge of the district, publicly announced that this bridge was an obstruction to navigation when it was erected. It was erected, therefore, in the face of the information given by the best authority that could be consulted in that matter in the government. These are the facts that I find independently of any previous adjudication; but added to this is the finding of my predecessor, Mr. Root, to exactly the same effect, upon which he based an order that the bridge as an obstruction to navigation be abated. This matter is now before me on a petition for rehearing of Mr. Root's order. As an original question, I should have ruled as Mr. Root ruled, and a fortiori, because the orders of this department are not to be lightly set aside, and are to be treated as a decree in equity would be and be set aside only upon a showing of a palpable error or mistake. The petition for rehearing is denied, and the order suspending the operation of Mr. Root's order is now revoked. The order will be put in full force and executed by the proper officers, and the Union Bridge will be notified accordingly."

In pursuance of these directions notice was duly served on the bridge officers.

From these recited facts it is clear that the bridge company had notice of the hearing; that it duly appeared; that on hearing and rehearing its rights were considered; and that, in pursuance of due action by the Secretary of War taken in the premises, it has been determined that the bridge is an unreasonable obstruction to navigation.

These proceedings being regular and in conformity with the act, three questions arise, viz.: First. Had Congress a right to determine what is an unreasonable obstruction to the navigation of an interstate river? Second. Could it delegate such power to the Secretary of War? Third. Is the act of Congress in question unconstitutional, because it provides no compensation to the bridge company? The settlement of these questions is of grave import. On the one hand stand the people at large, represented by the national government, who are interested in the preservation, improvement, and maintenance of the waterways which nature made highways of commerce. On the other hand, we have investors, who, in pursuance of state corporate authority, have built bridges across such highways and invested their funds therein. The country's growth and the expansion of commerce have made these bridges an unreasonable obstruction to navigation, but the bridge owner says to the government, "Unless you pay for the structure, you cannot remove the obstruction." On the other hand, the government says to the bridge builder, "You cannot stay a great national power, or cripple its use by making its exercise unduly costly, by building without government sanction bridges on the very ground you knew the government must use when it came to exercise its constitutional power to improve these waterways for the general good."

But before taking up these contentions, let us first ascertain the facts pertinent to this particular case, and especially the relation of this bridge company to the state of Pennsylvania under charter from which the obstructing bridge was built and under which alone its existence is justified. Now, it will be noted that this charter left the exact location of the bridge to the option of the company, simply authorizing it to build one "over the Allegheny river, at any practicable point

on Duquesne way, between Second street and the Monongahela river and Allegheny avenue, or any other practical point in the City of Allegheny." Neither did it prescribe the kind of bridge, its height, its span width or pier location. All these matters were left to the company, but this general right to build a bridge was granted on the express condition and limitation, inserted by the state in its charter, "that the erection of said bridge shall not obstruct the navigation of said river, so as to endanger the passage of rafts, steamboats or other water crafts; and the piers shall not be so placed as to interfere with tow boats proceeding out with their tows made up, and shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation." No government or state approval of the bridge, prior to its erection, is shown or alleged. In Dugan v. Bridge Company, 27 Pa. 310, 67 Am. Dec. 464, a charter having a provision of this general character was under consideration, and it was there said by the Supreme Court of Pennsylvania:

"In measuring corporate rights, we are to look at all the terms employed in the fundamental law or compact. We can no more cut out some of them or mitigate their legal effect, because they are in a proviso, than we could qualify the terms of a private agreement because found in one part of the instrument, instead of another. The whole instrument is to be taken together as expressing the final intentions and purposes of the parties. When the Legislature tells the company, 'You may erect a bridge over a particular stream, provided you do not impair the navigation thereof,' it is for the company to determine whether they will accept the franchise on such a condition; but, if they accept it, they take it cum onere, and, having no rights outside of their charter, they must enjoy their franchise, subject to that condition or not enjoy it at all."

But this prohibition against the bridge obstructing navigation thus expressed by the state in its charter was nothing more than the obligation the laws and decisions of that state imposed by implication. Prior to the adoption of the federal Constitution, the province of Pennsylvania, by act of August 14, 1725 (1 Smiths' Laws, p. 168), provided:

"That no bridge, frame or device whatsoever shall at any time to come be made, erected, upheld, sustained or repaired, over any creek or river within this province, navigable for any sloop, shallop, flat, or other craft, that shall or may [in] anywise stop or hinder the navigation of any such sloop, shallop, flat or other craft, or floats of logs: any law, custom or usage to the contrary notwithstanding."

And the special care which Pennsylvania exercises to preserve its waterways from obstructions is seen in Dugan v. Bridge Company, supra, wherein it was said:

"The navigation of the streams of a country is a great public interest, and the law has always treated obstructions as public nuisances. In Rex v. Clark, 12 Mod. 615, Chief Justice Holt said that to hinder the course of a navigable river was against Magna Charta; and many subsequent statutes have punished it, in England, with specific penalties. In this country, and especially in Pennsylvania, the navigation of our rivers has been sedulously guarded both by legislative action and judicial opinion."

Moreover, the courts of that state have held in the case last quoted that a duty is imposed on a bridge company to keep pace with the expansions of commerce, and so change or alter its bridge as not to obstruct such enlarged commerce, saying:

"The Legislature must be presumed to have had all the natural growth of this trade [coal] in view when they authorized the bridge. * * * We * * * are enabled to say that the true meaning of the act of incorporation is that the bridge was to be so built as not to injure, stop, or interrupt the navigation, either then or now, whether in its infancy or full growth."

In view of these holdings it is clear that this bridge has no warrant or countenance from the state of Pennsylvania to justify its further continuance if it be an obstruction to navigation. Such being the case, we pass to the next question: Has Congress a right to determine what is an unreasonable obstruction to the navigation of an interstate river? By section 8, art. 1, of the Constitution, it is enacted that "Congress shall have power * * * to regulate commerce * * * among the several states * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In the Wheeling Bridge Case, 18 How. 425, 15 L. Ed. 435, it was decided that Congress had such power, and that its enactment that a certain bridge was not an obstruction to navigation was in effect a vacation of a previous decree of the Supreme Court of the United States that such a bridge was an obstruction. This decision was approved in the later case of South Carolina v. Georgia, 93 U. S. 13, 23 L. Ed. 782, where in discussing it the court said:

"There it was ruled that the power of Congress to regulate commerce includes the regulation of intercourse and navigation, and consequently the power to determine what shall or shall not be deemed, in the judgment of the law, an obstruction of navigation. * * * The case of the Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969, is in full accord with this decision. It asserts plainly the power of Congress to declare what is and what is not an illegal obstruction in a navigable stream."

To the same effect are Gray v. Chicago, 77 U. S. 454, 19 L. Ed. 969, and Miller v. New York, 109 U. S. 393, 3 Sup. Ct. 232, 27 L. Ed. 971, in the latter of which it is said:

"Having power to regulate commerce with foreign nations and among the several states, and navigation being a branch of that commerce, it [Congress] has the control of all navigable waters between the states or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive."

Indeed, the power of Congress to regulate navigation being established (Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96), and Congress having the constitutional right to make all laws necessary and proper for carrying into execution its powers, it would (apart from all controlling decisions) seem that in Congress must necessarily vest the power to determine what obstructs navigation; for, unless it have power to determine what obstructs, it is without power to control and regulate navigation. And indeed, whether a thing obstructs navigation or not is a question not of law, but fact. "What does encroach on or straighten the harbor, or lessen the depth of water and navigation, is a fact, questio facti (10 Price, 374)," says Mr. Justice Woodbury in United States v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867. It would therefore follow that Congress should have the power, with the

effectiveness of a judicial decree, to determine what is an obstruction to navigation, or, as was said in the Wheeling Bridge Case, supra:

"The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation."

Seeing, then, the clear right of Congress to determine what obstructs navigation, we next inquire whether, if having enacted that certain obstructions in certain waters shall be removed, it is restricted to itself determining where such obstructions exist and is without power to call to its aid other aids or agencies in that regard. The broad and general power to regulate commerce being vested in Congress, and that without any limitation as to the means or manner in which it shall be done, the grant would seem to carry with it the implied right to employ every agency needful to the due exercise of the power. "It is a general principle of law in the construction of all powers of this sort that, where the end is required, the appropriate means are given." United States v. Bailey, 9 Pet. 255, 9 L. Ed. 113. Indeed, to strip Congress of the right to resort to departmental aid and professional engineering skill, and to restrict the exercise of its powers in that regard to express legislation affecting each particular case, would be practically prohibitive of all legislation on the subject. The objections to such a course are well stated in United States v. Moline (D. C.) 82 Fed. 592, where it is said:

"The first question [is the bridge an obstruction to navigation] is purely administrative, and is one that Congress can certainly delegate to the Secretary of War. A thousand questions of equal moment to the parties interested and of equal difficulty are necessarily delegated to the great departments of the government every month. In the very nature of things, Congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately."

To the same effect is Chatfield v. New Haven (C. C.) 110 Fed. 792. And in Miller v. New York, 109 U. S. 395, 3 Sup. Ct. 233, 27 L. Ed. 971, it was said:

"The execution of a vast number of measures authorized by Congress and carried out under the direction of heads of departments would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate."

Reference may also be made to South Carolina v. Georgia, 93 U. S. 13, 23 L. Ed. 782, which recognized the action of the Secretary of War in completely closing one channel of the Savannah river by a crib and forcing the water into another channel under a general grant of money "for the improvement of the harbor of Savannah," as an authorization of such work by Congress. Of course, it must be conceded that the power to legislate—that is, to say what the law is—is vested in Congress alone, but by the act now before us Congress did not delegate to the Secretary of War any power to fix or make the law. By this general act Congress itself enacted what should be done when an obstruction existed and all the power conferred on the Secretary of War was to determine when the law should be enforced; and that

this authority should not be abused a party considering himself aggrieved is by the act given a direct appeal to the court of highest resort. That administrative duties in carrying out legislative powers may be delegated to departments has been held in many cases, among which we cite Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Caha v. United States, 152 U. S. 212, 14 Sup. Ct. 513, 38 L. Ed. 415; Bushnel v. Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; Railway Co. v. Ohio, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747; United States v. Ormsbee (D. C.) 74 Fed. 207; Grady v. United States, 98 Fed. 239, 39 C. C. A. 42; Dastervignes v. United States, 122 Fed. 35, 58 C. C. A. 346. It being shown, then, that Congress has power to control navigation; that the Allegheny is an interstate, navigable stream; that Congress has assumed control over it; that, acting by the Secretary of War, it has determined the bridge in question to be an obstruction to navigation and ordered its alteration; and the bridge company having willfully refused so to do—the burden of justifying a further continuance of that which the supreme law making power of the land has determined to be an obstruction to navigation rests upon the bridge company so obstructing. That the bridge is an obstruction to navigation is now settled, and is not now open to question. Indeed, no question in that regard has even been raised in the whole proceeding, either on the hearing in pursuance of the statute or on the criminal proceeding in this court. It therefore having been legally determined that the bridge company maintains an obstruction to navigation, and so fails to "meet the requisitions of the law in regard to the obstructions of navigation," it can claim no immunity or protection from the state of Pennsylvania, whose charter required that its bridge "shall be constructed in such manner as meet the requisitions of the law in regard to the obstructions of navigation."

But it is contended the act of Congress under which this proceeding is had is unconstitutional because it makes no provision for compensation, and therefore violates the fifth amendment to the Constitution, which enacts, "Nor shall private property be taken for public use without just compensation." In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge some 30 years old. In the natural life of such a structure it would not have been long, were the government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but simply the profit arising from tolls during the life of its present structure. Moreover, the case does not fall within the literal terms of the constitutional provision in that no "private property [is] * * * taken for public use." The facts are not as they were in the case of the Monongahela Navigation Company v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463. Its bridge is not taken and used by the government for public purposes, as were the dams and locks of the navigation company in that case. Indeed, the right of

the bridge company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take or condemn its property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream. It is simply the enforcement of the time-honored maxim which qualifies the absolutism of all property rights: "Sic utere tuo ut non alienum lædas." "So use your own as not to injure another's property." It would be a strange anomaly that a demand made by the law upon one to perform a lawful duty must be preceded by compelling the law enforcer to provide compensation to the law violator for what is maintained in violation of law. It seems to us the statement of such a proposition is an answer to a claim for compensation. There can be no lawful compensation for an unlawful structure. But waiving its charter condition and the duty this bridge company owes to the state of Pennsylvania, under which alone it justifies the maintenance of this obstruction, we think the paramount right of Congress to require the alteration without compensation of any bridge obstructing navigable interstate waters is, under the decisions of the Supreme Court, clear. In the first place we have a law, enacted by a co-ordinate branch of the government, in which there is no uncertainty. It is directed against all bridges, those already built or to be built. "Any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waters of the United States," are its words. There can be no doubt of the clear legislative intent to compel alterations of such bridges as obstruct, and that without compensation. Shall this law be set aside as unconstitutional? The question is one of serious import from a national standpoint, for it is clear that, if an obstruction must be paid for before navigation can be improved, the improvement of navigation faces a grave menace. Unfortunate as this might be, still, if the enforcement of any act of Congress sacrifices the constitutional right of the citizen, the act must yield to the higher law of the Constitution. But, when a statute has been passed by the legislative branch of the government, the judicial branch will act with great caution in declaring it unconstitutional, and will do so "only," as Chief Justice Black of Pennsylvania said in Sharpless v. Mayor of Philadelphia, 21 Pa. 164, 59 Am. Dec. 759, "when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." Or, as Chief Justice Marshall said in Fletcher v. Peck, 6 Cranch, 126, 3 L. Ed. 162:

"The question, whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

Now, in passing this law and thereby seeking to fulfil its constitutional duty to regulate commerce, Congress would properly be guided

by the holdings of the Supreme Court in reference to that power. As we study those decisions, it would seem the views of that court are stated in no uncertain terms. Turning, as we naturally do, to the fountain head of American constitutional construction, we find the dominant power of Congress in that regard was asserted at an early day by Chief Justice Marshall in the case of Willson v. Black Bird Creek Marsh Company, 2 Pet. 245, 7 L. Ed. 412. There a corporation, under authority of a charter from the state of Delaware, built a dam across the navigable water in question. A vessel owner broke down the dam and sought to justify his act on the ground that it was an obstruction to navigation. His contention in that regard was not sustained; the court holding that the dam, having been built by authority of the state of Delaware, was, in the absence of legislation by Congress, a lawful structure. But, in delivering its opinion, the court went further, and said:

"Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations, and among the several states.' If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and lower states—we should feel not much difficulty in saying that a state law coming to conflict with such act would be void. But Congress has passed no such act."

We cannot but regard this statement of the great Chief Justice at that early day, 1835, a statement, it will be observed, not necessary to the disposition of that case, was purposely inserted to prevent any misunderstanding and as a timely warning to those who might thereafter act under state sanction in placing structures in streams that they were doing so in the face of a dominant, controlling power in Congress, and that, when that dormant power was exercised, all else must yield thereto; that the structure might lawfully be placed there for the time being by state power, but that structures, thus state authorized, might become obstructions, nationally abated, when Congress exercised its dormant, but none the less dominant power, to regulate commerce. And this early assertion of paramount federal control is made in all the later cases where the power is discussed. In them will be found the assertion that the right, when Congress acts, is not concluded by anything the states, or individuals acting under them, have done, that the power of Congress is not affected by its silent acquiescence or inaction, and that it may remove offending structures. Thus the absolute scope of this power when Congress undertook to exercise it is asserted in Williamette Iron Bridge Company v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629, where the court say:

"And although, until Congress acts, the states have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the states or that individuals by its authority or acquiescence have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams."

In Escanaba Company v. Chicago, 107 U. S. 683, 2 Sup. Ct. 185, 27 L. Ed. 442, the power of the state, in the absence of congressional legislation to maintain and regulate bridges over interstate navigable waters, was recognized. But the dominant control of Congress and the right to abate state-authorized structures when they obstructed navigation was vigorously asserted. Says Mr. Justice Field:

"Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other state, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form and strength, and the size of their draws, and the manner and times of using them, be better vested than with the state, or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But, until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest periods, and approved in repeated cases, the most notable of which are Willson v. Black Bird Creek Marsh Company, 2 Pet. 245, 7 L. Ed. 412, decided in 1829, and Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96, decided in 1865."

To the same effect is the case of Gilman v. Philadelphia, supra, where, long prior to the building of this bridge, it was said:

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose, they are the public property of the nation, and subject to all the requisite legislation by Congress. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Corfield v. Coryell, 4 Washington C. C. 378, Fed. Cas. No. 3,230. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the state or otherwise, to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament in England. It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. United States v. New Bedford Bridge, 1 Woodb. & Minot, 420, 421, Fed. Cas. No. 15,867; United States v. Coombs, 12 Pet. 72, 9 L. Ed. 1004; New York v. Milne, 11 Pet. 102, 155, 9 L. Ed. 648. * * * Lastly, Congress may interpose whenever it shall be deemed necessary by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary."

In Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525, a dam and boom were placed in the Chippewa river in pursuance of authority granted by the state of Wisconsin. The plaintiff was injured by the obstruction, but the defendant justified, in the absence of congressional legislation, under the state law. The defense, as in the Marsh Creek Case, was held good, but, just as in that case, the court took occasion to assert the paramount control of Congress when it saw fit to exercise such control, saying:

"There are within the state of Wisconsin, and perhaps other states, many small streams navigable, for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the Legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And, since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may be necessary to do so, the exercise of this limited power may all the more safely be confided to the local Legislatures."

So, also, in Cardwell v. American Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959, while the limited power of the state to control and maintain bridges is recognized, yet the dominant power of Congress to control those so authorized is broadly asserted. Referring to the decisions cited, the court says:

"They recognize the full power of the states to regulate within their limits matters of internal police, which embrace, among other things, the construction, repair, and maintenance of roads and bridges. * * * And that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that, until Congress acts on the subject, their power is plenary. When Congress acts directly with reference to the bridges authorized by the state, its will must control so far as may be necessary to secure the free navigation of the stream."

The argument is, however, advanced that the government, having made no objection to the bridge prior to its erection has in some way, by its inaction legalized the bridge as against itself, and thereby become liable to compensate the owners before ordering its alteration. We are referred, however, to no principle of estoppel or laches that would avail to thus compel the holder of a discretionary power to exert it immedately at peril. "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided." Gilman v. Philadelphia, supra, and cases therein cited. And, indeed, to apply an analogous principle, statutes of limitations do not affect the sovereign's rights. If one at his own instance, or acting under authority of a state, should, in the absence of any inducing action by the government, occupy land of the latter and place improvements thereon, manifestly such unauthorized improvement would be no bar to the government abating or removing the same when it saw fit to assert its dominant power. The laches,

if any, are not those of the government, but of the improver who neglected to secure prior federal consent. "It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams." Williamette Iron Bridge Co. v. Hatch, supra. And not only, as we have seen, was consent of Congress as a precautionary measure not obtained, but the relation of the government to this stream and the harbor of Pittsburgh were then such as might well admonish a prudent investor proposing to bridge the stream and narrow the harbor to acquaint himself with the plans of the government before starting such an undertaking. "Whatever is notice enough to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." Kennedy v. Greene, 3 Myl. & K. 722, quoted in Wood v. Carpenter, 101 U. S. 141, 25 L. Ed. 807, and "means of knowledge with the duty of using them are deemed equivalent to knowledge itself, and passive good faith will not serve to excuse willful ignorance." 21 Am. & Eng. Ency. Law, 584, and cases cited. In the County of Mobile v. Kimball, 102 U. S. 698, 26 L. Ed. 238, the subject of improvements in the line of commerce, and therefore of navigation made under state authorization, was considered. The distinction was drawn between those of a general nature, which, in the nature of things, must, in order to insure uniformity, be left solely to Congress and those, "where from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated." It was there held that "the improvement of harbors, bays, and navigable rivers within the state falls within this last category of cases," and in that case, there being no action by Congress on the subject, legislation by the state of Alabama providing for the improvement of the harbor of Mobile was held legal. But, while the state control thus assumed was recognized, the court laid down the principle that the inaction of the Congress was not a surrender of the power or a declaration that nothing shall thereafter be done by Congress. "State action," says the court, "upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and, until it sees fit to act, they may be regulated by State authority."

Under these authorities, we are of opinion that Congress was acting within its constitutional limits in enacting that bridges, whenever they obstructed navigation, should be removed, and that without compensation made to the obstructor. The absolute, dominant, controlling power of Congress over navigation had been asserted before this bridge was built. While the power of the state to authorize struct-

ures was recognized, yet the limited nature of that power and that it must be exercised and enjoyed subject to the dominant control of the constitutional, and therefore higher, power, had been as clearly pointed out, so that, when the state of Pennsylvania empowered this company to build its bridge so that it should "meet the requisitions of the law in regard to the obstructions of navigation," there was no doubt as to the source from which those requisitions would ultimately come. In this case Congress has acted, as it strikes us, with great magnanimity and with considerate regard to the situation in which this company itself placed itself. In 1874 the government's engineers reported to it (Chief of Engineers' Report, vol. 2, p. 686) that the bridge was an obstruction as follows:

"Below the Saint Clair street suspension bridge was a space of 3,000 feet, with excellent water at all stages. This space was always occupied by steamboats, to the great relief of the main harbor in the Monongehela, which is usually excessively crowded with coal towboats and barges. This use of the Allegheny has been entirely destroyed by the Union Bridge, as large boats cannot get under the bridge in any stage of water, and small boats cannot do so when the water is above average stages. * * * To thoroughly utilize this improved harbor, it is essential that first class boats should be able to traverse the Allegheny and Monongahela harbors with freedom. But the Union Bridge entirely closes up the mouth of the Allegheny, and thus destroys half of the benefit to be derived from the proposed improvements. * * * In view of all these facts, I am constrained to report that the Union Bridge is a serious and unnecessary obstruction to navigation, and to recommend that measures be at once taken to compel its owners to make such modifications as will permit the safe passage of the boats that usually navigate the Ohio up to Pittsburgh."

Indeed, that Congress, in the face of such information, has allowed this bridge to stand for 30 odd years thereafter and be used meanwhile to reimburse to that extent its owners by tolls, and that during that time the bridge has precluded the use of half the expensive harbor improvements made by the government, are in themselves proof that an absolute power in Congress to remove obstructions to navigation, when it saw fit to exercise the power, was wisely intrusted to that body in full confidence that such power would be exercised with due regard to the situation in which the obstructor had placed himself.

Holding then, as we do, that this law is constitutional, the proceedings under it regular and the verdict of the jury warranted, we dismiss the motion in arrest of judgment, and grant the motion of the government to impose sentence.

In re SALMON & SALMON.

(District Court, W. D. Missouri, W. D. January 19, 1906.)

No. 1,086.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

A private bank owned by a partnership became insolvent, and its affairs were taken charge of by the Secretary of State of Missouri, through a special agent as authorized by Rev. St. Mo. 1899, § 1305, which provides for the administration of the property of insolvent banks by such special agent and by a receiver to be appointed later at suit of the Attorney General. After the bank property had been delivered to the special agent, the partners, who were also insolvent, executed conveyances to him of all their remaining nonexempt property, both partnership and individual, with power to sell and apply to the payment of the partnership debts. *Held*, that the transactions together constituted a general assignment for the benefit of creditors and an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422] as amended in 1903 (Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683]).

2. SAME—CONVEYANCE WITH INTENT TO HINDER AND DELAY CREDITORS.

A conveyance by an insolvent of all of his nonexempt property in trust for the benefit of his creditors, although without preferences, is one made with intent to hinder and delay his creditors, since that is its necessary effect and constitutes an act of bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 80.]

3. SAME—SUSPENSION OF STATE INSOLVENCY LAW—MISSOURI STATUTE FOR LIQUIDATING BANKS.

Rev. St. Mo. 1899, §§ 1305, 1306, enacted in 1897, make it the duty of the Secretary of State to take charge of any bank, the capital of which has become impaired, examine into its condition, and, if found insolvent, to report such fact to the Attorney General, who is then required to institute suit for the appointment of a receiver and the winding up of its affairs for the benefit of its depositors, creditors, and stockholders. They also prohibit a bank from making a general assignment or transferring any of its property after insolvency, and require it at once, on finding itself in a failing condition, to place its affairs in the hands of the Secretary of State to be wound up as therein provided. *Held*, that such statute is in legal effect an insolvency law, and, in respect to private banks owned by individuals or partnerships subject to bankruptcy proceedings, its operation was suspended by the enactment of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], and that participation by creditors in proceedings instituted thereunder did not estop such creditors from thereafter prosecuting proceedings in bankruptcy against the debtors.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 8, 9.]

4. SAME—PETITIONING CREDITORS—ESTOPPEL.

Creditors of an insolvent partnership or its members are not estopped to maintain proceedings to have the debtors adjudged involuntary bankrupts, because of filing and proving their claims in a suit in a state court under a state statute, for winding up the affairs of a bank owned by the partnership, instituted after the filing of the petition in

bankruptcy, where the alleged act of bankruptcy was a conveyance of property not employed in the banking business, nor involved in the state suit.

In Bankruptcy. On involuntary petition.

Karnes, New & Krauthoff and C. I. Davis, for petitioning creditors.
Johnson & Lucas, for bankrupts.
Mann & Daniel and H. H. McCluer, for objecting creditors.

POLLOCK, District Judge. This is an application by the requisite number of creditors owning claims aggregating the required amount for an adjudication in bankruptcy against Geo. Y. Salmon and Harvey W. Salmon, as partners doing a private banking business at the city of Clinton, in this state, and also against said persons in their individual capacities.

The acts of insolvency charged in the petition, of which complaint is now made under stipulation of the parties filed herein, are matters of public record and consist:

First, of a trust conveyance made by the partners of all their partnership property, except that employed in connection with their bank, to Robert M. Cook, trustee, on the 21st day of June, 1905, which conveyance reads:

"This conveyance in trust made and entered into this 21st day of June, 1905, by and between George Y. Salmon and Harvey W. Salmon both of Clinton, Henry county, Missouri, as copartners as to all matters excepting herefrom the copartnership of Salmon & Salmon in the banking business, as parties of the first part, and Robert M. Cook of the city of Jefferson, county of Cole and state of Missouri, trustee, as party of the second part, witnesseth: "That whereas, the banking house of Salmon & Salmon located at Clinton, Henry county, Missouri, has failed, and in pursuance of the statutes governing said matter John E. Swanger, Secretary of State, has taken possession of the assets of the said copartnership and of the said bank and has appointed the said Robert M. Cook as special agent to take charge of the affairs of said bank temporarily until a receiver has been appointed, and said Robert M. Cook under said appointment has taken charge of the affairs of said bank temporarily until a receiver has been appointed; whereas, the above named parties of the first part, are desirous of conveying to the said second party in trust all of the partnership assets they may hold in addition to the assets of the said bank already in charge of said receiver, in order that all the copartnership property of said first parties, whether in the banking business or any other business wherever same be located and situated may be applied to the payment of the indebtedness of the said Salmon & Salmon, copartners:

"Now, therefore, in consideration of the premises and for the purpose aforesaid, the said first parties do hereby convey to the said Robert M. Cook in trust all and singular the property of the first parties as copartners in addition to the assets of the said copartnership as a banking firm both real, personal and mixed wherever the same may be situated. To have and to hold in fee simple and in trust for the purpose aforesaid, and said first parties further hereby authorize and empower the said Robert M. Cook to sell and dispose of in fee simple any and all of the lands owned by them, to convey in any other way any of the property herein intended to be conveyed to the said Robert M. Cook for the purpose mentioned in this conveyance as fully as the said parties of the first part themselves might do by direct deed including the power and authority to said Robert M. Cook to sell and convey all or any of said property by particular description or to transfer or deliver same to a receiver hereafter to be appointed."

Second, a like trust conveyance made at the same time, to the same party, of all the individual nonexempt property of Geo. Y. Salmon, made by Geo. Y. Salmon and Eugenia M. Salmon, his wife, which reads as follows:

"This conveyance in trust made and entered into this 21st day of June, 1905, by and between George Y. Salmon and Eugenia M. Salmon, his wife, of the city of Clinton, county of Henry and state of Missouri, as parties of the first part, and Robert M. Cook of the city of Jefferson, county of Cole and state of Missouri, trustee, as party of the second part, witnesseth: That whereas, the banking house of Salmon & Salmon, a copartnership consisting of George Y. Salmon and Harvey W. Salmon located at Clinton, Henry county, Missouri, has failed, and, in pursuance of the statutes governing said matters, John E. Swanger, Secretary of State, has taken possession of the assets of said copartnership and of said bank and has appointed the said Robert M. Cook as special agent to take charge of the affairs of said bank temporarily until a receiver has been appointed, and said Robert M. Cook under said appointment has taken charge of the affairs of said bank temporarily until a receiver has been appointed; and whereas, the above-named party of the first part is individually liable for all of the demands against said copartnership of Salmon & Salmon; and whereas, said first party is seised and possessed of individual assets and is desirous of conveying the same to the said second party in trust for the payment of the demands against the said Salmon & Salmon, copartners:

"Now, therefore, in consideration of the premises and for the purposes aforesaid, the said party of the first part does hereby convey to the said Robert M. Cook in trust all and singular the property of the first party, real, personal and mixed wherever it may be situated, reserving to himself all property exempt from execution and attachment. To have and to hold in fee simple and in trust for the purposes aforesaid, and said first party hereby further authorizes and empowers said Robert M. Cook to sell and dispose of in fee simple any and all of the lands owned by him and to convey in any other way by good and sufficient deed or other conveyance any of the property herein intended to be conveyed to the said Robert M. Cook for the purposes mentioned in this conveyance as fully as the said party of the first part might himself do by direct deed, with full description of any and all said land or other assets by him owned.

"The said first party further empowers and authorizes the said second party by deed of conveyance duly executed with particular description of said real estate or by any other conveyance of other property to transfer, deliver and convey said property to any receiver appointed by the circuit court having jurisdiction of the said estate of Salmon & Salmon."

Third, a like trust conveyance, made at the same time, to the same party, of all the nonexempt property of Harvey W. Salmon, a single man, which conveyance reads as follows:

"This conveyance in trust made and entered into this 21st day of June, 1905, by and between Harvey W. Salmon of the city of Clinton, county of Henry and state of Missouri, as party of the first part, and Robert M. Cook of the city of Jefferson, county of Cole and state of Missouri, trustee, as party of the second part, witnesseth: That whereas, the banking house of Salmon & Salmon, a copartnership consisting of George Y. Salmon and Harvey W. Salmon, located at Clinton, Henry county, Missouri, has failed, and in pursuance of the statutes governing such matters John E. Swanger, Secretary of State, has taken possession of the assets of said copartnership and of said bank and has appointed the said Robert M. Cook as special agent to take charge of the affairs of said bank temporarily until a receiver has been appointed and said Robert M. Cook under said appointment has taken charge of said bank temporarily until a receiver has been appointed; and whereas, the above-named party of the first part is individually liable

for all the demands against the said copartnership of Salmon & Salmon; and whereas, said first party is siesed and possessed of individual assets, and is desirous of conveying the same to the said second party in trust for the payment of the demands against the said Salmon & Salmon, copartners:

"Now, therefore, in consideration of the premises and for the purpose aforesaid, the said party of the first part does hereby convey to the said Robert M. Cook in trust all and singular the property of the first party, real, personal and mixed wherever it may be situated, reserving to himself all property exempt from executions and attachment. To have and to hold in fee simple and in trust for the purposes aforesaid, and said first party further hereby authorizes and empowers the said Robert M. Cook to sell and dispose of in fee simple any and all of the land owned by him and to convey in any other way by good and sufficient deed or other conveyance any of the property herein intended to be conveyed to said Robert M. Cook for the purposes mentioned in this conveyance, as fully as the said party of the first part might himself do by direct deed with full description of any and all said lands or other assets by him owned.

"The said first party further empowers and authorizes the said second party by deed of conveyance duly executed with particular description of said real estate or by any other conveyance of other property to transfer, deliver, and convey such property to any receiver appointed by the circuit court having jurisdiction of the said estate of the said Salmon & Salmon."

These trust conveyances were duly acknowledged the day they were made, and on the same day filed and recorded in the appropriate public office. As shown on the face of these conveyances, they were made at a time when the private bank owned and managed by the firm as partners had failed, and was in possession of the Secretary of State, through Robert M. Cook, as his agent, in pursuance of section 1305, Rev. St. Mo. 1899, which, in so far as material, reads:

"The Secretary of State may appoint a special agent to take charge of the affairs of an insolvent bank temporarily, until a receiver is appointed; such agent to qualify, give bond and receive compensation the same as a regularly appointed bank examiner; such compensation to be paid by such bank, or allowed by the court, as costs in case of the appointment of a receiver; provided, that in no case shall any bank continue in charge of such special agent for a longer period than sixty days."

As gathered from matters in evidence before me, I find at the time the above trust conveyances were made the partnership and the individual members thereof were hopelessly insolvent. The acts of bankruptcy charged in the petition filed in this case are: First, that these conveyances constitute a general assignment for the benefit of creditors; second, that the above conveyances were made with the intent to hinder, delay, or defraud the creditors of the grantors.

The first question arising for consideration on this record is: Did the act of making the above conveyances, in and of itself, as a matter of law, constitute an act or acts of bankruptcy? This question, I think, must be answered in the affirmative. As the bank itself, at the time the conveyances were made, had failed, was insolvent, and was in the possession of the grantee in the conveyances for the purpose of protecting and paying the depositors, and as this possession had been transferred by the grantors in these conveyances, under the law, because of the insolvency of the bank, and as the conveyances are absolute in form, covering all of the property of the debtors not exempt and not theretofore transferred by delivery to the

grantee in the conveyances in pursuance of law, and as they are made in trust for the purpose of making payment of the debts of the grantors, they operated in law as a general assignment for the benefit of creditors. That is to say, under the provisions of section 1306, Rev. St. Mo. 1899, a voluntary assignment of the property of the bank by the debtors being prohibited, for this reason it was not included in the conveyances made, but was transferred by delivery to the Secretary of State, under the law, therefore these separate conveyances, being of all the nonexempt property of the debtors susceptible of voluntary assignment, and of all the property not theretofore transferred, constitute in law one transaction, the legal effect of which is a general assignment for the benefit of creditors. White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309, 32 L. Ed. 677; Preston v. Spaulding, 120 Ill. 208, 10 N. E. 903; Hargadine v. Henderson, 97 Mo. 384, 11 S. W. 218; Belt v. Robinson, 63 Fed. 90, 11 C. C. A. 39; Mills v. Williams, 31 Mo. App. 447.

While I am clearly of the opinion, from matters in evidence before me, both the partnership and the individuals composing it were hopelessly insolvent at the time the conveyances were made, yet, if this were not shown, such general assignment would, irrespective of the insolvency of the grantors at the time it was made, constitute an act of bankruptcy. West Company v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814.

Again, although the conveyances in question were undoubtedly made in good faith for the purpose of paying pro rata the debts of the makers, without preference other than the laws of the state provided, and although they might not be avoided at common law for any fraud inhering therein, yet, as the making of these conveyances, taken in connection with the transfer of all the property of the bank theretofore made, must inevitably result in hindering and delaying the creditors of the grantors in the collection of their debts, and as the grantors in the making of these conveyances must be presumed to have intended the natural and probable effect of their act, it must be held, as a matter of law, the makers intended thereby to hinder and delay their creditors, and the making thereof constitutes an act of bankruptcy.

In Rumsey & Sikemier Co. v. Novelty & Machine Mfg. Co. (D. C.) 99 Fed. 699, it is said:

"The next question is whether the deed is a conveyance by the company with intent to hinder, delay, and defraud its creditors, or any of them. It is contended that because it devoted all the debtor's property to the payment of its creditors demands, pro rata and equally, and because there is no fraud of the kind requisite to avoid deeds at common law, or under the statutes of fraudulent conveyances, therefore this deed does not hinder, delay, or defraud creditors, within the meaning of the bankruptcy act. In considering this question, it must be borne in mind that the bankruptcy act confers certain peculiar rights and privileges upon creditors which were unknown to the common law, and unrecognized by state statutes concerning fraudulent conveyances. Among these are the right (1) to choose their own trustee, (2) to examine the bankrupt, (3) to have notice of all the important steps in the administration of the estate, and (4) to have the as-

sets converted into money and distributed under the supervision and control of a court of bankruptcy. Any course of procedure by an insolvent, like that resorted to in this case, whereby he conveys all his property to some trustee of his own selection, with power to dispose of it according to his own judgment, and with none of the safeguards provided by the bankruptcy act, clearly deprives the creditors of the valuable rights accorded to them by that act. In addition to this, if such a course of procedure is open to an insolvent, he may in all cases resort to it in anticipation of bankruptcy, and thereby altogether defeat the operation of the involuntary provisions of the act. Considerations like these lead me to the conclusion that such a course of procedure, even though invulnerable at common law and unattended with fraud in fact, inevitably operates to hinder, delay, and defraud the creditors with respect to their rights under the bankruptcy act. The rights above enumerated are taken from them, and they are deprived of all safeguards, in their effort to secure from the wreck of business some part of what is justly due them. Such being the necessary consequences of the act of the insolvent in making a voluntary conveyance of his property for the benefit of his creditors, it follows that he must have intended such consequences in making such a conveyance."

In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377, it is said:

"We entertain no doubt that a voluntary general assignment, with or without preferences, made by an insolvent debtor within the prescribed four months, is fraudulent, and intended by him to "hinder, delay and defraud" creditors, within the meaning of the section, because its necessary effect is to defeat the operation of the bankrupt act and the rights of the creditors to such an administration of the assets as that act is intended to provide. The reasons for this conclusion, and the authorities in support of it, are so fully and satisfactorily set forth in the opinion by Judge Brown in the court below that we do not deem it necessary to enlarge upon them. They are summarized in the following extract from his opinion. Since the time of George II, and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the act, and hence a fraud upon creditors, as respects their rights in bankruptcy, and voidable at the trustee's option, even without an express provision to that effect in the statute." Barnes v. Rettew, 2 Fed. Cas. 868; Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. 488.

See also, Davis v. Bohle et al., 92 Fed. 325, 34 C. C. A. 372.

It follows, from what has been said, the possession of all the property of the firm employed in the banking business having been transferred at the time of the making of the conveyances in question to Robert M. Cook, in trust for the benefit of creditors of the bank, because, as will be seen, of the insolvency of the bank, and the conveyances in question being absolute in form, and including all the remainder of the partnership assets and all individual assets not exempt for the benefit of creditors, and the natural and inevitable result of the same being to hinder and delay the creditors of the grantors in the collection of their just debts, the making of such conveyances constitutes an act of bankruptcy, and the order adjudging them bankrupts, both as partners and in their individual capacities, must go, unless, as contended by certain objecting creditors, petitioners herein are, by their acts and conduct, estopped from demanding such adjudication.

The facts relied upon to work an estoppel against petitioners, as shown by the record, are as follows: The original petition in bank-

ruptcy was filed June 26, 1905, 9:35 in the morning. On the same day about 11 o'clock, a. m., a proceeding was instituted in the circuit court of Henry county by the Attorney General of the state against the banking firm, in pursuance of authority conferred by section 1305, Rev. St. Mo. 1899, which, as above seen, makes provision for the Secretary of State taking charge of a bank, the capital of which is impaired, and also makes provisions for an examination of the bank, defines insolvency, and makes it the duty of the Attorney General to institute a suit in the proper court for the appointment of a receiver for the winding up of the affairs of the bank, if insolvent, for the benefit of the depositors, creditors, and stockholders in the bank; makes it the duty of the court, or judge thereof in vacation, to summarily appoint a receiver, etc., as follows:

"Upon taking charge of a bank the Secretary of State shall, as soon as is practicable, ascertain by a thorough examination into its affairs, its actual financial condition, and whenever he shall become satisfied that such bank cannot resume business or liquidate its indebtedness to the satisfaction of all its creditors, he shall report the fact of its insolvency to the Attorney General, who shall, immediately upon the receipt of such notice, institute proper proceedings in the proper court for the purpose of having a receiver appointed to take charge of such bank, and to wind up the affairs and business thereof, for the benefit of its depositors, creditors and stockholders; and it is made the duty of the court, or the judge thereof in vacation, summarily to appoint said receiver to take possession of the property, and assets of said bank, for the purpose of winding up the business thereof, any complaints or opposition of the bank or its officers subsequently to be heard in open court."

On the same day the proceeding was instituted a receiver was appointed who took charge of the bank and proceeded to wind up its affairs. On the 14th day of August thereafter the court appointed the receiver, one John B. Egger, referee, with directions to hear all claims presented against the trust estate and report his findings and the evidence thereon to the court at its next regular term for allowance, or disallowance. The petitioners in the present case, in pursuance of notice to them, presented their claims against the estate, which were allowed, and they surrendered the evidence of their claims and accepted certificates of allowance against the estate. It further appears the banking firm had transferred to the Fidelity Trust Company, of Kansas City, securities aggregating some $300,000, alleged to have been transferred more than four months before the filing of the petition in bankruptcy for the purpose of preferring the Kansas City State Bank as a creditor. In the proper exercise of his trust, it became necessary for the receiver to tender to the trust company the sum of $66,416.15 and bring suit to recover the securities transferred. Attorneys for petitioners, with the knowledge and consent of their clients, advised the making of this tender and the bringing of the suit by the receiver in the state court to recover the securities, and other suits which have been brought by the receiver.

It is further shown, under the advice of attorneys for petitioners, the receiver employed additional counsel in the suits brought by him and has incurred additional expense in the bringing of such suits and the employment of such additional counsel. It is therefore con-

tended by such acts and conduct petitioning creditors have elected to wind up the affairs of the trust in which they are interested in the proceeding brought by the Attorney General in the state court, in pursuance of the statute law above quoted, and are, and of right should be, by such acts and conduct, now estopped and debarred from further proceeding in this matter in this court, or now demanding an adjudication in bankruptcy for the acts of bankruptcy charged in the petition.

From an inspection of the record it is seen petitioners filed in this court an amended petition in bankruptcy on the 6th day of July, 1905. On the 11th day of September, thereafter, application was made to this court by petitioners for an order restraining creditors of the bankrupt estate from prosecuting actions against the receiver in the state court, and also, on the same day, application was made by petitioners for an order of this court restraining the receiver and his solicitors from applying any moneys in the hands of the receiver in payment of the compensation of such receiver, or his solicitors, or from making any application to the state court, fixing the amount of such compensation. These orders were granted by this court on the same day, as prayed. It further appears attorneys for petitioners have in all things, in so far as possible, under the peculiar circumstances of this case, diligently and earnestly pressed for a decision of their right to demand an adjudication of bankruptcy herein.

Under such state of facts, should petitioners be now held estopped and precluded from further prosecution of this proceeding by reason of their participation in the proceeding pending in the state court?

Petitioners deny the estoppel charged on two grounds: First, it is contended the state law under which the proceeding was instituted in the state court to wind up the affairs of the bank is in its nature and legal effect an insolvency law, and, in so far as the same applies to private banks its operation was suspended by the national bankrupt act, therefore, the proceeding in the state court is without authority of law, void, and works no estoppel. Second, that the acts relied upon as done by petitioners are not sufficient to work an election of remedy or an estoppel on the part of petitioners to contend the making of the conveyances in question constitute an act of bankruptcy.

The question first presented is the effect of the recognition by petitioners of the proceeding pending in the state court and their participation therein. The determination of this question of necessity depends largely upon the validity of such proceeding, for it is elementary, if such proceedings are unauthorized by the law, no participation therein by petitioners can work an estoppel. Bigelow on Estoppel (3d Ed.) 286; Bank of America v. Banks, 101 U. S. 240, 25 L. Ed. 850.

It can be neither disputed nor doubted but that the national bankruptcy act suspends the operations of all state insolvency laws over all cases coming within its scope and purview. Chief Justice Fuller, in delivering the opinion in the recent case In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, says:

"The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." Tua v. Carriere, 117 U. S. 201, 6 Sup. Ct. 565, 29 L. Ed. 855; In re Bruss-Ritter Co. (D. C.) 90 Fed. 651; In re Curtis (D. C.) 91 Fed. 737.

It is contended, however, by objecting creditors, that the Missouri statutes under which the proceeding was instituted in the state court is not such an insolvency law as is suspended in operation by the national bankrupt law, but that such act was passed and remains in force notwithstanding the national bankrupt act, under what is known as the reserve power or police power of the state for the purpose of exercising a visitorial supervision over the banking institutions of the state for the welfare of its citizens. The portion of the act now under consideration was passed in 1897, before the passage of the national bankrupt act, and is found in article 8, c. 12, Rev. St. Mo. 1899, under the head of "Banks and Banking." As has been seen from that part of section 1305 above quoted, after a bank has been taken in charge by the Secretary of State, and he has caused an examination and determination of its actual condition, and from such ascertainment he is satisfied "the bank cannot resume business, or cannot liquidate its indebtedness to the satisfaction of all its creditors," it then becomes his duty to report to the Attorney General of of the state, not the failure of the bank or the fact that he has taken the bank in charge, or the actual condition of the bank, but he is required by the terms of the act to report to the Attorney General the insolvency of the bank. The act then provides the duties of the Attorney General. That he shall institute a proceeding such as was instituted in the present case to wind up the affairs of the bank for the benefit of its depositors, creditors, and stockholders, and in winding up its affairs to make application to the proper state court, or judge thereof, to appoint a receiver; and the act further makes it the duty of such court, or judge thereof in vacation, when application is made, to summarily appoint a receiver to take charge of the affairs of the insolvent bank. Section 1306 prohibits any bank in the state from making a general assignment, and prohibits the transfer of any of its property of any kind or character after the commission of an act of insolvency, in the following terms:

"It shall be unlawful in this state for a bank or trust company to make a voluntary general assignment of its business and affairs. In case it shall find itself to be in a failing condition it shall immediately place itself in the hands of the Secretary of State. Any deed of voluntary general assignment executed by any such bank, individual banker or trust company shall be null and void, and in case the officers or directors of any such institution shall endeavor to make any voluntary general assignment of its assets the Secretary of State shall immediately take possession thereof and proceed as heretofore provided in the case of insolvent banks in this state for the appointment of a receiver by the court. All transfers of the notes, bonds, bills of exchange, or other evidence of debt owing to any bank or trust company, or of deposits to its credit; all assignment of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders

or creditors; and all payments of money to it, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, shall be utterly null and void. No attachment, injunction or execution shall be issued against such bank or trust company or its property before final judgment in any suit, action or proceeding in any state, county or municipal court."

Undoubtedly it was within the exclusive province of the Legislature of the state to provide the manner of establishing and managing banks of the state, to define their character, and limit the duration of their existence; also, for the welfare of the state, to provide for the visitation and examination of such banks, to require the business of such banks at all times to be so conducted as to render safe and secure the depositors in, and the creditors of, the bank; for such purpose, to define what condition of the bank's affairs constitutes insolvency and through an officer or agent of the state to take charge of the bank and its affairs for the protection of its depositors and creditors, all under the reserved or police power of the state. It was also the province of the Legislature, in so far as state corporate banks are concerned, to provide the exclusive manner designated in the act in question to wind up the affairs of such banks, dispose of its assets, and distribute the proceeds to the creditors justly entitled thereto, because such banks are not within the scope or purview of the national bankrupt act.

But the question here is, can the special judicial proceeding provided for in the act in question, for the winding up of the affairs of a banking concern, be given operation and effect as to private banks which are expressly within the scope and jurisdiction of the national bankrupt act, and is such power reserved in the state? I think not. The federal Constitution, and the acts of Congress passed in pursuance thereof, are the supreme law of the land, binding upon all courts and the Legislatures of the several states. It was the evident intent of the state Legislature, judging from the portions of the act above quoted, to make the manner of conserving, controlling, managing, and distributing the assets of insolvent banks of the state exclusive, and to brook neither divided possession, control, or power of disposition by the debtor after insolvency, nor joint or concurrent jurisdiction or power over its assets after insolvency by any court or tribunal save the one therein provided. This, in the absence of action on the part of Congress, under the federal Constitution, it might do. The object to be attained by the proceeding in the state court is the ascertainment of the claims against the estate, conservation and disposition of its assets, and the distribution of the proceeds to all the depositors and creditors as they may be found entitled by the special state tribunal designated in the act for such purpose. In thus far the object sought to be accomplished and the end attained by the proceeding in the state court, under the act in question, is the same in effect as that sought to be attained in the bankruptcy court under the national bankrupt act. True, the state act does not provide for a discharge of the insolvent debtor or debtors owning the bank upon the surrender and application of all

nonexempt property to the payment of the debts of the bank, but the absence of such provision from the state act is not thought to control or determine its character as an insolvency law, for, if the act contained an express provision for discharge, it would be void as to pre-existing creditors not participating in the proceeding. Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529; Farmers' & Mechanics' Bank v. Smith, 6 Wheat. 131, 5 L. Ed. 224; McMillan v. McNeill, 4 Wheat. 209, 4 L. Ed. 552; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606.

Again, to render a state insolvency law inoperative because in contravention of the federal bankrupt act, it is not essential that the state act shall contain a provision for the discharge of the debtor. It is rather thought such provision for discharge is an incident to, but not an essential part of, such law. In re F. A. Hall Co. (D. C.) 121 Fed. 992; In re Curtis (D. C.) 91 Fed. 737; In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38; In re Reynolds, Fed. Cas. No. 11,723.

I am of the opinion, from a consideration of the act, that, in so far as it provides an exclusive proceeding in the state court at the suit of the Attorney General for the appointment of a receiver of an insolvent bank, the disposition of its assets, and the distribution of the proceeds among the depositors and creditors, it is in its nature and legal effect an insolvency law, and, in so far as applied to the private bank in question, its operation was suspended by the passage of the national bankrupt act. Sturges v. Crowninshield, supra; In re Reynolds, supra; In re Curtis, supra; In re F. A. Hall Co., supra; In re Sievers (D. C.) 91 Fed. 366; Davis v. Bohle, supra; In re Bruss-Ritter Co., supra; In re Smith (D. C.) 92 Fed. 135; In re Anderson (D. C.) 110 Fed. 141; Carling v. Seymour Lumber Co., 113 Fed. 483, 51 C. C. A. 1; In re Storck Lumber Co. (D. C.) 114 Fed. 360; Ex parte Eames, Fed. Cas. No. 4,237; Thornhill et al. v. Bank of Louisiana, Fed. Cas. No. 13,990; Gilman v. Lockwood, 4 Wall. 409, 18 L. Ed. 432; Lyman v. Bond, 130 Mass. 291; Griswold v. Pratt, 9 Metc. (Mass.) 16.

It follows, of necessity, in my opinion, petitioners are not estopped to demand an adjudication herein because of their participation in, or their acts and conduct in relation to, the proceeding pending in the state court to wind up the affairs of the bank.

Again, if for any reason, or upon any ground, the position assumed should be untenable, I am of the opinion the acts and conduct of petitioners relied upon by objecting creditors to work an estoppel in this case are insufficient to that end. Laying out of consideration, for the purpose of the argument, the fact that this proceeding was brought in point of time prior to the institution of the proceeding in the state court by the Attorney General, yet the acts of bankruptcy here complained of are the voluntary making of the conveyances for the benefit of creditors. The proceeding instituted in the state court, in which the petitioners participated, is one relating not to the making of the conveyances in question, but to the affairs of the bank. By the express terms of the conveyances questioned the assets of the bank

were excluded therefrom because the statute law of the state under which the Secretary of State took possession of the bank and its assets prohibited the bankrupts from including such property in a general assignment. Hence, they were excluded from the conveyances made. In the event the estate shall be administered under the laws of the state, the assets of the bank will be administered in the proceeding now pending brought by the Attorney General in which the receiver was appointed, but the property passing by the conveyances challenged by this petition will be administered by the trustee therein named, under the laws of the state regulating voluntary assignments for the benefit of creditors.

It is neither shown, nor is it attempted to be shown, that petitioners in any way counseled, advised, participated in, or have been benefited by the making of the conveyances of which they now complain in this proceeding. It is only contended and shown they participated in the proceeding brought and conducted by the designated law officer of the state relating to affairs of the bank.

The cases relied upon by objecting creditors as authority for the estoppel claimed are Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337, and In re Romanow (D. C.) 92 Fed. 510. In the first of these cases the third point in the syllabus states the ground of the estoppel, as follows:

"Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors, who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor, based solely on the ground of the assignment."

In the second case the second point in the syllabus states the ground of estoppel, as follows:

"Creditors, who have assented to a general assignment by their debtor, and voluntarily become parties thereto, cannot maintain a petition in involuntary bankruptcy against him, alleging such assignment as an act of bankruptcy."

In the present case petitioning creditors, on the same day and prior to the time of the institution of the proceedings in the state court, commenced this proceeding in bankruptcy in this court. As shown by the record, and as seen from the facts stated, frequent orders have been made and applied for in the case. Attorneys for petitioners have diligently and persistently sought to speed the proceeding. Upon notice served the claims of petitioners were presented to the referee appointed by the state court and their claims allowed. Such participation, however, can scarcely be regarded as voluntary under the facts of the case. It became the duty of the receiver, in the exercise of his trust, to bring proceedings against the fidelity trust company and others. I can only view the conduct of the petitioners in this case as a prudent exercise of their rights, in view of the proceeding in the state court in regard to the affairs of the bank, and not as an

election of remedies or as an estoppel to further prosecute this proceeding. Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128.

It follows, upon the record made in this case, a judgment of adjudication must go. It is so ordered. It is further ordered creditors who have heretofore petitioned for leave to intervene in this cause may so do upon compliance with the usual terms imposed by the court with regard to costs.

In re P. J. POTTER'S SONS.

(District Court, W. D. Kentucky. February 16, 1906.)

BANKRUPTCY—CLAIMS ENTITLED TO PRIORITY.

A member of a banking firm made a loan, taking a note and a mortgage on real estate as security in his own name as agent. He afterward sold and transferred the note and mortgage and thereafter collected the interest as it came due and remitted the same to the owner. Before the maturity of the note the maker desired to pay it, and, the owner being absent, the banker received the money, placed it to the credit of the owner in the bank, and promised the maker to obtain and surrender the note and mortgage within a short time. He had no authority from the owner to accept payment, and both the bank and himself were at the time insolvent and were soon thereafter adjudged bankrupts; the owner of the note not having surrendered the same nor received the money. *Held*, that the payment created the relation of debtor and creditor between the bank and the payor and entitled the latter to prove her claim in bankruptcy therefor, but that, in the absence of any statute or rule of decision in the state which gave priority to her debt, the transaction gave her no right to priority of payment of the same, under Bankr. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], as a debt entitled to priority by the laws of the state or the United States.

In Bankruptcy. On trustee's petition for review of the ruling of the referee on the claim of Ella H. Smith.

John E. Dubose and John B. Baskin, for trustee.

John B. Rodes, for claimant.

EVANS, District Judge. Shortly stated, the essential general facts are that about 4 p. m., on April 21, 1905, the banking firm of P. J. Potter's Sons, and J. E. Potter and W. J. Potter, who composed the firm, as individuals, made a general deed of assignment for the benefit of their creditors to E. L. Mottley, as assignee, who promptly accepted the trust, and soon afterwards entered upon the discharge of the duties thereof. Alleging the making of the general deed of assignment to be an act of bankruptcy, certain creditors, in July, 1905, filed their petition in these proceedings, seeking to have both the firm and the individual members thereof adjudged bankrupt, and, the facts being clear, the adjudication was accordingly made on September 11, 1905. Subsequently the said E. L. Mottley was appointed trustee of the bankrupts in succession to himself as assignee under the deed of assignment, and he duly qualified as trustee. Though the public did not know it, the firm was utterly insolvent, at least, for some months previous to April 21, 1905, and must be pre-

sumed to have known their financial condition. Certainly they appear to have been resorting to many devices to keep up their credit, and keep their banking house going. It would appear that at the date of the assignment the firm liabilities were about $650,000, which amount was owing to several thousand creditors, and their assets have been appraised at about $300,000. It also appears that the individual indebtedness of J. E. Potter was about $100,000, and that his assets, at least nominally, were about $175,000, and that the individual indebtedness of W. J. Potter was $30,000, and his nominal assets were $50,000.

It appears that J. E. Potter negotiated the most, if not all, of the loans made by the firm, and also had charge of and rediscounted all bills that were rediscounted. In addition to making loans on personal security, it was the custom of the firm to loan money for a term of years, taking a mortgage on real estate as security therefor. These loans were usually made in the name of "J. E. Potter, Agent," and the notes were transferred and assigned, without recourse, to any of their customers who desired to make investments in such securities.

J. E. Potter testified that he loaned to Mrs. Ella Smith, wife of Joe D. Smith, $2,300 in August, 1903, taking as security a mortgage on a house and lot. The note was made payable to "J. E. Potter, Agent." Miss Margaret Wintersmith was at that time a customer of P. J. Potter's Sons, and had on deposit in their bank between $2,000 and $3,000, and she applied to them for an investment of her money, and J. E. Potter recommended this Smith note and mortgage, and she agreed to accept same, and the note was assigned to her, and she took possession of it. From time to time she wrote to him when the interest was due, and he would collect same and remit to her. The note was payable on or before August 21, 1905, and on April 11, 1905, Joe D. Smith, the husband of Ella Smith, told J. E. Potter that he wanted to pay said note. He told Smith that he did not have the note; that it belonged to Miss Wintersmith, who was then in Mexico, and was expected in a few days, but that he would take the money and place it to the credit of Miss Wintersmith, and give Smith the note as soon as Miss Wintersmith returned to Bowling Green. Before she reached Bowling Green the firm and its individual members had made an assignment. He also testified that Miss Wintersmith had frequently consulted with him about investments, and when he received this money he believed he was authorized to accept same.

Joe D. Smith testified that on or about August 21, 1903, he borrowed from J. E. Potter the sum of $2,300 and executed to him, as agent, a note for that sum due on or before two years after date, and at the same time executed a mortgage on his home for same; that the note and mortgage were really the obligations of his wife, Ella H. Smith, who obtained the money and owned the property; that he regularly, every six months, or about that time, paid the semiannual interest to J. E. Potter; that he in all these transactions acted as agent for his wife, Ella H. Smith; that on or about the ——— day

of March, 1905, J. E. Potter informed him that Miss Wintersmith wanted her interest, and he paid same with a check, and at the time of the payment of this check he informed J. E. Potter that he would shortly have the money to pay the note in full; that said Potter directed him to come and pay the money over to him; that on the 11th day of April, 1905, he took the check for $2,315.33 to J. E. Potter and paid the debt for his wife, who was then absent in California, and Mr. Potter told him that he would obtain the note in a few days and deliver the same; that he paid the money to said Potter, believing that he had full authority to collect and receive same; that he believed J. E. Potter and P. J. Potter's Sons were solvent.

It was admitted by E. L. Mottley, trustee, that J. E. Potter and P. J. Potter's Sons were, on the 11th day of April, 1905, insolvent; that from the time of the payment of the money, and until their assignment, they had on hand more than $7,000 in cash, and delivered at least that sum to the assignee (now the trustee, E. L. Mottley); and that, upon the receipt of the semiannual interest last paid, said J. E. Potter at once remitted the amount to Miss Wintersmith in Mexico.

It appears from the statement which it is stipulated Miss Wintersmith would have made, if present, that on August 31, 1903, she had as much as $2,300 on deposit in P. J. Potter's Sons Bank, and that she requested J. E. Potter to find her a good investment for same; that thereafter he reported to her that he had found a safe loan, and had informed her that it was a first mortgage on the property of Mrs. Ella H. Smith; that he made said loan, taking the note for $2,300 payable to "J. E. Potter, Agent," on or before two years after date, and on the same date transferred and assigned same to her, and delivered it to her; that said note has been since that time, and is now, in her possession; that the interest is payable semiannually, and was paid March 17, 1904, September 10, 1904, and April 8, 1905; that she left Bowling Green with her mother's family, and was absent during the winter of 1904–05; that she had said note with her and in her possession while she was thus absent; that she did not authorize, request, or direct said J. E. Potter, or any other person at or before the time said note is alleged to have been paid, or at any time, directly or indirectly, generally or otherwise, to collect said note, or to receive the proceeds of same; that, if said Potter or any other person has collected said note, it was wholly without authority from her; that she regards, and has always regarded, said note as an excellent investment, and did not at any time desire to collect same, but wanted it to run as long as the makers thereof should continue promptly to pay the interest; and that at the time she had no account with said Potter's Sons Bank.

It appears that at the close of business on April 21, 1905, the firm's books showed the cash on hand to be $72,000, but this was mainly made up of paper items carried as cash, and in fact the cash which came to the trustee was $7,158.

The referee found that on April 11, 1905, Ella H. Smith, by her agent, Joe D. Smith, in good faith, believing that J. E. Potter had

the right to receive same, paid over, in discharge of the note executed to J. E. Potter, agent, and then owned by Miss Wintersmith, the sum of $2,315.33 to said J. E. Potter; that said Potter had at the time no right to receive or collect the same; that he therefore took no title to same, but held in trust said fund for Ella H. Smith; that, when said money was deposited with P. J. Potter's Sons, they were charged with knowledge that it had been received and collected by said J. E. Potter without right, and they too hold same in trust for the use of said Ella H. Smith. And the referee added that the court is further of the opinion that, as said P. J. Potter's Sons and J. E. Potter were at the time insolvent, and J. E. Potter never had or believed he had any manner of authority to collect same, except for the purpose of remitting the same to the owner, therefore the deposit to her credit was unauthorized and wrongful, and neither said J. E. Potter nor said P. J. Potter's Sons acquired, or could have acquired, any title to said money, in any event. Even had he all the authority claimed for him, both he and said firm, for the reasons indicated, had and held said money as a trust fund for the use and benefit of Ella H. Smith.

Claimant proved her claim as a secured debt, both against the firm and against J. E. Potter individually, and asserted a right of priority of payment as against the general creditors, upon the ground that they obtained the money as trustees for her, and held it therefore as a trustee for her benefit, and not as owners thereof; and, upon exceptions being taken, the referee, upon a hearing before him, allowed the claim as a secured debt, and adjudged that it was entitled to preference over the general claims and debts against the estate of the bankrupts in the hands of E. L. Mottley, the trustee, and directed the trustee to make payment accordingly. The trustee has filed a petition for a review of this ruling, and the arguments of counsel upon the questions involved have received careful consideration, though our view of the case confines us to much narrower limits.

The facts we have stated do not show any relationship of principal and agent between the claimant and the bankrupts. But they do show a very plain case of intentional or unintentional deception, by means of which the bankrupts most wrongfully obtained from the claimant a large sum of money. Still the transaction in its ultimate results did no more (unless viewed from the standpoint of the criminal laws) than create an indebtedness for money had and received. No well-founded claim to an actual or constructive lien upon the money paid into the bank by the claimant can, upon general principles of equity, be advanced upon the facts disclosed by the record.

Undoubtedly the claimant's demand is provable under section 63 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]), but the judgment of the referee giving to her the right to have it paid in full out of the assets, before the general creditors can receive anything, must rest upon section 64b, which, so far as applicable to the question before us, provides:

"That the court shall order the trustee to pay all * * * (5) debts owing to any person who by the laws of the states or the United States is entitled to priority." 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448].

Of course the phrase "laws of the states" thus used means that priorities must be determined by the law of the particular state where the proceeding is pending, and not by the laws of all the states at once.

We know of no express statute or law of the United States which, per se, would authorize the priority adjudged by the referee, and if his ruling be proper it must find support upon some law of Kentucky. As we pointed out in Re Crow (D. C.) 116 Fed. 110, any law of Kentucky which may give a right to priority of payment remains in full force notwithstanding the enactment of the bankruptcy law. This is manifest from the provisions just quoted from section 64b. We are therefore brought to the consideration of the law of Kentucky.

We can hardly doubt that any priority of payment allowed under section 64b (5), so far as it is therein made to depend upon the "law of the state," must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment, and it is clearly incumbent upon the person who claims priority to show the existence of such law. We have found no judicially established rule in Kentucky which would support the priority adjudged by the referee in this instance, nor did he in his judgment or certificate refer to any cases adjudged by the Court of Appeals, nor has the learned counsel for the claimant cited us to any. Nor do we find any provision in the Kentucky Statutes which expressly applies to this exact class of cases, though but for the element of the bankruptcy proceeding, which may possibly have nullified the assignment made April 21, 1905 (Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165), section 74, Ky. St. 1903, might be decisive. It is as follows:

"Every voluntary assignment made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims, after the payment of the expenses of the trust; except that property, or any part thereof, conveyed by the deed or assignment, and upon which there is a valid lien, shall be first applied to the discharge of the lien debt; and if the property is not sufficient to satisfy the lien, the lien creditor shall have the right to present the remainder of his debt unsatisfied by the lien property as a claim against the estate, and receive thereon his pro rata share of the assets in the same manner as creditors whose claims are not secured by a lien; except that debts due by the assignor as guardian, committee, trustee of an express trust created by deed or will, or as personal representative, shall be paid in full before the general creditors receive anything."

Section 1916 contains even broader language. It, however, is part of the chapter on "Fraudulent and Preferential Conveyances," and possibly may be limited to such cases. It is in this language:

"In the distribution of the assets of any debtor, after the payment of the costs and expenses of the suit, the debts due as guardian, personal representative and as trustee, if the trust be created by deed or will duly recorded in the proper clerk's office, shall have priority over debts due general creditors, and property upon which there is a valid lien shall be first applied to the payment of the lien debt, and the remainder, if any, of the lien debt unsatisfied by the lien property may be presented as a claim against the estate, and the same pro rata paid thereon as upon other unpreferred debts."

Neither of these two sections in express terms relates to cases in "bankruptcy," but they certainly come very close to doing so, and they unmistakably exhibit the general public policy of the state as to the priorities. In each section priority is given only where the trust was created by deed or will, both of which instruments are required by other sections to be recorded in the proper clerk's office.

Equity and natural justice would usually place all debts upon an equal footing, giving to none a preference over the others. The bankruptcy act (section 67d, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3449]), however, clearly recognizes the superior right accorded to those demands which are secured by mortgage, pledge, or other express lien. Under the Kentucky Statutes of 1903, a mortgage or deed of trust creating an express trust must be recorded (section 496). A vendor's lien must appear by recorded deed (section 2358). The claims of wards against their guardians, and the debts due from executors and administrators (personal representatives), are usually shown by the records of the courts having jurisdiction of probate business, and it is doubtless the policy of the state, as manifested by the legislation we have referred to, not to give a right to priority of payment to any demand, unless evidence of the obligation has been put upon record, whereby any person expecting to extend credit, or who is asked to extend credit, may before doing so know, or have an opportunity to know, the facts.

Undoubtedly this claimant has a just demand against the bankrupts, but that is hardly the proposition before us. The question rather is: Has she a right to be paid in full before other equally meritorious creditors are paid any part of their debts? We find no statute or judicial rule which so provides in a case like this.

It may not be out of place to remark that whatever elements or phases of moral turpitude on the part of the bankrupts, or either of them, may have attended the creation of their liability to the claimant, at last only a debt was created. From the standpoint of the law this is all, and every other creditor in this respect is in the same attitude. Moral turpitude at the inception of an indebtedness does not intensify it nor raise its grade to anything more than an obligation to pay. The creation of the legal obligation is the ultimate result. Clearly the claimant in this instance has just cause for complaint as to some of the incidents attending the creation of her debt. We might even grant that the bankrupt held the money as trustee of an express trust, as distinguished from a mere obligation to pay a debt, still we would not be able to find anything in the record which in the remotest degree indicated that the debt was due by the bankrupts or either of them under or by virtue of a trust "created by deed or will," which manifestly is the only sort of trust obligation given priority by the laws of the state. We have not found any other statute or law of Kentucky, nor have we found any statute of the United States, which otherwise gives a cestui que trust a right of priority in any case in any way resembling this. Cases may indeed be found where, in winding up insolvent national banks, persons who had had transactions with the bank shortly before its failure were repaid certain

sums in full, either because collections intrusted to the bank were not in fact made until after its failure, or upon other very special reasons; but it must be remembered that national banks are creations of Congress, and their winding up is elaborately provided for in the national banking act, while, as we have seen, we must proceed in these cases upon section 64b (5) of the bankruptcy law. Certainly it is ordinarily true that debts one year, one month, or one week old are quite as sacred and quite as much entitled to be paid as debts only one day old, although the circumstances attending the creation of the latter may be more exasperating or may appeal more to our feelings, our imagination, or our indignation. But, unless in most rare and unusual cases, all unsecured debts not barred by limitation stand upon the same footing in the view of law and equity.

There being no statute or judicial rule to justify it, the judgment of the referee must be reversed, and, upon the return of the matter to him, he is directed to disallow and reject the claim as a secured or preferred debt, and to allow it only as one of the general or unsecured debts against the bankrupts.

WALDRON v. UNITED STATES et al.

(Circuit Court, D. South Dakota. July 1, 1905.)

No. 43.

1. PUBLIC LANDS—PRIVATE CLAIMANTS—PRIORITY OF RIGHT.

As between two claimants to public land it is the settled rule of law that the first in time is the first in right.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 55.]

2. INDIANS—ACT DIVIDING GREAT SIOUX RESERVATION—CONSTRUCTION.

Act March 2, 1889, c. 405, 25 Stat. 892, providing for the cession of part of the Great Sioux Indian reservation in Dakota, which by its terms was required to be accepted and signed by at least three-fourths of the adult male Indians occupying or interested in the same, is not to be construed as an ordinary statute, but was in effect a treaty with the Sioux Nation and is to be construed with reference to the understanding the Indians had of it at the time they accepted its provisions. Whether or not a person is an Indian, within its meaning, and entitled to the benefit of its provisions, is to be determined, not by the common law, but by the laws or usages of the tribe, by which the children of a marriage between a white man and an Indian woman take the status of their mother with respect to tribal rights and property, and, there having been a large number of such mixed bloods who were recognized members of the tribes and who signed the treaty, neither they nor other members of their class can be excluded from its benefits.

3. SAME—ACTION TO RECOVER ALLOTMENT.

In an action brought under Act Feb. 6, 1901, c. 217, 31 Stat. 760, which gives to a person in whole or in part of Indian blood or descent the right to bring such action to establish the right to an allotment of land by virtue of an act of Congress, which he claims to have been unlawfully denied him, the decision of the Land Department, upon the question whether or not the plaintiff when a person of mixed blood was recognized as a member of the tribe entitled to the benefit of the act,

will not in all cases be followed, since in case of an adverse ruling such rule would leave the plaintiff without the remedy which it was the purpose of the statute to give him.

4. SAME—RIGHT TO ALLOTMENT—MEMBERSHIP OF TRIBE.

Complainant was a woman of five-sixteenths Sioux Indian blood on her mother's side and had been recognized as a member of a Sioux tribe since her birth. On February 10, 1890, at the time of the taking effect of Act March 2, 1889, c. 405, 25 Stat. 892, by which a portion of the Great Sioux reservation was ceded to the government, she was residing with her husband and children on lands on the ceded part of such reservation. Within a year thereafter she filed her election to take an allotment of such lands as permitted by section 13 of the act, but her claim was rejected by the Land Department, on the ground that she was not an Indian, within the meaning of the act, and a trust patent to the land was issued to another member of the tribe who had later settled thereon. Complainant and her children were enrolled on the census, annuity, per capita, and issue rolls of her tribe, and had received rations, annuities, and per capita payments, the same as all other Indians thereof, and two of her brothers signed the acceptance of the act as members of such tribe. *Held*, that she was an Indian, within the meaning of the act, and the head of a family, according to the laws and usages of her tribe, her husband being a white man, and as such was entitled to the allotment and to a cancellation of the patent therefor issued to defendant.

Charles E. De Land (Bartlett Tripp, of counsel), for complainant.
J. D. Elliott, U. S. Atty., and W. G. Porter, Asst. U. S. Atty., for defendants.

CARLAND, District Judge. The above action has been submitted on pleadings and proofs. From the pleadings and proofs the court finds the following facts:

(1) The complainant, Jane E. Waldron, in February, 1889, by the selection of a building site located and, in July of the same year, went upon the land in controversy to reside; said land being described as follows: The S. W. ¼ of section 28; the N. W. ¼ of S. E. ¼ fractional of section 28; the N. E. ¼ of S. E. ¼ fractional, section 28; the S. W. ¼ of N. E. ¼ fractional, section 28; the S. ½ of N. W. ¼, section 28; the N. E. ¼ of S. E. ¼, section 29; and S. E. ¼ of N. E. ¼, section 29—all in township 5 N., Range 31, B. H. meridian, South Dakota.

(2) The complainant established her residence upon said land in the month of July, 1889, and has ever since resided thereon with her family, consisting of herself and her husband and children. At the time of the establishment of said residence by complainant said land was a part, and within the limits of, the Sioux Indian reservation in the then territory of Dakota, now South Dakota. That complainant established her residence upon said land with the purpose and intention in good faith of claiming said land as an allotment, under the provisions of Act Cong. March 2, 1889, c. 405, 25 Stat. 888, was residing thereon February 10, 1890, and had resided upon said Sioux Indian Reservation since the year 1882. Said land is not included within the limits of either of the separate reservations established by said act of Congress.

(3) On February 10, 1890, complainant was entitled to receive, and was receiving, rations and annuities at Cheyenne River agency, S. D., and within one year after said 10th day of February, 1890, to wit, on or about the 5th day of September, 1890, said complainant filed for record with the United States Indian agent at the Cheyenne River agency her election to have the allotment of land to which she would otherwise be entitled on one of the separate reservations created by said act of Congress of March 2, 1889, upon the land hereinbefore in these findings described, and upon which complainant resided February 10, 1890.

(4) Complainant and her children were enrolled on the census annuity per capita, and issue rolls of the Cheyenne Indian agency, and still are so enrolled as Indians belonging to said agency, and said complainant has received, since 1883, and her children, from time to time as they were born, rations, annuities, and per capita payments in the same manner as all other Indians entitled to receive rations, annuities and per capita payments at said agency.

(5) Mary Van Meter, the mother of the complainant, resided upon said Sioux Indian reservation from 1882 till her death, in July, 1894. Her sons John Van Meter, and Charles Luther Van Meter, her daughters Viola Bentley and her children, Elvira Oaks and her children, and said Mary Van Meter herself, were and are, except those who are deceased, carried upon the census, annuity, and per capita rolls of the Cheyenne Indian agency as Indians, and have received and are receiving rations, annuities and per capita payments, the same as all other Indians under similar conditions. Plaintiff's mother's maiden name was Mary Aungie. She was of five-eights Indian blood. She was born at old Ft. George in the Sioux Indian country. Her Indian name was "Cici." Her father's name was Henry Aungie. Her mother's name was Mary Aungie. Complainant's grandmother on the maternal side was one-half Indian blood. When Arthur C. Van Meter married Mary Aungie she (Mary Aungie) was a member of Crazy Bull's band of Yankton Sioux and lived at Sioux Point, near where the Sioux river empties into the Missouri river. Complainant's grandfather Aungie had three-fourths Indian blood. Complainant is five-sixteenths Sioux Indian. Her father was Arthur C. Van Meter, a white man. Complainant was born in 1861 at or near Vermilion. Complainant's grandfather Aungie's mother was a full blood Sioux Indian woman. Complainant's Indian name is "Sutasni." Complainant's mother's family first came to Sioux Point in 1855. Mary Aungie, mother of complainant, drew rations at the Yankton agency when it was established in 1859.

(6) Complainant is, and was on February 10, 1890, an Indian, within the meaning of that word as used in section 13 of the act of Congress of March 2, 1889, and was on the date first mentioned a member of the Two Kettle Band of the Cheyenne Sioux, and as such Indian was the head of a family, consisting of herself, her husband, and children. There is, and always has been, a uniform custom and law in force among the different bands or tribes of the Sioux Nation of Indians to the effect that where a white man marries

an Indian woman, a member of said tribe, the Indian woman becomes and remains the head of the family and is the source from which all annuities, per capita payments, and rations are derived for herself and family. That by this law and custom the right to tribal property is determined by the nationality or race of the Indian mother; the children of the marriage of a white man with an Indian woman taking the race or nationality of the mother, so far as the right to tribal property is concerned. That what is claimed to be the common-law rule, that the children take the race or nationality of the father, does not obtain among the Indians as to the offspring of a white man married to an Indian woman. This custom and law among Indians has been uniformly recognized by the different bands of the Sioux Indians and by the United States. That complainant joined the Two Kettle Band of Sioux Indians at the Cheyenne River agency, was recognized by said band and by the United States as a member thereof. Mary Van Meter, the mother of complainant, drew rations at the Yankton agency after its establishment in 1859. When she died in 1894 she was living upon land allotted to her on the Sioux Indian reservation in South Dakota, under the provisions of the act of Congress of March 2, 1889, and was recognized by the Two Kettle Band as an Indian of said tribe. Complainant is of part Indian blood and of Indian descent. Crazy Bull's mother and the mother of complainant were cousins. Crazy Bull was a chief of the Yanktonais and signed the treaty between the United States and the Yankton tribe of the Sioux Indians in 1858, at which time complainant's mother was a member of said tribe.

(7) That whatever settlement was made by the defendant Black Tomahawk upon the land in controversy was subsequent to that of the complainant, and not in good faith, but in the interest of others.

(8) Black Tomahawk was not residing upon the land in question on February 10, 1890. He was on that date a full blood Sioux Indian and was residing on other land at the date specified. He was receiving, and entitled to receive, rations and annuities at the Cheyenne River Indian agency.

(9) The United States on March 28, 1899, issued and delivered to defendant Black Tomahawk a trust patent for the land in question, under the provisions of section 11 of the act of Congress of March 2, 1889, in pursuance of an allotment of said land to said Indian purporting to have been made under the provisions of section 13 of said act on December 8, 1898, and approved by the Secretary of the Interior December 10, 1898. The United States has hitherto refused to allot said land to complainant and has authorized and requested said defendant Ira A. Hatch to remove said complainant therefrom by force.

(9½) That the fact that an Indian child was born outside an Indian reservation does not affect the right of the child to tribal property according to the laws and customs of the Sioux Nation.

(10) All the material allegations of complainant's bill are true.

The facts being found to be as above stated, it remains to be ascertained whether, as matter of law, complainant is entitled to

the relief prayed for. This action is brought under the provisions of Act. Feb. 6, 1901, c. 217, 31 Stat. 760. That law provides as follows:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any allotment act or under any grant made by Congress or who claim to have been unlawfully denied or excluded from any allotment on any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdiction involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or treaty."

It was held in Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039, that this act embraces a suit where the facts are as found in this case. Justice Peckham, at page 408 of 194 U. S., and page 678; of 24 Sup. Ct. (48 L. Ed. 1039), in delivering the opinion of the court, uses this language:

"That this act embraces the case of a person situated as was the appellee at the commencement of the suit seems to us so plain as to require no further argument. It is not in any way a retrospective operation which is thus given to the act, except as it applies, by its language, to any one who was then (at the time of the passage of the act of 1894) entitled to an allotment. She claims that she was so entitled to an allotment of the land in question, and that it had been improperly allotted to defendant (appellant) and that the act permits her to assert her claim in the Circuit Court as against the appellant and to have it adjudged between them. We have no doubt she has that right."

Section 13 of Act Cong. March 2, 1889, c. 405, 25 Stat. 892, provides:

"That any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said Great Reservation not included in either of the separate reservations herein established may, at his option, within one year from the time when this act shall take effect, * * * by recording his election with the proper agent at the agency at which he belongs, have the allotment to which he would otherwise be entitled on one of said separate reservations upon the land where such Indian may reside."

Section 8 of the act gives 320 acres of land to each head of a family. Section 11 provides for the issuance of patents for allotted lands. Section 16 provides that the acceptance of the provisions of said act by the Indians referred to therein should be in manner and form as required by the treaty concluded between the different bands of the Sioux Nation of Indians and the United States, April 29, 1868, 15 Stat. 639. Article 12 of said treaty provides:

"No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same."

Through commissioners appointed by the United States the provisions of the act of March 2, 1889, were accepted by the Sioux Nations of Indians, and the President of the United States by proc-

lamation fixed February 10, 1890, as the date on which said act should take effect. As between two claimants of public land, it has long been an established rule of law that the first in time is the first in right. Shepley v. Cowen, 91 U. S. 330, 23 L. Ed. 424; Wirth v. Branson, 98 U. S. 118, 25 L. Ed. 86; McCreery v. Haskell, 119 U. S. 327, 7 Sup. Ct. 176, 30 L. Ed. 408; Hy-yu-tse-kin v. Smith, 194 U. S. 414, 24 Sup. Ct. 676, 48 L. Ed. 1039. The same rule must obtain in this case. It is not disputed but that complainant established her residence upon the land prior to the defendant, and, if it is, the evidence clearly shows that such is the fact. From the decisions of the General Land Office it appears that the right of complainant to have the land allotted to her was denied solely for the reason that complainant was not an Indian, within the meaning of that term as used in section 13 of the act of Congress of March 2, 1889. As the court finds in this case that complainant is an Indian, within the meaning of said act, it is proper that the law affecting this question be referred to in connection with the facts in the case. In the first place, it is necessary to keep in mind that the act of Congress of March 2, 1889, does not stand, for the purposes of construction and interpretation, as ordinary laws of Congress, so far as the Indians are concerned, for while it appears in form as an independent legislative act of the government, it was and is a treaty or contract made by the United States and the Sioux Nation of Indians. The act was to have no force or effect unless the provisions thereof were accepted by the Sioux Nations of Indians in the manner provided by Article 12, of the treaty of 1868. The Indians were an ignorant and uncivilized race. They knew little or nothing of the terms of the law which they were to accept except what they were told by the commissioners who negotiated its acceptance. A man who can read cannot be heard to say that he understood a contract to mean something different than its terms imply; but a man who cannot read, and signs a contract on the faith of what the other party to the contract tells him, stands in a very different position. The commissioners of the United States stated to the Indians before obtaining their signatures that the law included mixed bloods as well as full bloods. It must be presumed that Congress knew when the law was submitted for acceptance that there were numerous mixed bloods living upon the reservation about to be divided and drawing rations at the different agencies, and it cannot be presumed that these mixed bloods were intended to be deprived of their rights to tribal property by a law that, without their signature, would not have become effective for any purpose. These observations are made for the purpose of showing that the law must be looked at as a contract and construed with reference to the understanding the Indians had of the law at the time they accepted its provisions. Mixed bloods were accepted as going to make up the number of Indians necessary to accept the law, and John Van Meter and Charles L. Van Meter, brothers of complainant, signed the acceptance as members of the Two Kettle Band at the Cheyenne agency, and they are referred to in the preamble and attestation clauses of said acceptance

as Indians. Senate Executive Document 51 Congress, p. 234, No. 51. When this very case was before the Secretary of the Interior the advice of the then Attorney General of the United States, Mr. Olney, was asked as to the status of complainant as an Indian. Under date of February 9, 1894, in a letter addressed to the Secretary of the Interior, Mr. Olney used the following language:

"It will be noticed that the act under consideration was dependent for its validity upon the consent of the Indians (section 28). In other words, it was substantially a treaty with the Sioux Nation; acts in this form having taken the place of the ancient Indian treaty since the latter was prohibited by act of Congress in 1871. By the agreement confirmed in this act the Sioux Nation gave up a large amount of territory, and the rights conferred on the nation or on individuals were in consideration thereof. The persons entitled to such rights, are the persons who, at the time of the agreement, constituted the Sioux Nation and were lawful members thereof. The question therefore whether any particular person is or is not an Indian, within the meaning of this agreement, is to be determined in my opinion, not by the common law, but by the laws or usages of the tribe. See Western Cherokee Indians v. United States, 27 Ct. Cl. 1–54; United States v. Old Settlers, 148 U. S. 427–429, 13 Sup. Ct. 650, 37 L. Ed. 509. As to these laws or usages I am not informed and am not qualified to advise." Senate Ex. Doc. No. 59, p. 109, 53 Cong.

This statement as to the proper construction of the act of March 2, 1889, is sound and in entire harmony with the views of this court. In this proceeding the court has been informed as to the usages and customs of the different tribes of the Sioux Nation, and has found as a fact that the common law does not obtain among said tribes, as to determining the race to which the children of a white man, married to an Indian woman, belong; but that, according to the usages and customs of said tribes, the children of a white man married to an Indian woman take the race or nationality of the mother. Presumptively a person apparently of mixed blood, residing upon a reservation, drawing rations, and upon the rolls as an Indian, is in fact an Indian. Famous Smith v. United States, 151 U. S. 50, 14 Sup. Ct. 234, 38 L. Ed. 67. In Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, it was said by the Supreme Court:

"In construing any treaty between the United States and an Indian tribe * * * the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Sloan v. United States (C. C.) 118 Fed. 283.

It is held in the case last cited that mixed bloods, who were recognized by the tribe as members thereof, and have been formally declared such by the tribe in council or the equivalent, may properly be given allotments. It is also said in the same case that, upon the question as to whether a person has been so recognized or not, the rulings of the Land Department will be followed. This rule would deprive the complainant in this case of any remedy whatever under the provisions of Act Feb. 6, 1901, c. 217, 31 Stat. 760, and therefore cannot be accepted as the true rule in all cases. The United States have never, so far as legislation is concerned, recognized the technical rule of the common law in reference to the children born

of a white father and an Indian mother. In 1897, Congress, in the Indian appropriation act of that year (Act June 7, 1897, c. 3, 30 Stat. 90), declared:

"That all children, born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs or belonged at the time of her death by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such rights."

See, also, opinion Atty. General Cushing, 7 Op. Atty. Gen. 46.

In a letter of Commissioner Morgan to the Secretary of the Interior dated April 14, 1890, relative to allotments under the act of March 2, 1889, now under consideration, the Commissioner said:

"In carrying out the provisions of the general allotment act, Indian women married to white men, or to other persons not entitled to the bentfit of the act, are regarded as heads of families and entitled to allotments as such. The same rule should govern in allotting land under the Sioux act." Senate Ex. Doc. No. 59, p. 115, 53 Cong.

In Davison v. Gibson, 56 Fed. 445, 5 C. C. A. 545, the Circuit Court of Appeals of this circuit said:

"It is common knowledge, of which the court should take judicial knowledge, that the domestic relations of the Indians of this country have never been regulated by the common law of England, and that that law is not adapted to the habits, customs, and manners of the Indians."

The court has considered the cases cited by counsel for defendants wherein, upon certain facts, persons were held not to be Indians; but these cases either seek to invoke what they say was the common law, or are in criminal proceedings. These cases, so far as they seek to invoke the common law to the Indians, are not followed, for reasons herein stated, and, so far as they seek to construe criminal statutes, are inapplicable as there is a wide distinction to be made between the construction of a criminal statute and a contract between a tribe of Indians and the United States.

Without going farther, the court is of the opinion that, under the facts found in this case and the evidence in the record, the complainant is entitled to a decree canceling the trust patent issued to Black Tomahawk, and decreeing that complainant is entitled to have the land in controversy allotted to her by the United States, under the provisions of the act of Congress of March 2, 1889.

In re HARR.

(District Court, E. D. Missouri, N. D. February 10, 1906.)

No. 96.

1. BANKRUPTCY—SPECIAL FINDINGS—REVIEW.

The findings of facts by a special master in a bankruptcy proceeding, while not as conclusive as the findings of a jury or trial judge sitting as a jury, are very persuasive, and will not be disturbed by the court if there is substantial testimony to sustain them and they do not appear to be influenced by any mistaken conclusions of law.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 929; Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—FINDINGS—EVIDENCE.

On an application for a bankrupt's discharge, evidence *held* to require a finding that the bankrupt obtained certain cattle on credit from the seller on a materially false statement in writing made to the seller by the bankrupt for the purpose of obtaining the property on credit.

3. SAME—DISCHARGE—PROPERTY FRAUDULENTLY OBTAINED—OBJECTIONS—PERSONS ENTITLED TO MAKE.

Bankr. Act July 1, 1898, c. 541, § 14, subd. b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Cong. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684], authorizes a bankrupt's discharge, unless (subd. 3) he has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit. *Held*, that the right to oppose a discharge on such ground was not limited to the creditor defrauded, but might be properly pleaded by any creditor of the bankrupt.

In Bankruptcy.

To the petition of the bankrupt for a discharge objections were filed by certain creditors, which were referred to a special master to hear and take testimony and to report his findings of fact and conclusions of law. At the same time the claim of Wood Bros., one of the objecting creditors, was referred to the same special master to be determined whether it should be allowed against the estate. The questions raised by the specifications of objections are as follows: (1) That said bankrupt has committed an offense punishable by imprisonment, in that he knowingly and fraudulently concealed from his trustee in bankruptcy certain personal property in said specifications enumerated. (2) That said bankrupt did make a false affidavit in relation to his bankruptcy proceedings, in that he failed to include, willfully, knowingly, fraudulently, corruptly, and falsely, all of his property in the schedules filed in said bankruptcy proceedings by said bankrupt, a particular description of which said property is set out in the specifications of objections. (3) That said bankrupt had obtained property on credit from Wood Bros. upon a materially false statement in writing made to them for the purpose of obtaining such property on credit, a copy of which statement in writing alleged to have been made by the bankrupt is included in said specifications of objections to the bankrupt's discharge. (4) That the said bankrupt within four months preceding the filing of his petition in bankruptcy did transfer, conceal, or destroy his property, or permitted to be removed, destroyed, or concealed, his property with the intent to hinder, delay, or defraud his creditors, in that he failed to inventory a number of articles of personal property which are fully set out in the specifications. The special master in a very elaborate report found all the issues in favor of the bankrupt, and recommended that the discharge be granted. Exceptions to the report were filed by the objecting creditors.

A. R. Smith, O. S. & G. M. Callihan, and T. L. & L. J. Montgomery, for objecting creditors.

Joseph S. Tall and F. L. Schofield, for bankrupt.

TRIEBER, District Judge [1] (after stating the facts). The findings of facts by a special master who attended the examination of the witnesses, thus giving him an opportunity of seeing them testify, while not as conclusive as the finding of facts by a jury or a trial judge sitting as a jury, are very persuasive, and if there is substantial testimony to sustain his findings uninfluenced by any mistaken conclusions of law they will not be disturbed by the court hearing the cause on a transcript of the evidence without opportunities to see the witnesses, and thus to judge of their credibility in the same manner as was enjoyed by the master. For these reasons the findings on the objections made by the special master on the first, second, and fourth specifications of objections and on the claim of Wood Bros. will not be disturbed, although the testimony is conflicting, and but for the findings of the special master the court might have reached different conclusions.

As to the third specification, there is no substantial testimony to sustain the findings made by the special master. The undisputed testimony shows that on the 30th day of September, 1904, the bankrupt, for the purpose of purchasing 188 head of cattle, of the value of $3,190.60, on a credit of one year, made to Wood Bros. the statement in writing purporting to set out his financial condition. In this written statement he represented himself to be the owner of property worth several thousand dollars over and above all his debts and liabilities. Three weeks thereafter, on the 22d day of October, 1904, he filed his petition in bankruptcy, showing that he was hopelessly insolvent; his liabilities exceeding his assets more than $10,000. Wood Bros., in reliance upon the statement made by the bankrupt, sold and delivered the cattle to him, and accepted his note payable one year after date, with 7 per cent. interest, with no other security than a mortgage on the cattle sold and delivered. That practical business men such as Wood Bros. appear to be would have made this sale but for the false representations of Harr as to his financial condition is hardly to be believed. No experienced business man would sell any kind of property, especially property as perishable and fluctuating in value as cattle, on a credit of a year without other security than the cattle itself, unless he had reason to believe that the purchaser was solvent, and, in case of a deficiency upon a foreclosure of the mortgage, whether that deficiency be caused by the death or loss of some of the cattle or a depreciation of the values, they could collect the balance of their claim out of other property of the debtor. If they looked to the cattle only for their security, why was the written statement of Harr's financial condition demanded? The remark of Mr. Houston, the credit man of Wood Bros., that for their security they "relied mainly on the mortgage," which seems to have had a controlling influence on the findings made by the special master, proves nothing to the contrary. No doubt the mortgage was deemed the main security, but the court entertains no doubt what-

[1] By assignment from the Eastern District of Arkansas.

ever that had it not been for the belief that Harr was perfectly solvent, a belief justified by the written statement made by him to them, Wood Bros. would have refused to make the sale of the cattle, unless there would have been a cash payment made or security on other property given sufficient to protect them against any loss or depreciation in value of the cattle, or any accident likely to happen within a year. The finding of the court is that the bankrupt obtained the cattle on a credit from Wood Bros. upon a materially false statement in writing made to them by the bankrupt for the purpose of obtaining the said property on credit. This finding by the court and the special master's finding that the Wood Bros.' note had been fully paid off before the proceedings in bankruptcy were instituted, and for this reason they are not "a party in interest," which finding of the master is sustained by substantial evidence, and for this reason approved by the court, leaves but one question of law to be determined:

"Does the fact that property was obtained by a bankrupt on credit a short time before the proceedings in bankruptcy were begun upon false statements made in writing, for the purpose of obtaining such property on credit, prevent the granting of a discharge, although the debt had been satisfied before the proceedings in bankruptcy were instituted, and can any creditor other than the one defrauded plead that fact in opposition to the granting of the discharge?"

The provision of the amendment of 1903 applicable to this question is:

"Obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

In none of the previous bankruptcy acts, nor in any of the English bankruptcy acts, is any similar provision found. As the objections to the discharge were filed not only by Wood Bros., but also by the Clark County Savings Bank, which is an undisputed creditor, the application for the discharge, after eliminating Wood Bros., is opposed by "a party in interest" within the meaning of section 14b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]). In re Frice (D. C.) 96 Fed. 611.

The main question involved in this proceeding seems never to have been passed on by any court whose decision has been reported. The cases cited by counsel in Re Allendorf (D. C.) 129 Fed. 981, and in Re Levey (D. C.) 133 Fed. 572, have no bearing whatever on this question. In Re Allendorf the court found that the property had not been obtained on the false representations made by the bankrupt more than eight months prior to the purchase of the goods, and in Re Levey the points decided were that specifications of objections to a discharge can only be filed by a party in interest, and one not shown to be a creditor should state the facts showing how and why he is a party in interest, and it was further held that the trustee in bankruptcy, so long as the estate is unsettled and he is claiming and seeking to recover property from the bankrupt alleged to belong to the estate, is "a party in interest" within the meaning of section 14 of the bankrupt act, and may oppose the discharge. It will be noticed that the language

used in the amendment of 1903 to section 14b of the act (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]) is "obtained property on credit from any person," etc.

To sustain the contention of the learned counsel for the bankrupt, the court would have to interpolate after the word "person" the following: "Who is a creditor of the bankrupt at the time of his adjudication"—or add the proviso, "That the bankrupt estate was injuriously affected thereby." This is not permissible; courts cannot legislate under our system of government. They can only enforce or construe the laws as enacted by the legislative department. One of the main objects of the bankruptcy act is to protect unfortunate, but honest, debtors. Fraudulent debtors are not intended to be protected, nor to escape payment of their just liabilities. The bankruptcy act as originally passed did not contain this provision. No doubt the experience after the enactment of the original bankruptcy act in 1898 caused Congress to make this amendment in order to prevent bankrupts to obtain property on credit upon false representations from enjoying the benefits of the act and receiving a discharge from their liabilities. When the intention of the lawmakers is clear, the duty of the courts is to carry it into effect.

The fifth exception of the objecting creditors to the findings and conclusions of the special master will be sustained; the others overruled.

WOOD v. UNITED STATES FIDELITY & GUARANTY CO.

(District Court, D. Massachusetts. July 29, 1905.)

No. 1,651.

1. INDEMNITY—CONTRACT—CONSTRUCTION.

Where an agreement indemnifying a contractor's surety provided that, in the event of the contractor's being unable to complete the contract, the contractor thereby assigned such "plant" as the contractor then owned or had upon the work to the surety, the term "plant" was sufficient to include lumber and other materials intended for use in the building in process of erection, together with horses, carts, and harnesses used in connection with the work.

2. BANKRUPTCY—CREDITORS—UNLIQUIDATED DEMANDS.

Where an agreement indemnifying a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor's being unable to complete the contract, and the contractor subsequently abandoned the contract, and was declared a bankrupt, the surety became a creditor of the bankrupt from the date of the latter's abandonment of the contract, within Bankr. Act July 1, 1898, § 60, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445], providing for the avoidance of preferences to creditors, though the amount of the surety's claim depended on contingencies, and was not liquidated.

3. SAME—AMOUNT OF CLAIM—DETERMINATION.

Where an agreement indemnifying a contractor's surety, containing an assignment of the contractor's plant on the work in case the contractor should be unable to carry out the contract, was executed more than four months before the contractor became a bankrupt, and when he was solvent, the amount of the surety's claim against the bankrupt was not the amount that the latter might have paid by reason of its liability on the

bonds, independent from the plant so assigned, but was the amount of the loss it might sustain in completing the contract, with such aid as it might gain by taking and using the plant so assigned.

4. SAME—PREFERENCES.

Where a contractor, more than four months before becoming a bankrupt, and while solvent, executed an agreement indemnifying his surety, containing an assigument of the contractor's plant in case he should be unable to complete the contract, the exercise of the right thereby acquired by the surety within four months of the bankruptcy proceedings, and with knowledge that the contractor was then insolvent, did not constitute a preference in its favor.

5. INDEMNITY—CONTRACT—CONSTRUCTION.

A contractor's indemnity agreement provided that if the contractor was unable to complete the contract, he assigned to the surety such plant as the contractor owned or might have upon the work. *Held*, that the surety's right to the property depended on the facts existing when the right was given, and not on the facts existing when possession was taken, and hence it was immaterial that the property taken by the surety was acquired by the contractor after the execution of the indemnity agreement.

Leslie K. Storrs, for plaintiff.
Elder & Whitman, for defendant.

DODGE, District Judge. The plaintiff is trustee in bankruptcy of Charles King, adjudicated a bankrupt January 25, 1904 on an involuntary petition against him in this Court, filed September 19, 1903. He brings this suit to recover for certain building materials, horses, vehicles and harnesses taken by the defendant on or about August 26, 1903, at Diamond Island in Portland Harbor, Me. It is alleged that the property taken was King's property at the time, and that it was taken under circumstances which made the taking a preference voidable by the trustee in bankruptcy under section 60a and 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). On December 13, 1904 the case was referred by consent to an auditor, upon whose report filed April 13, 1904, trial has now been had before the court without a jury. The findings of the auditor are in great part undisputed, and his undisputed findings are sufficient for the decision of the case. They will be referred to as occasion may require without restating them at length.

The following provisions of the indemnity agreement set forth in the auditor's report are relied on by the defendant as establishing its right to take the property under the circumstances found; and as preventing such taking from being considered a preference:

"We do further agree, in the event of our being unable to complete or carry on the aforesaid contract, to assign, and we do hereby assign such plant as we may own or have upon said work to the said United States Fidelity & Guaranty Company."

1. The plaintiff contends that the property taken has been erroneously held by the auditor to be properly included in the term "plant." The auditor's findings describe the property as consisting of—

"Lumber, the greater part of it cut and ready to go into the building, bricks, lime, cement, structural iron for this contract, stone, window frames, a small amount of paint and painters' stock, flue lining, nails, some in full kegs and

some in kegs which had been opened and from which a part had been used, and certain horses, carts and harnesses."

King's contract for the performance of which the defendant became surety, was to construct certain buildings at Ft. McKinley, on Diamond Island above referred to. The property above described was what he had brought to the island to be used in the contract work. I see no reason to doubt that it was such property as the parties to the indemnity agreement intended to include by the words "such plant as we may use or have upon said work," or that it would naturally and properly fall within the meaning of those words, and I agree with the auditor that the property taken was part of the plant upon said work.

2. When King gave up the performance of the work he had contracted to do, he committed a breach of the condition of the bonds whereon the defendant was his surety and thereby incurred a liability to the defendant founded upon the indemnity agreement. The amount of that liability may not then have been fixed nor capable of being then fixed and it may have been depended to some extent upon contingencies, but the defendant seems to me to have then acquired a claim provable though not liquidated, and such as makes it a creditor within the meaning of section 60. In the bankruptcy proceedings begun against King on September 19, 1903, the defendant appeared to oppose the bankrupt's discharge as a creditor, and if a creditor on September 19th it was a creditor on August 26, 1903. Upon this point my conclusion is opposed to the finding made by the auditor.

3. If however the defendant was a creditor, the amount of its claim can only be ascertained according to the provisions of the indemnity agreement. This agreement, as the auditor finds, was entered into more than four months before the bankruptcy and when, so far as appears, King was solvent. The provisions above quoted from it which gave the defendant the right to take such plant as King might then own or have upon the work, in case of failure on his part to carry the work forward, can only have been intended, like the other provisions giving the defendant the right to continue and complete the work itself, to enable it to minimize its loss if subjected to actual liability as surety upon King's bonds. All the above agreements upon King's part entered, as well as the premium paid by him, into the consideration for which it had become his surety on those bonds. His liability to the defendant is to be ascertained, therefore, upon the basis established by those agreements, and was not that amount which it might have to pay by reason of its liability on King's bonds independently of and without benefit from the plant which he had given it the right to take and use; but the amount of such loss as it might sustain in completing the contract with such aid and assistance therein as it might gain by taking and using the plant in question. Of its claim against King so ascertained, it cannot of course be said that the defendant was enabled, by taking and using the plant, to obtain a greater percentage than that obtained upon their claims by other creditors of the same class, in the distribution to be effected through the bankruptcy proceedings.

4. If the above construction of the indemnity agreement is sound, the assignment of the plant to the defendant for which it provides is

to be regarded as a bona fide agreement, upon sufficient consideration, more than four months before King's bankruptcy, for the transfer upon a certain contingency of a specified portion of his property, and as sufficient to give the defendant, upon the happening of the contingency, a valid claim to the property. The exercise by the defendant of the right to take it thus acquired, though within four months of the bankruptcy, and notwithstanding its knowledge, whether actual or imputed, that King was then insolvent, did not bring about a preference in its favor. See Lowell, Bankruptcy, § 86, p. 67; In re Jackson Iron Mfg. Co., Fed. Cas. No. 7,153. King's consent to the taking, or that of the common-law assignees, in whom the title to all his property was then vested, so far as he could vest it in them, was, therefore, a consent to what they could not lawfully oppose. The auditor finds that it was given in the belief that the defendant was lawfully entitled to the property, and that neither he nor they or the defendant believed or had reasonable cause to believe that any preference was intended. According to the view of the matter above taken these findings must be approved. There is nothing to show any fraudulent intent on the part of King or the defendant toward other creditors, so far as the taking is concerned, or to show any intent other than to carry into effect the right given by the indemnity agreement.

5. The auditor finds that at the time the indemnity agreement was executed, King had not begun the contract work and that no part of the plant or material taken was then at Ft. McKinley. It does not appear when the plant or material taken was acquired by King nor when it was taken to Ft. McKinley. Assuming that it was all acquired by King after the execution of the indemnity agreement, the defendant's claim to it when it was taken was, in my opinion, none the less valid. The defendant's right to the property is still, as in Thompson v. Fairbanks, 196 U. S. 517, 25 Sup. Ct. 306, 49 L. Ed. 577, and Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, to be judged not by the state of facts existing when possession was taken but by the state of facts existing when the right was given. Since possession was taken before the bankruptcy, the defendant, upon taking possession, held the property by a title relating back to the time when its right was acquired, at which time, so far as appears, there was nothing to prevent King from giving it such a right, and by a title which is good against the trustee in bankruptcy.

I find, therefore, that no preference is established, and judgment will be for the defendant.

In re MONTAGUE.

(District Court, E. D. Virginia. July 5, 1905.)

BANKRUPTCY—VOIDABLE PREFERENCE—FAILURE TO RECORD BILL OF SALE.

A bankrupt a year or more prior to his bankruptcy made a bill of sale to his father, to whom he was indebted, for a steam launch to be delivered about three months thereafter. It was so delivered, but the bill of sale was not recorded until shortly before the petition in voluntary bankruptcy was filed, when the father knew it was in contemplation and when the bankrupt was insolvent. *Held*, that under Code Va. 1904, § 2465, which provides that a bill of sale for property, possession of which is allowed to remain with the grantor, shall be void as to creditors "until and except from the time" it is recorded, the bill of sale did not take effect as a transfer until it was recorded, and that such transfer constituted a voidable preference under Bankr. Act 1898, § 60a and b (July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689]).

In Bankruptcy. On report of special commissioner.

The following is the report of Special Master Claude M. Dean:

On July 8, 1902, H. St. A. Montague, the bankrupt, purchased from L. W. Harris a certain steam launch, known as the "Ruby," for the sum of $320.80, and paid for the same on that day as shown by the bill of sale filed before me and marked, as "Exhibit H. M. No. 3." At the time of this sale the launch was in the Westhampton Lake, in Henrico county, Va. By bill of sale, dated July 12, 1902, but not acknowledged until February 2, 1904, and recorded on that day in the clerk's office of King William county, Va., H. St. A. Montague, the bankrupt, sold the said launch to his father, J. W. Montague, for the sum of $153.41 (being the amount he was indebted to his father), and for the further consideration that the launch was to remain in his possession and he was to have the use of the same until October 1, 1902. The launch was used by him as a pleasure boat for hire on the Reservoir Lake, to which place it was removed from Westhampton Lake during the early part of August, 1902. J. W. Montague, the vendee, took possession of the launch during the early part of October, 1902, and had the same removed to his landing on the Pamunkey river, in King William county, Va., and the launch has so remained in his possession ever since, being used as a pleasure boat for hunting parties, and for the purposes of hauling freight. At the time of the sale, delivery, and removal of the boat from the Reservoir Lake, H. St. A. Montague resided in Richmond, Va., but soon thereafter returned to his father's home to live, and the launch has since been used and run by him and another man.

H. St. A. Montague, the bankrupt, on July 28, 1902, indorsed certain notes given by one W. W. Edwards to L. W. Harris. The notes not being paid when they became due, the said Harris sued the said Montague in the spring of 1904 on these notes, and on April 8, 1904, recovered judgment against him for the sum of $251. The bill of sale, dated July 12, 1902, from H. St. A. Montague to J. W. Montague, was acknowledged and recorded in the clerk's office of King William county, Va., on February 2, 1904.

The bill of sale is as follows: "Palls, Va., July 12, 1902. I have this day sold to J. W. Montague, the steam launch known as 'Ruby' for the sum of one hundred and fifty three $^{41}/_{100}$ dollars, the launch to be delivered Oct. 1st, 1902. Received payment in full. H. St. A. Montague."

J. W. Montague testified that his son had stated to him before he had the bill of sale recorded that, if Harris's suit went against him (the bankrupt), he would go into bankruptcy. And H. St. A. Montague testified to the same effect.

On April 20, 1904, H. St. A. Montague filed his petition in bankruptcy.

The law applicable: Code Va. 1904, § 2465: "Every such contract in writing * * * and every bill of sale or contract for the sale of goods and

chattels when the possession is allowed to remain with the grantor (and any such bill of sale or contract shall be in writing and signed by the vendor), shall be void as to subsequent purchasers for valuable consideration without notice, and creditors until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract, deed, or bill of sale may be. * * * Section 60, cls. "a," "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], printed in Loveland on Bankruptcy (2d. Ed.), p. 1157.

Had not the bill of sale of July 12, 1902, contained the clause that the possession of the launch was to remain with the vendor until October 1, 1902, I would have been inclined to have held that the transaction was a bona fide one; that the delivery of the launch during the month of October, 1902, to the vendee was equivalent to the recordation of the bill of sale, and that vendee had a good and valid title to the launch. But as the bill of sale discloses upon its face that the launch was to remain in the possession of the vendor until October 1, 1902, and the vendee, for reasons known to himself, not having recorded the same until February 2, 1904, I am constrained to hold that under section 2465 of the Code of Virginia the title to the launch did not pass to the vendee until the date of the recordation of the bill of sale, viz., February 2, 1904.

Though a preference of creditors by a transfer or assignment of property by an insolvent may sometimes be unjust to the other creditors, it was not forbidden by the common law, and is not forbidden by many of the states. Yet, it is, however, made invalid by the bankruptcy act provided three things occur, viz.: (1) At the time of the transfer the bankrupt must be insolvent. (2) The transfer must be made within four months before the filing of the petition. (3) The person to be benefited must have had reasonable cause to believe that it was intended thereby to give a preference. Loveland on Bankruptcy (2d Ed.) 387, and cases cited. But in order that a transfer shall constitute a preference which may be avoided, whatever the manner of transferring it may be, and in order to set aside a sale on the ground that it is a preference, four elements are necessary and four things must occur, viz.: (1) The transfer must be made from an insolvent person to a creditor. (2) The transfer must have been made within four months before filing a petition in bankruptcy, or after filing the petition and before adjudication. (3) The person receiving it or to be benefited thereby, or his agent acting therein, must have had reasonable cause to believe that it was intended thereby to give a preference. (4) The effect of such transfer must be to enable any one of his creditors to obtain a greater percentage than any other of such creditors of the same class. Loveland on Bankruptcy (2d Ed.) pp. 572, 589; Sebring v. Wellington, 6 Am. Bankr. Rep. 671, 71 N. Y. Supp. 788; In re Dundas, 7 Am. Bankr. Rep. 129, 111 Fed. 500. If any of these elements are wanting, the preference cannot be set aside, if otherwise valid under the state law.

Now, have the four elements and necessary things occurred to constitute a preference? And, if so, have the three necessary things occurred to invalidate the transfer of the launch under the bankrupt law? I am clearly of the opinion that they have; for it is virtually conceded that the bankrupt was insolvent on the date of the recordation of the bill of sale, and, if it were denied, his schedule of debts filed in his petition would show that he was. And holding, as I do, that the title to the launch did not pass to the vendee until February 2, 1904, the transfer certainly took place within four months of the time the bankrupt filed his petition. The testimony of J. W. Montague, the vendee, on page 10, and that of the bankrupt, on pages 12 and 13, of the testimony taken before me, in which it is stated that the bankrupt informed his father that if the Harris suit went against him he would have to go into bankruptcy, clearly discloses to my mind that the vendee had a reasonable cause to believe that the said transfer was intended and did give him a preference, and it surely cannot be denied that the transfer of the launch certainly enabled J. W. Montague, one of the bankrupt's creditors, to obtain

a greater percentage of his debt than any other of such creditors of the same class.

Such being my conclusions, I am led to the opinion that the trustee may recover the launch or its value from the vendee, J. W. Montague, and that this court can, under section 60b of the bankrupt act, as amended, order such a recovery by the trustee. Loveland on Bankruptcy (2d Ed.) p. 607. Collier on Bankruptcy (4th Ed.) p. 251. In reaching the above opinion, I have gone over all the testimony of the witnesses very carefully, given the arguments of the respective counsel the utmost consideration, and examined into many authorities.

Isaac Diggs, for L. W. Harris, creditor, and the trustee.

Ordway Puller, for the bankrupt and J. W. Montague, the vendee.

WADDILL, District Judge. The ruling of the special master as set forth in the foregoing report is approved, and his opinion is adopted as that of the court. Let decree be entered accordingly.

MILLS v. CITY OF CHICAGO et al.

(Circuit Court, N. D. Illinois, N. D. February 23, 1906.)

COURTS—JURISDICTION OF FEDERAL COURTS—STOCKHOLDER'S SUIT.

To establish the claim that a suit brought in a federal court by a nonresident stockholder in a local corporation against the corporation and a city to enjoin the enforcement of an ordinance of the city is collusive and a fraud on the jurisdiction of the court, it is not sufficient that the company would be benefited by the success of the complainant, which is the theory upon which all suits are brought, nor that its officers express a desire for his success, nor that his counsel represented the company in a prior suit brought by it in the same behalf; but an agreement between complainant and the company, pursuant to which the suit was brought, must be shown either directly or inferentially.

In Equity. On final hearing.

For former opinion, see 127 Fed. 731.

William D. Guthrie and I. K. Boyesen, for complainant.

James Hamilton Lewis, Corp. Counsel, Henry M. Ashton, and David K. Tone, for defendant city of Chicago.

James F. Meagher, for defendant People's Gas Light & Coke Company.

GROSSCUP, Circuit Judge. The bill is by a citizen of California, a stockholder of the People's Gas Light & Coke Company, suing in behalf of himself and other stockholders of the company similarly situated, against the city of Chicago and the gas company, citizens of Illinois; the object of the bill being to restrain the city from enforcing an ordinance forbidding manufacturers of gas from demanding or collecting from consumers of gas, more than seventy-five cents per thousand cubic feet, and attaching a penalty of from twenty-five to two hundred dollars for each violation thereof. The bill alleges that the ordinance is invalid, in that it impairs the obligation of a contract between the city and the company; and in that the council was without power from the state to pass a rate regulation ordinance. The bill also charges that notwithstanding the demand of complain-

ant that the company institute, at the earliest practical moment, a suit against the city to prevent the enforcement of the ordinance—a former suit by the company, then pending on appeal in the Supreme Court, having been dismissed in the Circuit Court of the United States for want of jurisdiction—the company refused to institute such suit, giving as its reason that the institution of a new suit at that time, would excite public prejudice, which it was deemed of importance to avoid.

On demurrer to the bill, and motion for injunction, the court held that the bill exhibited a case wherein a stockholder might sue, the company declining to sue; and that the ordinance complained of was invalid for want of power in the city council from the state to regulate rates. Accordingly an injunction was issued. Thereupon the plea was interposed that the suit was collusive—that the stockholder had not brought his suit in good faith, to enforce his rights, and those of the other stockholders, but had brought it because of a collusive understanding between him and the gas company, based on the fact that by reason of his citizenship in the state of California, a suit by him would lie in the United States courts, while a suit by the company would have been cognizable only in the state courts.

The considerations chiefly relied upon by the city in support of its contention are, that after the decree against the company by the United States Circuit Court had been affirmed by the Supreme Court, the officers of the company openly expressed their desire to see the complainant in this suit succeed; that counsel for the complainant in this case is the counsel who argued the company's case in the Supreme Court; that Mr. Brady, one of the stockholders and directors of the company, contributed to the complainant five thousand dollars toward the complainant's expenses in this suit; that the complainant on his examination, admitted that the suit was brought to confer jurisdiction on the United States court; and, generally, that the suit is in the interest of the gas company.

To sustain the charge of collusion, the evidence must show, either directly or inferentially, that there has been some agreement or understanding between the company and the complainant that the suit should be brought—that Mills was not acting for himself and the other stockholders alone, but was a channel through whom the company, with his acquiescence, was reaching out for a footing in the United States courts. Was this the state of things between Mills and the company at the time the suit was brought?

The fact that the company is beneficially interested in Mills' success, and was, as things have transpired, beneficially interested from the beginning, is not alone sufficient to show this understanding. A stockholder's suit, the company having refused, is always based upon the assumption that the company is interested, and ought, because of that interest in its own name, to have brought the suit.

The fact that the same counsel was employed by the company in its suit, and by Mills in his, is not alone sufficient to show collusion. Mr. Guthrie was not of counsel for the company when the Mills suit was brought, and it may very well have transpired that the de-

sire of the company to employ him in the argument before the Supreme Court arose after the Mills suit had been brought. Nor is it to be held that because two clients employ the same counsel respecting the same general end, they are in agreement or collusion as to the means of bringing about the end.

The testimony relating to Mills' admissions is inconclusive. It impresses one upon reading it, rather as a misunderstanding of the question put, than as an admission of any agreement between Mills and the company, or any motive on his part, other than the lawful motive of bringing his suit in the court in which, under the Constitution and laws of the United States, he is entitled to have it determined.

The evidence that the company, its officers and stockholders now openly wish Mills to succeed is not alone sufficient. Since the Mills suit was brought, the company's suit had been heard and affirmed by the Supreme Court of the United States. The company is without hope now of any relief through that suit. But that does not prove that at the time the Mills suit was brought, the company did not reasonably believe that the decree of the circuit court of the United States dismissing the bill would be reversed; and that the supplemental litigation demanded by Mills was unwise. The situation is changed; and with change of situation there naturally comes a change of views—a change that in no respect alters the fact of what the views were before the situation changed.

True, a chain of circumstances, each of which alone is insufficient to establish a given contention, may, together, indisputably prove that contention. But circumstantial evidence, to be conclusive from the mere fact of cumulation, must lead the judgment to this conclusion: That, all the circumstances considered, there is no explanation for their existence except upon the existence of the fact sought to be proven. That condition of things does not exist here. All the circumstances considered, I can reasonably believe that Mills brought this suit, not under an agreement with the company, but contrary to what the company then regarded to be its true interest; and that the bringing of the suit in the United States court was not because it was so planned beween Mills and the company, but because Mills, being entitled as a stockholder to bring his suit in some court having jurisdiction of the subject matter, chose that court, that under the Constitution and laws of the United States, was especially opened to the determination of suits between parties, one of whom was a resident of the state where the suit must be brought, and the other a stranger.

Decree may be entered finding the issues in favor of the complainant and for an injunction as prayed.

WILDER et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 559.

1. CRIMINAL LAW—WRIT OF ERROR—MATTERS REVIEWABLE.
An appellate court cannot review the ruling of a trial court in refusing to entertain a plea in abatement tendered by a defendant in a criminal case after a demurrer had been overruled and at a term succeeding the one at which defendant had entered a plea of not guilty; there being nothing in the record to excuse the delay or to show that the court abused its discretion.

2. CONSPIRACY—OFFENSE AGAINST UNITED STATES—OBSTRUCTING DUE ADMINISTRATION OF JUSTICE.
A conspiracy to corruptly obstruct and impede the due administration of justice in a court of the United States in a civil action between private parties, in violation of Rev. St. § 5399 [U. S. Comp. St. 1901, p. 3656], is a conspiracy to commit an offense against the United States within the meaning of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], and is indictable thereunder.

3. OBSTRUCTING JUSTICE—ELEMENTS OF OFFENSE—FEDERAL STATUTE.
In Rev. St. § 5399 [U. S. Comp. St. 1901, p. 3656], making it a criminal offense, inter alia, to corruptly or by threats or force "obstruct or impede, or endeavor to obstruct or impede the due administration of justice" in any court of the United States, the words "due administration of justice" import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn (if not obstructed or impeded) concerning material facts, and to exercise his option as to introducing testimony as to such facts, and an offense is committed under such statute if a person corruptly endeavors to induce other persons who have knowledge of facts which may be material to a party to a pending cause to conceal or deny their knowledge, so as to prevent such party from obtaining knowledge or procuring evidence of such facts.

4. CONSPIRACY—SUFFICIENCY OF INDICTMENT.
An indictment under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for conspiring to commit an offense against the United States by obstructing the due administration of justice in a court of the United States, in violation of Rev. St. § 5399 [U. S. Comp. St. 1901, p. 3656], considered, and *held* good.

Boyd, District Judge, dissenting.

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington.

The first count of the indictment in this case reads as follows:

"Indictment.

"United States of America, Southern District of West Virginia—ss.:

"In the District Court of the United States in and for the Southern District aforesaid at the April term thereof, A. D. 1903, at the city of Huntington, West Virginia.

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid on their oaths, do present, charge, and say:

"That heretofore, to wit, on the 21st day of April, 1902, one V. A. Wilder, whose name is unknown to the grand jurors aforesaid otherwise than V. A. Wilder and one Daniel Justus did, in the county of Kanawha, in the Southern District of West Virginia, and within the jurisdiction of said court, unlawfully, knowingly, corruptly, fraudulently and feloniously con-

spire, combine, confederate and agree together to commit an offense against the United States, in this, to wit:

"That on said last-named day, and for a long time prior thereto, and ever since there was and has been pending and undetermined in the Circuit Court of the United States for the Western District of the state of Virginia, in the Fourth judicial circuit, a certain action at law in ejectment in which the matter in dispute exceeds, and has always exceeded, exclusive of interest and costs, the sum and value of two thousand dollars, and which the said Circuit Court then and there and during the times aforesaid had and still has the lawful and proper jurisdiction to hear and determine, and which action in ejectment one Henry C. King, a citizen of the state of New York, instituted in said court against Henry C. Stuart, a citizen of the said state of Virginia, for the recovery of an estate in fee simple and the possession of certain land lying in the county of Buchanan, in said state of Virginia, which said county of Buchanan, before and at the time of the institution of said action in ejectment, and ever since was, has been and now is within and a part of the said Western District of the state of Virginia, and which land so sought to be recovered by said King in said action in ejectment was, at the time of the institution of said action and ever since has been claimed by said King to be a part of the land granted to one Robert Morris by the commonwealth of Virginia by patent dated the 23rd day of June, 1795, being as so claimed by said King that part thereof which lies in the said county of Buchanan. That at the time of the institution of said action in ejectment the said Stuart claimed, and has ever since claimed, an estate in freehold in and to certain lands in said county of Buchanan, which the said King at the time of the institution of said action in ejectment claimed, and has ever since claimed to be partly within the boundaries of the land set out and described in the said patent from the commonwealth of Virginia to the said Robert Morris, but how much of the land so claimed by the said Stuart is within the boundaries of the land set out and described in said patent and the true location of the boundaries of the land embraced in said patent were, at the time of the institution of said action in ejectment and ever since have been matters in dispute and controversy of more than two thousand dollars in value, exclusive of interest and costs in said action in ejectment between the said King and said Stuart.

"That in the declaration filed by said King in said action of ejectment is set out the location as claimed by him of the boundaries of the land embraced in said patent which includes a large part of the land so claimed by said Stuart, and the said Stuart has always, since the institution of said action in ejectment, claimed and still claims, that the location of the boundaries of the land embraced in said patent as set out by the said King in his said declaration is not the true location and that the true location of the boundaries of the land embraced in said patent would include a much smaller quantity of the land so claimed by said Stuart than is embraced by the location thereof claimed as aforesaid by the said King in his said declaration. That the said action in ejectment was so instituted by the said King against the said Stuart for the purpose of establishing title in fee in said King to the land embraced in said patent which lay in the said county of Buchanan, and to recover from the said Stuart that part of the land so claimed by him, which the said King claimed as aforesaid to be within the boundaries of the land embraced in said patent, and that at the time of the institution of said action in ejectment and ever since the said King claimed and has claimed to be the owner in fee-simple estate and entitled to the possession of that part of the land embraced in said patent which lies in the said county of Buchanan and according to the location thereof as set forth in his said declaration. That shortly after the institution of said action in ejectment, and long prior to the 21st day of April, 1902, to wit, at rules held in the clerk's office of said court on the first Monday in January, 1808, the said Stuart appeared to said action in ejectment, and the said Stuart shortly after the institution of said action of ejectment and long prior to the 21st day of April, 1902, to wit, at rules held

in the said clerk's office as aforesaid and at the June term, 1898, of the said court by proper plea interposed in his behalf put in issue the right of the said King to recover in said action in ejectment the land so sought to be recovered by him therein, and said issue has ever since remained between the said King and the said Stuart as a matter in controversy between them to be tried and determined in and by the said Circuit Court of the United States for the Western District of the state of Virginia, and said issue now remains pending and undetermined in said court, and that ever since said action in ejectment was instituted in said court, the said Stuart has controverted and denied and still controverts and denies the right of the said King to recover therein the land so sought to be recovered by him therein as set out in his said declaration, and that said action in ejectment is still pending and undetermined in said court, and that at the time of the institution of said action of ejectment the said King was a citizen of the state of New York and the said Stuart a citizen of the state of Virginia, and they have ever since been citizens of different states, and that at the time of the institution of said action in ejectment and ever since the said Circuit Court of the United States for the Western District of the state of Virginia has had the due and lawful jurisdiction to hear and determine all matters in controversy in said action in ejectment between the said King and the said Stuart and still has such jurisdiction. That the said patent dated the 23rd day of June, 1795, from the commonwealth of Virginia to Robert Morris in describing the land granted thereby designates one of the corners of the said land as, and states the name to be 'three poplars and a sugar tree by a small branch of Knox creek.' That ever since said action of ejectment was instituted it has been and now is material and important to said Stuart and of great value to him in defending said action in ejectment, and in contesting the location of the boundaries of the land embraced in said patent as claimed by said King, and set forth in his said declaration, and to show that of the land so claimed by said Stuart a much less quantity is within the boundaries of the land embraced by said patent than is claimed by said King in said declaration and to establish the true location of said boundaries, to show and prove in any trial in said action that said corner so designated as 'three poplars and a sugar tree by a small branch of Knox creek' was located near what is known as the Race Fork of Knox Creek in said Buchanan county, the said Race Fork being a small branch of Knox Creek, and that ever since the institution of said action of ejectment it has been and now is material and important and of great value to the said King in order to recover in said action the lands sought to be recovered therein by him as aforesaid, to show and prove in any trial in said action that said corner so designated as aforesaid was not located on or near said Race Fork of Knox Creek. That certain persons residing in said county of Buchanan, to wit: Riley Lester, William A. Lester, Miles Lester, Andrew Baker, George Childers, Jacob Lester, John Charles, Hiram Smith, Calvin Lester, and the said Daniel Justus had many years prior to the 21st day of April, 1902, to wit: seven years prior thereto seen certain marked poplar trees not over three in number, and a marked sugar tree, standing near together, and near said Race Fork of Knox Creek, in said Buchanan county, and within a short distance, to wit: 400 feet of the house where the said Daniel Justus resided on said 21st day of April, 1902, and were so marked as seen by said persons as to indicate that they were corner trees and might be corner trees of the land embraced in said patent. That said marked trees had long prior to said 21st day of April, 1902, to wit: six years prior thereto, been cut down and destroyed. That the evidence and testimony which said persons who saw said marked trees could give in relation thereto would be material and important, and of great value to said Stuart in any trial of said action of ejectment to show and prove that said marked trees were the corner in whole, or in part, which was described in said patent as aforesaid as 'three poplars and a sugar tree by a small branch of Knox creek,' and to show and prove that the corner so designated in said patent was located near said Race Fork of Knox Creek, and would be damaging and prejudicial to said King in at-

tempting to show and prove in any such trial that the land embraced in said patent was located as claimed in his said declaration.

"That heretofore, to wit: on the 21st day of April, 1902, in the county of Kanawha, and in the Southern District of the state of West Virginia, and within the jurisdiction of this court, and after the said Stuart in said action of ejectment had, as hereinbefore set out, put in issue the right of the said King to recover therein the lands sought to be recovered by him therein as aforesaid, and while the said matters in controversy in said action of ejectment between the said King and the said Stuart were, as hereinbefore set out, existing and pending, the said V. A. Wilder and the said Daniel Justus for the unlawful, fraudulent and felonious purpose of corruptly obstructing and impeding and with the unlawful, fraudulent, and felonious intent to obstruct and impede the due administration of justice in the said Circuit Court of the United States for the Western District of Virginia in the said action in ejectment then and there pending and undetermined in said court as aforesaid, between the said Henry C. King and the said Henry C. Stuart, and with full knowledge and notice that said action in ejectment was so pending and undetermined, did unlawfully, knowingly, corruptly, fraudulently, and feloniously conspire, combine, confederate, and agree together to prevent, obstruct, impede, hinder, embarrass, and defeat the said Henry C. Stuart, from proving in any trial of said action in ejectment that said marked trees had existed and were located as aforesaid, and from proving in any such trial that the corner in said patent described as aforesaid was located near said Race Fork of Knox Creek and at the place above described, in this, to wit, that it was then and there unlawfully, knowingly, corruptly, fraudulently, and feloniously conspired, confederated and agreed by and between the said Wilder and the said Justus that the said Justus should endeavor to procure the said Riley Lester, William A. Lester, John H. Lester, Miles Lester, Andrew Baker, George Childers, Jacob Lester, John Charles, Hiram Smith, and Calvin Lester to make false and corrupt statements in writing under oath which should be inconsistent with, and contradictory of, the true facts which they knew in regard to the existence and location as aforesaid of said marked trees, and that said Justus should endeavor to induce and persuade said last-named persons from ever testifying in any trial which might be had of said action in ejection as to the facts within their knowledge which might prove the existence and location as aforesaid of said marked trees, and that the said Justus should endeavor to procure said last-named persons to make false declarations and statements contradictory of, and inconsistent with the facts within the knowledge of said persons which would tend to prove the existence and location as aforesaid of said marked trees, and to which they would testify if examined as witnesses by said Stuart in any trial of said action of ejectment, and that the said Justus should endeavor to make said last-named persons unfriendly and hostile to the interests of the said Stuart which were involved in said action of ejectment and that the said Justus should endeavor to persuade and get said persons to agree not to tell the truth if they were called or examined as witnesses in behalf of said Stuart in any trial of said action of ejectment and that the said Justus should endeavor to get said persons to conceal and secrete the facts within their knowledge which would tend to prove the existence and location as aforesaid of said marked trees, and that the said Justus should endeavor to get the said persons to make false statements which would indicate that they could give no evidence tending to prove the existence and location as aforesaid of said marked trees, in order that said persons would not be examined as witnesses in behalf of said Stuart in any trial of said action of ejectment and that the said Justus should endeavor to prevent, obstruct, impede, hinder, embarrass, and defeat the said Henry C. Stuart from securing and producing upon any trial of said action of ejectment the evidence which existed in relation to the existence and location as aforesaid of said marked trees through the knowledge of the said parties who had seen the same as aforesaid, or through the knowledge of any other persons who had seen said trees, or any of them, marked and

located as aforesaid, and that the said Justus should refuse to testify in any such trial as to the facts within his knowledge which might prove the existence and location as aforesaid of said marked trees, and that the said Justus should endeavor to find witnesses who, upon any such trial of said action of ejectment, would testify and give evidence against the existence and location as aforesaid of the said marked trees, and evidence to contradict, impair, weaken and destroy the evidence which might be given in any such trial by any of the said persons last named without regard to the fact whether the witnesses so to be found by said Justus would testify honestly and truthfully or falsely and corruptly, and that the said Justus should himself make a false and corrupt affidavit in writing contradictory of, and inconsistent with, the real facts within the knowledge of said Justus as to the existence and location as aforesaid of said marked trees. That thereafter, to wit, on said 21st day of April, 1902, in the said county of Kanawha and at the city of Charleston, and in pursuance of and for the purpose of effecting and carrying into execution the said unlawful, fraudulent, corrupt, and felonious conspiracy, combination, confederacy, and agreement between the said V. A. Wilder and Daniel Justus, and to effect the object thereof, the said Wilder paid to the said Justus the sum of one hundred dollars in lawful money of the United States as a reward and consideration for what the said Justus was to do and perform as aforesaid in pursuance of said combination, confederation, conspiracy, and agreement and the said Justus did, then and there to effect the object of said unlawful, fraudulent, corrupt and felonious conspiracy, combination, confederacy and agreement between him and the said Wilder, make the false and corrupt affidavit which he had agreed to make as aforesaid, and thereafter, to wit, on the 24th day of April, 1902, and on divers other days, in the said county of Buchanan, the said Justus in pursuance of, and for the purpose of carrying out and to effect the object of the said unlawful, fraudulent, corrupt, and felonious conspiracy, combination, confederacy, and agreement between himself and the said Wilder, did unlawfully and corruptly solicit and endeavor to procure certain parties, to wit, the said Riley Lester, William A. Lester, and John H. Lester and divers other parties to the grand jurors aforesaid unknown to make corrupt and false statements contradictory of, and inconsistent with, the real facts, as the said Justus then and there well knew, within the knowledge of said parties last above named and said unknown parties as to the existence and location as aforesaid of said marked trees, and then and there unlawfully and corruptly offer to pay and give, and to procure to be paid and given, money and other things of value to said parties last above named and to said unknown parties in order to obtain such statements, and then and there corruptly and fraudulently solicited the said Riley Lester, William A. Lester, and John H. Lester and said unknown parties to conceal the real facts, as the said Justus then and there well knew, within the knowledge of the said parties last above named and said unknown parties as to the existence and location as aforesaid of said marked trees, and then and there corruptly and fraudulently solicited said parties last above named and said unknown parties to pretend and represent that they knew nothing as to the existence and location as aforesaid of said marked trees, although the said Justus then and there well knew that said last-named parties and said unknown parties had seen some of said marked trees at the location aforesaid and were lawful and competent witnesses to testify in any trial of said action in ejectment to prove the existence and location as aforesaid of said marked trees.

"And so the grand jurors aforesaid, upon their oaths aforesaid, do present, charge and say that the said V. A. Wilder and Daniel Justus, in the said county of Kanawha, in the state of West Virginia, and in the Southern District of said state, heretofore, to wit: on the 21st day of April, 1902, did, in violation of section 5440, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676], unlawfully, knowingly, corruptly, fraudulently, and feloniously conspire, combine, confederate, and agree together to commit an offense against the United States, to wit: to corruptly obstruct and impede the

due administration of justice in the said Circuit Court of the United States for the Western District of Virginia, as hereinbefore set out, and to effect the object and to carry out the said unlawful, fraudulent, corrupt, and felonious conspiracy, combination, and confederacy, did the acts and things hereinbefore set out; all of which is contrary to the form, force, and effect of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

Maynard F. Stiles, for plaintiffs in error.

Geo. W. Atkinson, Dist. Atty., and Malcolm Jackson, Special U. S. Atty., for the United States.

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

McDOWELL, District Judge (after stating the facts). The defendants were indicted April 9, 1903, under section 5440 U. S. Rev. St. as amended by act May 17, 1879, c. 8, 21 Stat. 4, 3 U. S. Comp. St. 1901, p. 3676. On the next day the defendant Wilder appeared in open court, moved to quash the indictment, and demurred to the indictment and to each count thereof. The trial court took time to consider the motion and demurrer, and thereupon said defendant was arraigned and pleaded not guilty. At the next term, on September 22, 1903, both defendants appeared, moved for a change of venue, which was denied, and moved to quash the indictment, presumably only for objections such as could be made on demurrer. The argument not being completed, the court adjourned until the next day, and on September 23d the court overruled the motion to quash and the demurrer. And thereupon "the defendants by their attorneys tendered a special plea in writing, to the filing of which the government objected, and the court having seen and inspected said special plea, and having heard fully the arguments of counsel thereon, the court doth sustain said objection, and thereupon refuse to permit said special plea to be filed, to which action of the court the defendants by their attorneys object and except, and tender their bill of exceptions marked 'Defendants' Bill of Exceptions No. 1,' which is accordingly signed, sealed, and made a part of the record herein." No bill of exceptions appears in the record, no suggestion of diminution of record has been made, and it is understood to be a fact that no bill was ever prepared or submitted to the trial judge. A plea in abatement (endorsed: "Tendered and objection by Gov. and objection sustained by the Court and plea rejected. Sept. 23d, 1903. Edwin M. Keatley, Clerk.") is copied as a part of the record. The cause was tried at the April term, 1904, and resulted in a general verdict of guilty against both defendants, and a judgment sentencing them to pay a fine and the costs.

The assignments of error are based on the action of the trial court in overruling the motion to quash and the demurrer and in refusing to allow to be filed the plea in abatement. If the motion to quash the indictment was based on matter not presented by the demurrer, such matter does not appear in the record. The plea in abatement sets up alleged improper influences brought to bear on the grand jury which returned the indictment. Quite aside from the technical rule which

forbids us to consider the matter presented by the plea, because it has not been made a part of the record by bill of exception, is the fact that the plea was tendered after the trial court had ruled on the demurrer to the indictment and at a term following that at which the defendant Wilder (in whose behalf alone the plea on its face appears to have been offered) had pleaded not guilty. If any reason in excuse of this delay existed, it does not appear from the record. In order to obviate this insuperable objection to considering the plea itself, this court must assume, in the absence of any evidence to such effect, that the trial court erred. So far as we can know, the trial court may have rejected the plea on the ground that the facts set up therein were not recently discovered by the defendants, and that therefore the tender of the plea had been unduly delayed. Nothing in the plea alleges excuse for the delay in tendering it. It is with the strictest propriety that appellate courts refuse to presume that error was committed. Not only is the discretion of the trial courts very great in ruling as to the merits of such pleas (Radford v. U. S., 129 Fed. 49, 63 C. C. A. 491; McGregor v. U. S. [C. C. A.] 134 Fed. 187), but there is also a discretion vested in such courts as to allowing such pleas to be filed after the regular time therefor has passed. We cannot possibly say from this record that the trial court abused this latter discretion. And, unless we can properly so decide, we cannot in any event reach a consideration of the merits of the plea. For these reasons, we do not express any opinion whatever as to the matters set up in the plea.

The assignments of error based on the action of the trial court in overruling the demurrer and motions to quash, based on objections such as can be presented by demurrer, alone remain for our consideration. Attention needs to be given only to the first count of the indictment. As the second count differs from the first only in that the second is more generally expressed, the second count is invalid if the first count is. If the first count is valid, we need not concern ourselves as to the second count.

The indictment is founded on section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], as amended, and the offense conspired to be committed was (section 5399 [U. S. Comp. St. 1901, p. 3656]) corruptly obstructing or impeding the due administration of justice in a certain action of ejectment pending in the federal Circuit Court for the Western District of Virginia, styled "King v. Stuart." Section 5399 reads, so far as now material, as follows:

"Every person who corruptly * * * obstructs or impedes, or endeavors to obstruct or impede the due administration of justice therein [a court of the United States] shall be punished," etc.

Subject to the conclusion to be hereinafter reached as to some important questions, this indictment seems to be well drawn under the rulings in U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, and Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419.

Section 5440, Rev. St. as amended by Act May 17, 1879, c. 8, 21 Stat. 4 [U. S. Comp. St. 1901, p. 3676], so far as now material, reads:

"If two or more persons conspire * * * to commit any 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 shall be liable. * * *"

The contention that a violation of section 5399, consisting of obstructing the administration of justice in a civil litigation, between private citizens in a federal court, is not an offense against the United States, need not be discussed at any length. One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the United States, in that it prevents or tends to prevent the execution of one of the powers of the government. See U. S. v. Sanche (C. C.) 7 Fed. 715; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419. The agreement must be to commit an offense against the United States; but the act done to effect the object of the conspiracy need not, as we think, be itself a crime or an offense against the United States. U. S. v. Sanche (C. C.) 7 Fed. 715; U. S. v. Newton (D. C.) 52 Fed. 275; U. S. v. Donau, 11 Blatchf. 168, Fed Cas. No. 14,983; U. S. v. Cassidy, (D. C.) 67 Fed. 698, 705; U. S. v. Thompson (C. C.) 29 Fed. 86, 89; Curley v. U. S., 130 Fed. 1, 3, 64 C. C. A. 369. However, this point is not of importance in the case at bar. Here the acts alleged to have been done to effect the object of the conspiracy and those alleged to have been agreed to be done are in the same category. If the act agreed to be done would, upon consummation, violate section 5399, the acts done equally violate that statute. If the acts agreed to be done would, if successful, obstruct or impede the due administration of justice, the acts done were certainly endeavors to obstruct or impede. In its final analysis, therefore, the question now for consideration is the true intent shown by the latter clause of section 5399.

If the strictest and narrowest possible meaning were given the word "administration," as used in this statute, the interferences forbidden would be confined to those which obstruct or impede the judge, the jurors, counsel, the marshal, and possibly witnesses. But such obstructions are provided for in the first part of the statute, and in using the different and broader language employed in expressing the latter clause of the statute it seems clear that the intent was to embrace obstructions other than those which were dealt with in the first clause. Perjury, subornation of perjury, and obstructing officers in the service of process are dealt with in sections 5392, 5393, and 5398 [U. S. Comp. St. 1901, pp. 3653–3655]. The first clause of section 5399 sufficiently provides for influencing, intimidating, or impeding witnesses (who have been summoned or otherwise designated as such) and officers of the court while actually in the discharge of their official duties. If those acts which may obstruct or impede the administration of justice, and which are not embraced within the previously used language, are held not to be embraced within the meaning of the latter clause of section 5399, Congress has wholly failed to forbid such acts, and has uselessly and confusingly twice expressed the same intent in different language.

The argument is made that the conspiracy was not to obstruct or impede the due administration of justice, in that prejudice to Stuart can only be predicated on a double contingency: (1) That, if there had been no act done to carry out the object of the conspiracy, Stuart would in due time discover the facts as to the marked trees; and (2) that, after learning these facts, he would agree with the grand jury in the opinion that evidence of such facts is valuable to him. But the words "due administration of justice" import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn (if not impeded or obstructed) concerning material facts and to exercise his option as to introducing testimony of such faces. The violation of the law may consist in preventing a litigant from learning facts which he might otherwise learn, and in thus preventing him from deciding for himself whether or not to make use of such facts. The latter clause of section 5399 seems to us to be too broad in its scope to be confined to cases where the suppression of knowledge of material facts merely might not prejudice the litigant. On the other hand, it is, as we think, sufficient if the litigant might be prejudiced by the success of the conspiracy. The acts intended to be made criminal by the latter clause of the section are, as we think, not forbidden merely on the ground that such acts will of necessity prevent a fair trial, but on the ground that such acts may prevent such trial. We need give no weight to the conclusions of the grand jury that the facts sought to be suppressed are "material" in the ejectment cause, and that to prove them would be "valuable to Stuart." The facts alleged in the indictment are such that this court must for itself of necessity draw the conclusion that the facts as to the marked trees are material. Whether or not it will be of value to Stuart to prove these facts when the ejectment cause comes on to be tried is now a mere matter of opinion. And even after a trial of the ejectment cause shall have taken place, if Stuart should introduce the evidence sought by the defendants here to be suppressed, it is conceivable that it would still be a matter of opinion as to whether or not such course was a wise one. When a conspiracy, such as the one here, is discovered and the indictment is returned in advance of the trial of the case of the litigant against whose interest knowledge of material facts has been attempted to be suppressed, it must, at the date of the indictment, be a mere matter of opinion whether or not the litigant will seek to use the facts, and equally a mere matter of opinion whether or not he would, if there had been no interference, have discovered the facts; but, if the conspiracy be successful, it is manifest that the litigant cannot have favorable occasion for preparing for trial. This imports a fair opportunity to learn what may be of value concerning material facts and a consequent fair opportunity to decide intelligently whether or not to use such facts when the case comes on to be tried.

In the brief of the learned counsel for defendants it is said:

"I apprehend that one party to a lawsuit would have a legal right to make it as difficult as possible for his opponent to prove his case, and consequently to 'conspire' with some one else to do so. Of course, he would

have no right to commit or procure perjury, or prevent execution of, or obedience to, process, nor tamper with a 'witness'; but none of these things is charged in this indictment."

If section 5399 did not contain the language used in its last clause, this argument might be sound. But this argument shows the vital need for a federal statute such as we deem the clause mentioned to be. In the absence of a federal statute of the scope of this clause, a party to a pending civil suit in a federal court, so long as process for persons intended to be used as witnesses by his adversary had not been issued, could legally induce all such persons to conceal themselves or otherwise evade service of process. But that such acts, if successful, would impede and obstruct the administration of justice, is quite apparent.

It is further contended as follows: The indictment does not allege that the marked trees were in fact corner trees of the Morris tract. They may not have been, and, if not, the "conspiracy" was merely an agreement to prevent a perversion of justice. This argument assumes a right in the defendants here to decide a question which under our theory of law should be left, at Stuart's option, to the decision of the tribunal which is to try the ejectment cause. As we cannot here and now assume the truth of the hypothesis on which this argument is founded, it follows that the sufficiency of the indictment must be determined on the only permissible hypothesis, to wit, that the trees in question may have been corner trees of the Morris tract. The facts as to these trees (that there were some poplar trees, not over three in number, and one sugar tree standing near together, standing near a branch of Knox creek, so marked as to indicate that they were corner trees and might be corner trees of the Morris tract) are sufficient, read in connection with the other facts alleged in the indictment, especially the quotation from the grant, "three poplars and a sugar tree by a small branch of Knox creek," to make it necessary for the court to draw the conclusion that these trees may have been corner trees of the Morris tract. The possibility that these trees may not have been corner trees of the Morris tract does not affect the validity of the indictment, and does not prevent the charge of suppressing the information concerning these trees from being a sufficient charge of an impeding or obstructing the due administration of justice. The fallacy underlying the argument now under discussion is the same as that discussed above. It was wholly unnecessary for the pleader to allege in the indictment that the trees were in truth corner trees, and under the present indictment evidence tending to show that the defendants believed they were not corner trees of the Morris tract would not have been admissible in behalf of the defendants. After verdict of guilty such evidence might well be offered to the trial judge in mitigation of punishment. It might reduce the culpability of the defendants, if they believed and had reason to believe at the time of the agreement that these trees were not corner trees; but such belief would not prevent the agreement from being a conspiracy to violate section 5399, Rev. St. A belief on the part of the defendants that the trees in question were

not in truth corner trees of the Morris tract, and that the "testimony" sought to be suppressed was false, would lessen the moral wrong involved, but would not excuse the commission of the acts alleged in the indictment. Such argument is not even based on the ancient fallacy that a good end justifies the use of improper means. It is based on the assumption that a supposed good end justifies the use of improper means. As hereinbefore stated, the allegations of the indictment are such that we cannot assume that the trees were in fact not corner trees of the Morris tract. The utmost length that we can go in this case in making assumptions favorable to the defendants is that they believed that the trees were not in fact corner trees. Hence the argument above referred to is based on the theory that forbidden and illegal means may properly and legally be used if the ultimately intended result is morally justifiable. It could be equally well argued that intimidating a witness is not a violation of the first clause of section 5399, if the person so doing believes that such witness will testify falsely.

As we have under consideration only the questions raised by demurrer to the indictment, we do not express any opinion as to the admissibility or effect, on trial, of evidence proving or tending to prove that the trees here in question were not in fact corner trees of the Morris tract.

We are of opinion to affirm the judgment of the trial court.

Affirmed.

BOYD, District Judge (dissenting). I am unable to concur in the opinion of the court in this case, and for the following reasons:

The plaintiffs in error, who will hereafter, for convenience, be designated as the "defendants," demurred generally to the indictment, and to each count thereof. The demurrer was overruled by the court, to which the defendants duly excepted.

The question which I will first discuss is whether the indictment, or either count thereof, contains allegations sufficient to charge an offense against the criminal laws of the United States. The indictment is drafted under section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676], which is in the following language:

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The Supreme Court, in United States v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, has construed this statute, and, as I interpret the opinion, has held that, in order to constitute a crime under its provisions, the persons charged must conspire to commit a criminal offense against the laws of the United States, and some one or more of the conspirators must do an act in furtherance of the conspiracy, and that the act done must itself be a crime against the United

States; that is, the act to carry into effect the conspiracy, standing alone, must be a violation of a criminal statute of the United States. In this respect the offense created by section 5440 differs from conspiracy at common law; the latter offense being complete when the agreement is made, or the combination entered into to do the unlawful act.

My first consideration will, therefore, be directed to an analysis of the indictment, and to ascertain if there is enough in it to fulfill these requirements. The offense which it is alleged Wilder and Justus conspired to commit is by virtue of section 5399 of the Revised Statutes [U. S. Comp. St. 1901, p. 3656], which is as follows:

"Sec. 5399. Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

The charge against the defendants, in substance, is that they conspired to corruptly obstruct and impede the due administration of justice in the trial of a certain civil action in which Henry C. King is plaintiff, and Henry C. Stuart defendant, pending in a court of the United States, to wit, in the Circuit Court of the United States for the Western District of Virginia. To corruptly obstruct or to impede the due administration of justice in a court of the United States is a violation of section 5399, above quoted; but a mere conspiracy to violate this section does not constitute the offense under section 5440. Some act must be done, as before stated, by one or more of the parties to the conspiracy, to carry the same into effect, and that act, as is decided in United States v. Britton, supra, must be a crime in itself. This brings me to the important point in the present case; and that is, are the acts, or any of the acts alleged to have been done by the defendants in furtherance of the conspiracy, in themselves a violation of the criminal statutes of the United States? There are no crimes against the United States except such as are so made by the statutes enacted by Congress, and, unless the defendants violated one or more of these statutes, in what they or one of them, did to carry out the conspiracy, the offense under section 5440 is incomplete.

In order to fully present the question, it will be necessary to restate, in substance, the material facts as set out in the indictment. It is alleged that the Morris patent of June 23, 1795, locates a corner of the land granted at "three poplars and a sugar tree, by a small branch of Knox creek"; that it is material and important for Stuart, in his defense to King's action, to prove that this corner was located near Race Fork, a small branch of Knox Creek; that as an evidence of this fact there had stood at this point three poplars and a sugar tree, marked to indicate a corner, which had been destroyed six or seven years before; and that Riley Lester, William Lester, and the others named in the indictment, as well as the defendant Justus, had knowledge of the fact that these three poplars and a sugar tree on Race Fork were so marked before their destruction. The indict-

ment alleges that it was of great value to Stuart, and to his interest to prove that these three poplars and a sugar tree, near Race Fork, a small branch of Knox Creek, had existed, marked to indicate a corner, which had been destroyed some six or seven years before. Such evidence, it is alleged, would be damaging to King in the trial, because it would give him less land in the event of the establishment of the corner at that point. In the indictment the gravamen is that Wilder, who was the agent of King and represented his interests in connection with his lands in Virginia and West Virginia, and Justus, agreed to obstruct and impede the due administration of justice by using the methods recited to prevent Stuart from proving, in a trial of the case, that the corner referred to was at the point above stated. It is a criminal offense, under section 5399, as before stated, to corruptly or by force or threats impede or obstruct the due administration of justice in a court of the United States, but it is not an offense, under section 5440, to conspire to corruptly or by force or threats impede or obstruct the due administration of justice in a court of the United States, unless the conspirators, as is held in U. S. v. Britton, supra, commit a crime in their efforts to carry out the purposes of the conspiracy. This presents the question directly: If Wilder and Justus did the acts jointly or severally charged against them, in furtherance of the alleged conspiracy, did they thereby violate any criminal law of the United States? It is alleged that Justus knew of the existence of the marked trees which had been destroyed on Race Fork, a small branch of Knox Creek, the corner claimed by Stuart, and also that he knew that the Lesters and others named in the indictment had knowledge of it; that, in this situation, Justus himself made an ex parte affidavit that he had no knowledge of the existence of such corner; that he solicited and endeavored to procure the Lesters and other persons named in the indictment to make corrupt and false statements, contradictory of, and inconsistent with, the real facts relative to the existence and the location of said marked trees; that he offered to pay and give money and other things of value to said parties, in order to obtain such statements; and that he endeavored to persuade the said parties to conceal the real facts as to the location and the existence of said marked trees, and tried to induce them to pretend and represent that they knew nothing as to the existence and location of the same. I have found no law of the United States under which any of these acts alleged to have been done in furtherance of the conspiracy, entered into between Wilder and Justus are in themselves made criminal. One of the acts alleged is that Justus, in furtherance of the conspiracy, made an affidavit denying the facts within his knowledge, which would be competent and material evidence in the said action of ejectment as to the true location of the boundaries of the land embraced in the Morris patent; but this allegation does not contain facts sufficient to charge a criminal offense on the part of Justus in making the affidavit, for it does not amount to a charge of perjury. It is not alleged that he made the affidavit in any case in which a law of the United States authorizes an oath to be administered, or that the oath was

taken before a competent tribunal, officer, or person, under the provisions of section 5392 of the Revised Statutes, which is the only statute covering the crime of perjury committed in the making of an ex parte affidavit as to persons generally, though there are other statutes which apply to officers and persons making false affidavits in particular cases. The affidavit made by Justus could not be used as evidence on the trial of the case of King against Stuart, and, so far as I can see, the only effect of it was to have from Justus a statement, which the indictment alleges was under oath, as to his knowledge of a certain boundary which was in controversy in the case. The other acts alleged to have been committed by Justus in furtherance of the conspiracy are of the same character. None of them violate any criminal statute of the United States. It is alleged that he undertook to persuade certain persons named in the indictment to make false statements as to their knowledge of the facts about the boundaries of the land in controversy; but it is not alleged that he succeeded in procuring any false statement. It is further alleged that he undertook to induce such statements by the payment of money, but there is no allegation that anybody accepted the money, or made a false statement; and, even if they had, it is not alleged that any false statement was made by a witness who had been subpœnaed by Stuart, or by any person that Stuart knew would be material to him as a witness in his case. It is true that if Justus, having entered into a conspiracy with another or others to impede and obstruct the due administration of justice in the trial of this case of King v. Stuart, had himself gone upon the stand as a witness, and sworn falsely, thus committing perjury, this would have completed the offense under section 5440, and all of the conspirators would be guilty, or if Justus, in furtherance of the alleged conspiracy, had, by bribery or otherwise, procured a witness to commit perjury, and thus have been guilty himself of subornation of perjury, in that event the conspirators would be guilty of the offense under section 5440. But no such acts were committed in this case. The acts alleged to have been committed in furtherance of the conspiracy fall short of that which is necessary to complete the offense contemplated by the section. If A., B., and C., conspire together to break into and rob a post office, which is a criminal offense against the United States, and A., in furtherance of the conspiracy, procures the necessary implements, goes to the post office, and breaks the window so as to permit an entrance, then, all of the conspirators would be guilty of a crime under section 5440, although the post office was not actually robbed, because the act which A. does in furtherance of the conspiracy is itself a violation of the criminal laws of the United States; that is, to break into a post office. But if A. simply procures the implements, although with intent to break open the office, and does nothing further then the offense, under section 5440, is not complete. So it would be in a conspiracy to defraud the United States through a false pension claim. If a number of persons conspire together to commit a fraud of this sort upon the government, and to accomplish the purpose through false affidavits and one

of them prepares statements intended to be sworn to, and yet desists before the statements are sworn to and filed, no offense is committed under the provisions of section 5440, because the mere making or procuring of written statements, not under oath, and which are not filed, is no violation of the criminal laws of the United States. These two examples fully illustrate the position I take upon this indictment, and I think they are in entire harmony with the decision of the Supreme Court in Britton's Case. I am consequently led to the conclusion that, no matter how great the impropriety of the alleged acts on the part of Wilder and Justus, they are not sufficient to constitute a criminal offense under the provisions of section 5440.

I have so far discussed the question involved upon the assumption that the indictment charges specifically that the corner alleged to be indicated by the three poplars and the sugar tree on Race Fork was, in fact, a true corner in the boundary lines of the lands in controversy; but upon a careful reading of the indictment it will be found that it alleges no such thing. The allegation is that it is important and material for Stuart, in order to show that King is entitled to a much less quantity of land than he is claiming, to prove that the corner is at that place; and in the first count of the indictment it is alleged that the Lesters and other persons named in the indictment, together with the defendant, Daniel Justus, had, seven years prior to the 21st of April, 1902, "seen certain marked poplar trees, not over three in number, and a marked sugar tree, standing near together, and near said Race Fork of Knox Creek, in said Buchanan County, and within a short distance, to wit, four hundred feet of the house where the said Daniel Justus resided on the 21st of April 1902, and were so marked as seen by said persons as to indicate that they were corner trees, and might be corner trees of the land embraced in the said patent." And this is the fact which it is alleged that it was important and material for Stuart to prove. The question arises at once, therefore, as to whether or not it would be the due administration of justice for Stuart to prove that fact, because after all the point indicated by the three poplars and the sugar tree, as alleged, might not be a true corner of the lands involved. Indeed the very allegation in the indictment leaves that matter in doubt, because it says the trees, as seen by said persons "were so marked as to indicate that they were corner trees, and might be corner trees of the land embraced in the said patent." It is a consistent deduction that, if these trees so marked only indicated that they were a corner or might be a corner, the converse of the proposition, that the indication might prove incorrect, or that these trees might not be a corner of this boundary, is equally plausible. If they were not a corner, then it could be no obstruction to the due administration of justice to show and prove that fact. But, aside from this, the sole proposition in the present case centers in the location of the corner said to be indicated by the three poplars and the sugar tree which had been destroyed on Race Fork, a small branch of Knox Creek. In order to make the indictment sufficient in that respect, it should have been alleged, definitely and specifically, that that was a true corner, and that

the testimony of the parties named, if examined as witnesses in the case would prove it. Alternative allegations in an indictment are not permissible, and indefinite allegations are equally as objectionable. An allegation in an indictment as to the principal fact upon which the indictment is based cannot be sustained where it is charged in the alternative or in terms which are uncertain. For this reason, I am of the opinion that the first count in the indictment, at least, cannot be upheld, even if it contained other sufficient allegations to make it good in law.

Having discussed the indictment in its legal aspects, and arrived at the conclusion that it is insufficient in law to charge a criminal offense, I feel constrained to go further and express my views upon the character and purposes of the prosecution as I gather them from facts appearing in the record. In the progress of the case in the court below the defendants filed a plea in abatement, and also an affidavit for change of venue. I copy from the plea in abatement, which was sworn to, and the statements in which, so far as appears of record, were not contradicted, the following averments:

"At the time of making of said indictment, and for a long time prior thereto, there was and had been pending in circuit court of West Virginia, for the county of Cabell, a certain chancery suit entitled 'State of West Virginia v. Henry C. King et al.,' in which the defendant was interested personally and as agent of said King, and in which C. W. Campbell, who is one of the complaining witnesses upon said indictment, was a party, and together with John A. Sheppard, who is another of the complaining witnesses upon said indictment, was counsel in said chancery cause for himself and a large number of other parties who claimed in said suit sundry portions of the 500,000-acre tract of land mentioned in said indictment adversely to said King, and in the trial of said cause before a commissioner in said chancery cause sought and attempted to establish a corner of said tract upon Race Fork of Knox Creek, in Buchanan county, Virginia, at a point where they contended that the three poplars and a sugar tree, called for as a corner of said 500,000-acre tract, once stood; but the said commissioner found and reported against said contention and against said pretended corner, and against the location of said tract contended for by said Campbell and Sheppard and their clients and associates. Thereupon the said Campbell and Sheppard, conspiring and contriving together, and with sundry of their clients and associates, as this defendant, upon information and belief, charges, on their own motion, initiative, and accord, gathered up Riley Lester and John H. Lester, who had been witnesses for said Campbell and his clients in said chancery cause in said state court, and not elsewhere, and presented themselves unsolicited by any officer or agent of the United States before the grand jury then sitting in this cause at its April, 1902, term, and insisted upon testifying before said grand jury, and did testify before said grand jury, as this defendant is informed and believes. At the same time, and as a part of the same plan and arrangement, came one Malcolm Jackson, Esq., an attorney not in the employ of nor in any manner connected with the government of the United States, but representing the private persons interested and claiming adversely to said King in said chancery suit in said state court, with the aforesaid indictment herein prepared in advance, as this defendant is informed and believes, and, without reference to any evidence that might be given and produced before said grand jury then and there sitting, and together with said Campbell and Sheppard, procured said paper to be received and returned as the indictment in this case, and to be indorsed by the district attorney, and this defendant, upon credible information and belief, says that the said indictment was not drawn or prepared by or under the direction of any attorney, officer, or agent of the

United States, nor at the procurement or request of any such attorney, officer, or agent, but that the same was drawn, devised, contrived, and procured, and the evidence therefor, if any there was, tending to justify it, procured and furnished solely by private and voluntary prosecutors."

And in the affidavit for change of venue, among other facts, it is stated in substance that within the boundaries of the Morris grant, under which King claims, is included some 500,000 acres of land; that, since King began to assert his title to this land, various suits and actions affecting it have been instituted, and many are still pending, both in the federal and in the state courts, in the states of Virginia and West Virginia; that many of the claimants adverse to King in the causes affecting said lands are residents of Cabell county, in the town of Huntington, W. Va., in which the present case was tried, and many of the others are closely related and connected with the residents of the said town and county, and adjoining counties, by blood and marriage, and through business, political and social relations; that the principal attorneys representing interests adverse to King, including C. W. Campbell and his law partner, reside at Huntington, and have extensive acquaintance and many friends, adherents, and partisans, and great influence and prestige in the said town, and throughout the said county and the surrounding counties. It is further set forth that in the suit in the name of the State of West Virginia v. King and others, pending in the circuit court of Cabell county, there has been an investigation before a commissioner in chancery relative to the alleged corner on Race Fork of Knox Creek, which is referred to in the indictment, and that the commissioner, after taking testimony, found and reported that certain stumps claimed to be those of the three poplars and sugar tree said to have been destroyed were not stumps of any corner trees, or marked trees, and that there was no corner of the Morris tract at that place, and, continuing, I find the following statement in the affidavit for change of venue:

"That much bitterness of feeling arose out of the said case, and in revenge and in an effort for personal vindication and in the hope that some 'moral effect' upon the final action upon said commissioner's report might be had, as affiant believes and charges, the said Campbell and Sheppard, upon their own motion, went before the grand jury and procured the said indictment to be made; and they and their clients in said suit of State of West Virginia v. King et al., procured other counsel to appear and to assist them and to draw and prepare the said indictment, and this affiant is informed by the district attorney that the said Campbell, and Sheppard, and other counsel employed by private persons, will have, if permitted by the court, the practical and active conduct and prosecution of this cause. That the cause is not instituted and prosecuted at the instance and in the interest of the government of the United States, but by private persons for private purposes and as an auxiliary to the land litigation between said King and those interested with him on one side, and the persons claiming said land adversely to him and their counsel on the other."

It is true that the court below declined to consider the plea in abatement, and denied the motion for change of venue, but, notwithstanding this action of the court, the statements in the plea and in the affidavit filed for change of venue are in the record, and, as before stated, there is nothing to show that they were controverted. These

statements tend to show, at least, that the interest of private parties prompted the institution of this case, and, taken together with the allegations in the indictment, there plainly appears in the whole proceedings the earmarks of a criminal prosecution inaugurated and conducted for the attainment of private and personal ends, rather than the due administration of public justice. In my opinion a case of this importance, and one so materially affecting the rights and interests of citizens, should not be sent to the grand jury without previous investigation by the officers or agents of the government appointed for the purpose, and not until, upon such investigation, it is made satisfactorily to appear that the ends of justice are to be subserved by the prosecution. It is not denied that Sheppard and Campbell, two lawyers, both of whom are indorsed upon the indictment and were examined as witnesses before the grand jury, were interested adversely to King in the land litigation, both as attorneys and as claimants of the land which King is seeking to recover under his patent. The prosecution was not initiated by any officer or agent of the United States, nor, so far as appears, even suggested by such officer or agent. On the other hand, it is admitted that the indictment was prepared outside of the office of the United States attorney for the district; was drafted by an attorney retained and employed by private parties; was carried before the grand jury by attorneys who appear against King in the land litigation, and who themselves, as above stated, are named as witnesses on the indictment, and were sworn and examined as such witnesses. It is not the policy of the United States to accept the voluntary services of attorneys in the prosecution for violation of its criminal laws. The Congress of the United States has wisely provided a department of justice, at the head of which is the Attorney General, and associated with him the Solicitor General, and a corps of assistants. This department has, in general, the control and direction of prosecutions for the violations of the criminal laws of the government, and, in addition, in each judicial district the law provides for an attorney of the United States, whose official duty it is to prosecute in behalf of the government. Besides this, in every department there are agents, examiners, and other instrumentalities provided, through which alleged offenses against the government are investigated, and parties charged with crime brought to trial. It is true that in many of the states what are known as "private criminal prosecutions" are permissible, but in such cases the usual proceeding is to indorse the name of the private prosecutor on the indictment before it goes to the grand jury, and in the end, if the charge is ascertained by the court to be unfounded, frivolous, or malicious, the indorsed prosecutor is made to pay the costs. But there is no such provision governing proceedings in criminal causes in the courts of the United States. In these courts private prosecutors are unknown. I lay it down as a proposition based upon the highest principles of justice that it is dangerous to open the way for the use of the grand jury as an instrument for the furtherance of interests involved in civil controversies between private parties. In a charge to the grand jury, delivered by the late Justice Field in 1872, he said:

"The grand jury is designed as a means of not only bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting citizens against unfounded accusation, whether it come from government, or be prompted by partisan passion or private enmity."

See 2 Sawy. 699, Fed. Cas. No. 18,255.

The circumstances which surrounded the institution of this prosecution, the fact that some of the persons who were active agents in the procurement of the indictment were interested, both as attorneys and claimants, in the land litigation with King, that private counsel was employed to prepare the indictment and prosecute the case in court, and other incidents connected with the proceeding—must necessarily impress the unprejudiced mind with the belief that the prosecution is intended as an auxiliary to the land litigation arising under the Morris patent, and in aid of those claiming adversely to King. Is a party to a civil action pending in court, which is only at issue upon the pleadings and not set for trial, with no testimony taken or witnesses subpœnaed in his behalf, to arrogate to himself the assumption that justice abides alone in him, and with his contention, and that concerted action on the part of his adversaries to disprove his claim is a crime? If such be the law, then in nearly every case of importance in the courts, the parties on the one side or the other, and perhaps on both, would be liable to indictment.

The exceptions to the action of the court below upon the plea in abatement and on the motion for change of venue are not presented in the record in such way as to authorize a review of the same by this court, and I have only adverted to these matters in order to discuss the propriety of criminal prosecutions instituted under the conditions appearing in this case, and to again reiterate that it is dangerous to both the personal and property rights of the citizen to permit the use of the grand jury in aid of civil litigation.

THE ATLANTIC CITY.

(Circuit Court of Appeals, Third Circuit. January 24, 1906.)

No. 50.

1. COLLISION—STEAM VESSELS MEETING—APPLICATION OF RULES.

Rule 3 of the supervising inspectors in force in 1896, providing that "if, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other," he shall signify the same by signals, and, if within half a mile of each other, the vessels shall slow down until an agreement is made and understood, does not apply to steamers meeting on the Delaware river where it is 2,000 feet wide, on such courses that, if they are maintained, the vessels will pass in safety, and under such circumstances one of the vessels is not in fault for keeping her course and speed without signaling.

[Ed. Note.—Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. SAME—CHANGE OF COURSE—MISTAKING SIGNALS.

A steam vessel, meeting another on courses which, if maintained, would have taken them past each other starboard to starboard without

danger of collision, *held* solely in fault for a collision between them brought about by her mistaking a signal from another vessel for one from the meeting steamer and suddenly porting her helm when they were not more than 300 feet apart; the other vessel having kept her course until such maneuver, when she at once stopped and reversed.

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

For opinion below, see 136 Fed. 996.

John F. Lewis, for appellant.

Samuel Park, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. A libel was filed in this case, in the district court, by the owner of the river steamboat "Sylvan Glen," against the steam ferryboat "Atlantic City," to recover damages for a collision which occurred August 18, 1896, at about 11 o'clock at night, between the "Sylvan Glen," which was bound up the Delaware river, and the ferryboat "Atlantic City," which was bound down, somewhere about mid-channel, opposite the city of Philadelphia. The libel charges that, when the steamboat "Sylvan Glen," which was bound from Washington Park, in New Jersey, to Arch Street Wharf, Philadelphia, had reached about opposite South street, the steam ferryboat "Atlantic City," running between Chestnut Street Wharf, Philadelphia, and Kaighn's Point, Camden, was sighted by those in charge of the "Sylvan Glen"; that the "Atlantic City" was then about opposite Walnut street, and was showing her green light to the "Sylvan Glen"; that those in charge of the "Sylvan Glen" gave a signal of two whistles to the "Atlantic City"; that the "Atlantic City" did not reply at once, but shortly after, gave a signal of one whistle to the "Sylvan Glen," and changed her course to starboard; that thereupon the "Sylvan Glen" ported her helm, in order to pass port to port; that at this time the "Sylvan Glen" was about half a square below the new Boston Steamship Wharf, and the "Atlantic City" was about the same distance above; that the "Atlantic City," at this time, was showing her red and green lights, but immediately the course of the "Atlantic City" was changed to port, heading almost directly to the "Sylvan Glen," the "Atlantic City" blowing danger signals; that the engines of the "Sylvan Glen" were stopped and reversed, but that the "Atlantic City" kept on, striking the "Sylvan Glen" on the port side, at the forward gangway, producing serious damage to the "Sylvan Glen." The libel charges that the said collision was occasioned through no fault or negligence on the part of the "Sylvan Glen," but was wholly caused by the negligence and carelessness of those in charge of the navigation of the "Atlantic City," in that: (1) Upon receiving the signal of two whistles from the "Sylvan Glen," the two vessels at that time being upon courses which did not involve risk or collision, she gave a cross signal of one whistle, and ported her helm, thereby changing her course to starboard, nearer the course of the "Sylvan Glen"; (2) that, after giving said signal of one whistle, and porting her helm, she did not keep under said port helm, but instead thereof, starboarded

her helm and changed her course to port, bringing her in contact with libelant's boat, "Sylvan Glen"; (3) that the "Atlantic City" did not stop and back, when those in charge thereof saw that a collision was probable, and that she did not keep and maintain a good and efficient lookout.

The case is fully stated in the findings of fact made by the learned judge of the district court, in his opinion. These findings are not only accepted as judicial findings of fact are required to be, but, after a careful reading of the testimony, we are in entire agreement with them. This portion of the opinion is as follows:

"I think, however, the weight of the testimony establishes the following facts: The 'Sylvan Glen' left Washington Park, below Philadelphia, about ten and a half o'clock in the evening, bound for the Arch Street Wharf, Philadelphia. She passed up the river, somewhat on the Philadelphia side of the middle of the river. When about opposite the South Street Wharf her pilot sighted the 'Atlantic City' coming out from her wharf at Chestnut street and turning down the river. After straightening out her course, the 'Atlantic City' was about in the middle of the river. Each of the vessels showed to the other her green or starboard light. When they were not over half mile apart, and while each was showing to the other her green light, each of them gave to the other a signal of two whistles, thus indicating the intention of their respective pilots to pass starboard to starboard. Neither of the pilots heard the signal of the other. Notwithstanding this fact, both of the vessels were continued at full speed without the repetition of any signal, and, on the apparent assumption that each vessel would continue to show her green light to the other, and that they would pass each other on their starboard sides. After they had reached a position of probably not more than 300 feet apart, the 'Glen,' as all her witnesses admit, suddenly ported her wheel and sheered across the 'Atlantic City's' bow. Almost instantly it became evident that there was danger of collision, and the engines of both vessels were stopped and reversed, but too late to prevent a collision. The 'Atlantic City' struck the 'Glen' near her port bow. Had the two vessels continued their original courses, they would have passed starboard to starboard without danger of collision. The pilot of the 'Glen' says that the 'Atlantic City,' after first showing her green light to the 'Glen,' gave a signal of one blast, starboarded her course, and then after the 'Glen' had starboarded her course, the 'Atlantic City' ported her course and 'chased' the 'Glen' about the river, and thus caused the collision. The weight of evidence satisfies me that the 'Atlantic City' continued her course with a steady wheel, and that the pilot of the 'Glen' is mistaken in his statement that the 'Atlantic City' in anywise altered her course. The pilot of the 'Glen' further says that he ported his wheel and attempted to pass on the port side of the 'Atlantic City,' because of a signal of one blast given to him by the 'Atlantic City.' In this statement the pilot of the 'Glen' is also clearly mistaken. It appears that a steam tug with a car float in tow was crossing the river from Camden to Philadelphia ahead of the 'Glen.' The pilot of the tug says that as he was crossing the river the 'Atlantic City' crossed his bow, and just as the 'Atlantic City' was so doing the 'Glen' gave a blast of one whistle, which he, the pilot of the tug, understood to be for him, and that he responded to it with one blast. By these signals, the pilot of the tug understood that the 'Glen' would pass to the stern of the tug. The pilot of the 'Atlantic City' and other witnesses declare that the 'Atlantic City' gave no signal of one blast, and it is quite clear to me that the pilot of the 'Glen' mistook the signal of the tug for the signal of the 'Atlantic City.' The collision occurred a little to the Camden side of the middle of the river, at a point where the river is about 2,000 feet in width."

The situation disclosed by these findings of fact, is, then, simply, that the "Sylvan Glen" was proceeding up the river a little to the westward of the middle of the channel, which was about 2,000 feet wide, when she sighted the "Atlantic City" coming out of her wharf at Chestnut street, and turning down the river; that when she had so turned on her course down, the steamers were about half a mile apart, each showing to the other her green or starboard light. Each of them gave to the other a signal of two whistles, indicating the intention of their two pilots to pass starboard to starboard. The course of the "Atlantic City" was about in the middle of the river, or as seems probable from the testimony, after the signals were given, a little to the eastward thereof. That after the blowing of the whistles, both vessels continued at full speed, on the apparent assumption that each understood the other's signals, and that they would pass each other on their starboard sides. As they passed over the half mile that separated them when the signals were blown, it is manifest that the course of each was to the starboard of and parallel with the course of the other, and that these courses were sufficiently separated, and insured a safe passing. That their courses continued on these parallel lines, until the "Sylvan Glen," when not more than 300 feet away, ported her helm and sheered across the "Atlantic's" bow. The danger of collision being at once evident, the engines of both vessels were stopped and reversed, but too late to prevent a collision. The learned judge finds, as a fact deduced from the testimony, that "had the two vessels continued their original course, they would have passed starboard to starboard, without danger of collision."

The situation thus described, was such as to justify either vessel, although not hearing the signal of the other, in assuming that its own signal was heard, because both were acting in conformity to the signals given by pursuing their parallel courses up and down the river. There was nothing for either to do but to proceed on the course she was on, continuing to show green light to green light. The margin of safety was as great as was necessary. As the distance between them was lessened, each vessel had a right to suppose that the other was cognizant of, and appreciated, the situation and the conduct necessary to safety, which was that each should keep on its course, and thus pass starboard to starboard. No signaling was necessary to inform either vessel what such a situation required. It is a fact, however, as found by the learned judge of the district court, that, when not more than 300 feet away, the "Sylvan Glen" suddenly ported her helm and sheered across the bow of the "Atlantic City"; that the "Atlantic City" had not changed her course, but was continuing the same with a steady wheel, and immediately, upon the sheering of the "Sylvan Glen," stopped, and then reversed her engines at full speed. Stopping here, it is difficult to see upon what ground fault can be attributed to the "Atlantic City." She had a right to proceed upon her course at full speed down the river, with the "Sylvan Glen" within view but upon such a course parallel to her own as would insure safety, if adhered to. Vessels are not required, in navigating broad river channels, to go at slow

speed, to avoid collision with another vessel, which collision could only occur by a reckless disregard of the rules of navigation, as well as of the dictates of common sense. The situation just prior to the sheering of the "Sylvan Glen," in this case, was such that the course of safety was obvious to both parties, and nothing was due, or necessary, in the way of signaling from one to the other. No signal was required from one vessel, to inform the other that they were to pass to starboard, as they approached within the half mile on these parallel courses. Nothing but gross negligence on the part of one or both, could have brought them together.

This brings us to consider the ground upon which the learned judge held both vessels at fault. He cites rule 3 of the board of supervising inspectors, in force at the date of the collision, as follows:

"If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The learned judge then says:

"The proper observation of this rule would have prevented any collision. Neither pilot was properly discharging his duty when he continued on his course with unabated speed, after having given his signal of two blasts, without having received any response from the other vessel, and without having ascertained the intention of the other vessel."

We cannot agree with the learned judge, in thinking that this rule is controlling or applicable in the present case. It manifestly refers to vessels so approaching each other, as that it is not obvious whether they will pass to starboard or port. It applies to vessels in a narrow channel, or to vessels approaching head on, or nearly so, where "either vessel fails to understand the course or intention of the other." This was obviously not the situation in the case at bar. The testimony shows, and the court in its findings of fact, has found, that after the signals were given, when half a mile apart, each vessel understood the intention of the other, for the learned judge says that they continued, without repetition of signal, on the apparent assumption that each would show her green light to the other and that they would pass each other on their starboard sides. The learned judge has also found that, had the two vessels continued their original courses, they would have passed starboard to starboard, without danger of collision. There was no reason why in this case, the pilot of either vessel, as the rule states, should be in doubt as to the course or intention of the other, and the testimony shows, as a matter of fact, that no confusion or doubt, or cause for the same, existed until the "Sylvan Glen" suddenly sheered across the bow of the "Atlantic City," when only 300 feet away; the captain of the "Sylvan Glen," in substance and effect, testifying that he had no other idea than that they would pass starboard to starboard, until he heard the one whistle of the tug, as the "Atlantic City" passed across its bow, which he mistakenly took

for a signal from the "Atlantic City," that she intended to sheer to port. We do not think that, by any just interpretation of the meaning of rule 3, the "Atlantic City" came within its operation.

The "Sylvan Glen" must therefore be held wholly in fault. The fact, as found by the learned judge of the court below, that the one whistle given by the tug crossing from Camden to Philadelphia, as the "Atlantic City" crossed its bow, was mistaken by the "Sylvan Glen" for a signal whistle from the "Atlantic City," while it explains the otherwise incomprehensible conduct of the "Sylvan Glen," cannot, of course, put the "Atlantic City" in fault, and no contention is made that it does. The fact is here referred to, only to relieve the "Sylvan Glen" from a charge of wanton recklessness in sheering across the bow of the "Atlantic City."

The judgment of the court below must be reversed, with instructions to enter a decree dismissing the libel.

UNITED STATES v. GUEST.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 610.

1. INTERNAL REVENUE—LIABILITY ON DISTILLER'S BOND—TAX ON SPIRITS LOST IN WAREHOUSE.

A surety on a distiller's bond is not relieved from liability for the tax upon spirits lost in the distillery warehouse, by the fact that at the time of the loss the warehouse was in the possession of the collector, who had seized it for an alleged violation of law, and that the loss was through the negligence of the custodian; his remedy in such case being by an appeal to the Secretary of the Treasury for an abatement of the tax, under Rev. St. § 3221 [U. S. Comp. St. 1901, p. 2087].

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Internal Revenue, § 70.]

2. LIMITATION OF ACTIONS—SUIT TO RECOVER TAX—INTEREST RECOVERABLE.

Under Rev. St. § 3184 [U. S. Comp. St. 1901, p. 2072], providing for the collection of delinquent internal revenue taxes with a penalty of 5 per cent. thereon and interest at the rate of 1 per cent. a month, such interest is not a penalty, but is recoverable as interest, and the limitation of five years, prescribed by Rev. St. § 1047 [U. S. Comp. St. 1901, p. 727] for suits to recover penalties, does not apply to a suit to recover such interest as a part of the debt.

3. SAME—DISTILLER'S BOND—TAX ON SPIRITS LOST IN WAREHOUSE.

The sureties on a distiller's bond are not liable, in the first instance, for taxes on spirits which were lost after being placed in a warehouse, and thus brought within the express terms of the warehousing bond, whatever their ultimate liability may be should the remedy by suit on the latter bond prove unavailing.

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

John G. Capers, U. S. Atty., and Thomas W. Bacot, Asst. U. S. Atty.

Blythe & Blythe, for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

WADDILL, District Judge. The United States, the plaintiff in error, filed its complaint in the court below, on the 19th day of March, 1904, against William A. Morgan, James L. Trammel, and John E. Guest, the latter of whom is the defendant in error here, to recover judgment upon a certain distiller's bond executed by the said William A. Morgan, as principal, with the said Trammel and Guest, as sureties. The government sought to recover the sum of $51.15, stamp tax on spirits contained in a certain package removed from one of its distillery warehouses, with interest thereon at the rate of 1 per cent. per month from the 1st day of October, 1896; and also for the sum of $88.12 for deficiency spirits during the months of June and July, 1896, with interest at the same rate from the 1st day of February, 1897, until paid, together with a penalty of 5 per cent. imposed upon the said two sums. Judgment by default was entered against the principal defendant; Trammel, surety, had left the state, and service was not had upon him; and the surety John E. Guest appeared and interposed his defense, setting up, among other things, the plea of the statute of limitations, the lack of notice to him as surety of the assessment, and specially pleaded as follows:

"Specifically answering the allegations of the second and fourth paragraphs of the complaint, this defendant alleges on information and belief that, some time during the summer of 1896, the collector of internal revenue for the district of South Carolina seized the distillery of the said William A. Morgan, and all the whisky in the warehouse, and took possession of the same; that the said collector, his agents and servants, so negligently guarded said whisky, that large quantities thereof were abstracted from said warehouse, including the said package No. 57, and that this caused the alleged deficiency set forth and sued for in this action; and that therefore this defendant, as surety on said bond, is not liable therefor."

A jury was impaneled, and the allegations set up in said fourth paragraph admitted, as well as the fact that the cause of action arose more than six years prior to the time of the institution of the suit. Upon this pleading, the court, among other things, ruled that the recovery for the special tax of $51.15 could not be had against the defendant, because of the loss of the spirits upon which the tax was charged by reason of the negligence of a government officer, after the same had been taken possession of by the government, and without fault on the part of the defendant. The court further held that the statute of limitations did not run against the government, as to the debt sued on, but that, under section 1047 of the Revised Statutes [U. S. Comp. St. 1901, p. 727], so far as the penalty was concerned, the statute limiting such recovery to five years applied; and that the 1 per cent. claimed by the government was in the nature of a penalty, and was barred, and only legal interest could be recovered. And the court thereupon instructed a verdict in favor of the government against the defendant Guest for only the sum of $88.12, the deficiency sued for, with interest from the 7th day of February, 1897, at the rate of 7 per cent. per annum; that being the legal interest rate in the state of South Carolina. The government reserved exceptions to the rulings of the court, and presents for our consideration the correctness of such rulings in the three particulars mentioned, namely: Whether

recovery can be had against a surety on a distiller's bond for losses arising in the distillery warehouse, after the spirits on which the tax was assessed had been seized by the government officer; whether the 1 per cent. per month specified in the statute was recoverable as interest upon the debt due the government, and as against which the statute of limitations would not run; or whether the same should be treated in the nature of a penalty, and subject to the five-year limitation prescribed by the act of Congress.

We are inclined to differ with the learned judge of the lower court in all three particulars. As to the loss of the spirits, it is true the distillery and its contents had been seized by the government's representative, and the defendants may be said to have in no manner brought about the loss; still it does not serve to relieve the liability under the bond. That the government is not liable for negligence or laches of its officers or agent is well recognized and settled, and such negligence constitutes no bar or defense to a recovery upon a bond taken by the government. Hart v. United States, 95 U. S. 316, 24 L. Ed. 479; Minturn v. United States, 106 U. S. 437, 1 Sup. Ct. 402, 27 L. Ed. 208; United States v. Witten, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81.

Section 3221 of the Revised Statutes [U. S. Comp. St. 1901, p. 2087] provides a method for the abatement of taxes on distilled spirits, where the same have been lost or destroyed, namely, by appeal to the Secretary of the Treasury, and it is only under this section that relief in such cases can be secured.

Section 3184 of the Revised Statutes [U. S. Comp. St. 1901, p. 2072] prescribes interest at the rate of 1 per cent. per month upon taxes and assessments of the character involved here, and our conclusion is that this is recoverable as interest, and is not a penalty; there being a 5 per cent. penalty specifically prescribed on the amount of the tax.

This is an ordinary suit, or, technically speaking, action of debt, upon a bond taken by the government to secure its revenue; and, on recovery under the same, interest runs at the rate of 1 per cent. per month, or 12 per cent. per annum, the rate prescribed by the act of Congress; and the statute of limitations, as recognized by the court below, does not run against the government in the collection of its debts, while it does against the enforcement of the penalties, by reason of the act of Congress in such case made and provided.

While these are our views upon the three propositions discussed, we do not see that the same avails the government materially in this case, since the judgment as entered against the appellee is for more than the government was in any event entitled to recover in this case on the bond sued on. This is a suit upon a distiller's bond, and not on a warehousing bond; and it being admitted, as averred by the fourth paragraph of the defendant's answer hereinbefore recited, that large quantities of the spirits, after the same was placed in the distillery warehouse, were abstracted therefrom, including the stamp taxed package sued for, and that by reason thereof the liability for deficiency spirits sued for was incurred, manifestly a recovery for such causes cannot be primarily had upon the distiller's bond, as distinguished from the warehousing bond.

Two bonds are executed by distillers; the first known as the distiller's bond, executed prior to commencing business, and the other, as a warehousing bond, to cover the aggregate monthly deposits of spirits in the warehouse. The condition of the first bond is as follows:

"The condition of the foregoing obligation is such that A. B. now intends on and after the ——— day of ———, 190—, to be engaged in the business of a distiller. * * * Now, therefore, if the said A. B. shall in all respects, faithfully comply with all the provisions of law relating to the duties and business of distillers, and shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions, and shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be incumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business, then this obligation shall be void; otherwise it shall remain in full force."

And of the warehousing bond, as follows:

"Know all men by these presents, that we, A. B., as principal, and C. D., as sureties, are held and firmly bound, etc. The condition of the foregoing obligation is such that if the above bounded principal, or either of them, or the heirs, executors or administrators, or either of them, shall well and truly pay, or cause to be paid, unto the Collector of Internal Revenue for the ——— Collection District of ——— the amount of tax at the rate imposed by act of Congress of August 28th, 1894, due and owing on the following described spirits, to wit: ——— which were deposited during the month ended ——— and entered for deposit in the distillery warehouse No. ——— on the ——— day of ———, 189—, before such spirits shall be removed from such warehouse, and within eight years from the date of said entry, then this obligation shall be void; otherwise to remain in full force and virtue."

It appearing upon the pleadings and proof in this case that whatever loss the government sustained arose, not in connection with the distillation of the spirits, but from causes arising after the spirits had been seized by a government officer in the distillery warehouse, resulting in the loss altogether of one package, and confessedly a shortage in others, recovery should have been sought on the warehousing, as distinguished from the distiller's bond.

The suggestion is made that the recovery sought can be had against the sureties under the distiller's as well as the warehousing bond, and that the latter bond is intended as mere cumulative security for the obligations arising under the former bond. United States v. National Surety Co., 122 Fed. 904, 59 C. C. A. 130; United States v. Richardson (D. C.) 127 Fed. 893. Conceding this to be true, and which is a proposition not necessary to be passed on here, it does not follow that for losses of the character involved in this case, and for which primarily recovery should be had against the sureties on the warehousing bond as distinguished from the distiller's bond, no recovery need be sought at all on said warehousing bond, but reliance be placed entirely upon those liable under the distiller's bond; thereby placing the burden upon a set of sureties who, if at all, are only secondarily liable, to the exclusion of those primarily responsible.

Any error of the lower court, so far as the government is interested in this case, being harmless in character, the judgment of that court will be affirmed.

KELLER, District Judge. I concur, except as to the implied statement in the opinion that, as a last resort, recovery might be had on the distiller's bond for tax due on warehoused spirits, which position I doubt.

THE CLIFTON.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 614.

1. SHIPPING—MORTGAGE OF VESSEL—WHAT CONSTITUTES.

A contract reciting that the second party had advanced to the first parties a sum of money with which to purchase a steamboat, the title to be taken in the name of said second party, which provided that the first parties should have possession of the vessel nominally as lessees, and that on payment by them to the second party of the sum so advanced within three years, with interest, the title should be conveyed to them, and, further, that in case of her loss the second party should collect the insurance and account to the first parties for the excess above the amount due him, must be construed as a mortgage only, leaving the first parties the owners of the vessel, especially where it is shown that they had previously formed a partnership for the purpose of buying and operating the vessel, and that they in fact merely borrowed the money from the second party and executed the contract as security.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 96.]

2. ADMIRALTY—JURISDICTION—SUIT BY MORTGAGEE.

A contract by which a vessel is mortgaged to secure money borrowed to pay the purchase price thereof is not maritime in character, and a court of admiralty will not entertain a suit by the mortgagee to recover possession of the vessel thereunder.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 181–184; vol. 44, Cent. Dig. Shipping, § 95.]

Appeal from the District Court of the United States for the Northern District of West Virginia, in Admiralty.

The appellant, Darlington, filed his libel in the court below against the steamboat Clifton, her tackle, apparel, etc., and H. B. Hulings and George F. Jones, to recover possession of said steamboat, under the following agreement filed with the libel:

"Articles of agreement made and concluded this 18th day of August, A. D. 1904, between George F. Jones, of the borough of Wilkinsburg, county of Allegheny and state of Pennsylvania, and H. B. Hulings, of the city of Allegheny, county of Allegheny and state of Pennsylvania, of the first part, and O'Hara Darlington, of the town of Sharpsburg, county of Allegheny and state of Pennsylvania, of the second part, as follows, to wit:

"Whereas, the party of the second part hereto has advanced to the parties of the first part hereto the sum of $4,000.00 for the purpose of purchasing the steamboat Clifton in the name of the party of the second part hereto and having said steamboat put in good repair and fully insured in the name of the party of the second part hereto, and whereas, the parties of the first part hereto have purchased and fully paid for the said steamboat Clifton and taken the full and legal title thereto in the name of the party of the second part hereto and put the said steamboat in good repair:

"Now, this agreement witnesseth, that for and in consideration of the premises and the mutual covenants and agreements herein contained, and for the sum of one dollar in hand paid by each party to the other, the receipt of which by each from the other is hereby acknowledged, the parties to this agreement hereby covenant and agree together, as follows, to wit:

"First. The parties of the first part hereto agree to pay to the party of the second part hereto the sum of $4,000.00 with interest at 6 per cent. payable quarterly from the date hereof in three years from the date hereof, reserving to themselves, however, the privilege of paying the whole or any part thereof at any regular interest paying period.

"Second. The party of the second part hereto agrees, on the receipt of the sum of $4,000.00, with interest from the date hereof, all of any such sum which, with any payment that may have been previously made hereon, according to the paragraph hereof, marked first, which will aggregate the sum of $4,000.00 with 6 per cent. interest thereon (interest, however, not to be charged on any part of the principal sum after the date of the payment of the same) to turn over to the parties of the first part hereof or to any person they may nominate the full legal title to the steamboat Clifton, and all papers relating thereto free and clear of all incumbrances imposed by him, the party of the second part hereto, and to hold them the parties of the first part hereto, discharged from any further liability for the said sum of $4,000.00 advanced to them as recited in the preamble hereof. And further that in case of the destruction of the said steamboat by fire, the party of the second part hereto agrees that he will hold the surplus of insurance money recovered on account thereof, over and above any indebtedness arising under these articles of agreement, subject to the orders of the parties of the first part hereto, and that he will prosecute the insurance company carrying risks on this boat to the full extent of their liability.

"Third. The party of the second part hereby agrees to lease to the parties of the first part hereto the steamer Clifton for the term of three years for annual rental of one dollar with the privilege of removing said steamboat Clifton at will to any point on the Allegheny, Monongahela or Ohio rivers, or any of their tributaries.

"And for the true and faithful performance of all and singular the above stipulations and undertakings the parties hereto bind themselves, each to the other, and their respective heirs, executors, administrators and assigns.

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

"[Signed] O'Hara Darlington. [Seal]
"Geo. F. Jones. [Seal.]
"H. B. Hulings. [Seal.]"

Under this agreement, which he termed a conditional sale or lease, the libelant claimed to be the owner of the steamboat, and that Hulings & Jones were wrongfully withholding the same from him, and that they had forfeited all rights under the contract aforesaid, and that they willfully, designedly, and fraudulently failed and refused to comply with the conditions of the conditional sale or lease, and that the same had thereby become of no effect and inoperative, and he accordingly prayed for the possession of the steamboat, and such other and further relief to him as to law and justice appertained, and seemed meet, etc. Process was regularly issued and the steamboat attached and taken possession of by the marshal. To this libel the respondent H. B. Hulings excepted, and made answer, setting up in effect that he and the said Jones entered into an agreement of copartnership for the purpose of acquiring the steamboat Clifton, and operating the same upon the waters of the Allegheny, Monongahela, and Ohio rivers and their tributaries, and that in pursuance thereof they borrowed from the libelant the sum of $4,000 to pay for the steamer, pursuant to the agreement hereinbefore recited, and bought and paid for the same, and took the title in the name of the said Darlington, but with the understanding that, when the $4,000 and interest was paid, the full legal title to the boat was to be turned over to them, or any person they might nominate; that the libelant was not the owner of the steamboat, but that the said Hulings & Jones were in fact the real owners thereof and owed the $4,000 thereon to said Darlington, as well as certain other moneys referred to, and he further charged that his copartner, Jones, was a person of small means, and that he had colluded

with the libelant to secure possession of the steamboat from respondent, and to deprive him of his rights under his contract of copartnership with said Jones, as well as under the contract of copartnership aforesaid with libelant; that respondent was the master of the steamer, and, having discovered the purpose on the part of his partner and the libelant to deprive him of his rights as aforesaid, he, prior to the time of the filing of the libel herein on the 13th day of February, 1905, to wit, on the 18th day of January, 1905, duly filed his bill in equity in the circuit court of Wood county, W. Va., against said Jones and Darlington, asking the winding up of the partnership between himself and his said partner, and that said Jones and Darlington should be prohibited from interfering with the business and the conduct of the same until its dissolution and the completion of certain contracts of affreightment then in process of execution, and that a receiver be appointed to take charge of the property of the copartnership, including the steamer, and complete said contracts. A receiver was duly appointed who gave bond in the penalty of $25,000, and regularly possessed himself of said partnership property, including the steamer; and the circuit court of Wood county subsequently directed the completion of said contracts of affreightment, and to secure money to that end authorized the issuance of receiver's certificates in the sum of $3,500.

In the subsequent progress of said admiralty cause the receiver of the state court duly appeared, filed his petition and answer, setting up his appointment as receiver by the circuit court of Wood county, W. Va., prior to the institution of the admiralty proceedings, and of the fact of his possession as such receiver of the copartnership property of Hulings & Jones, including the said steamboat, and of his dispossession thereof by the marshal, under the process issued in the admiralty cause, and asked for the protection of his rights as such, and in the latter cause he was also designated by the federal court as special receiver, to complete the contracts of affreightment aforesaid, and he gave bond to that court for that purpose. Evidence was thereupon duly taken, and the cause finally heard upon the pleadings and proofs, and the district court sustained the exceptions to the libel, and dismissed the same, from which action of the court, this appeal was taken.

John F. Hutchinson and L. R. Via, for appellant.

James W. Vandervort (Reese Blizzard, on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

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

The assignments of error are quite numerous in this case, but the more material questions arising upon the record are as follows: First. That the state court having acquired jurisdiction of the subject-matter in controversy, by reason of the suit in equity previously instituted therein, whether the district court had jurisdiction to entertain the libel, and if such jurisdiction existed, it ought to have been exercised under the circumstances. Second. Whether, merely because the subject-matter of the litigation was vessel property, a court of admiralty should have entertained jurisdiction thereof. Third. That the libelant was a mere mortgagee seeking to secure possession of mortgaged property, and not entitled to the interposition of a court of admiralty to secure such relief.

On the first and second propositions much can be said to support the contentions of the appellee, and a full discussion of the subjects will be found on the first in the case of Moran v. Sturges, 154 U. S.

256, 274, 276, 277, 284, 285, 14 Sup. Ct. 1019, 38 L. Ed. 981, and on the second, in the case of Ward v. Thompson, 22 How. 330, 16 L. Ed. 249; Rose's Notes, vol. 5, p. 945; The Eclipse, 135 U. S. 599, 608, 10 Sup. Ct. 873, 34 L. Ed. 269; Hughes' Admiralty, pp. 17, 18. But, in the view taken by the court of the character of the contract under consideration, it will not be necessary to pass especially upon these questions, as the third objection raised is conclusive of this case. The libelant under the contract between himself and Hulings & Jones hereinbefore recited, particularly when read in the light of the circumstances of its execution, and in connection with the agreement between the said Hulings & Jones, was manifestly not the owner of said steamboat, but a mere mortgagee thereof, that the paper under which the libelant now claims to be the owner of the steamboat was intended only as a security for $4,000 and interest, and that, in so far as it appeared to be otherwise, it was but a makeshift and device to cover up the real transaction which was only designed to secure him the money borrowed, while the vessel in point of fact belonged to Hulings & Jones.

Nothing is better settled than that a court of admiralty will not afford relief to a mortgagee seeking to recover possession of property mortgaged to secure the payment of a nonmaritime debt. Such a contract as the one under consideration here is in no sense maritime in character; the loan having none of the characteristics of such a debt, and having been effected without regard to the navigation or perils of the sea. Bogart v. The John Jay, 17 How. 399, 15 L. Ed. 95, Rose's Notes, vol. 5, p. 483, and cases cited; The Lottawanna, 21 Wall. 558, 582, 583, 22 L. Ed. 654, Rose's Notes, vol. 8, pp. 470, 477; The Guiding Star (D. C.) 9 Fed. 521, 524; The C. C. Trowbridge (D. C.) 14 Fed. 874; Deely v. The Ernest and Alice, 2 Hughes, 70, 77, Fed. Cas. No. 3,735.

It follows that the decision of the lower court is plainly right, and the same should be affirmed.

Affirmed.

BANK OF RAVENSWOOD et al. v. JOHNSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 621.

1. BANKRUPTCY—PRACTICE BEFORE REFEREES—OBJECTIONS TO EVIDENCE.
   It is the duty of a referee in bankruptcy on a hearing before him either as referee or as special commissioner to receive and record all evidence offered, noting objections made as required by General Order No. 22 (89 Fed. x; 18 Sup. Ct. vii).

2. SAME.
   A referee is not required to stop proceedings before him and to certify to the court for decision questions raised on objections to evidence.

3. SAME—PUNISHMENT OF CONTEMPTS.
   A referee has no power to punish a witness for contempt in refusing to answer questions or to produce documents that power being expressly vested in the District Court by Bankr. Act July 1, 1898, c. 541, § 41b,

30 Stat. 556 [U. S. Comp. St. 1901, p. 3437], which also clearly prescribes the duty of the referee.

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

Dorr Casto and W. N. Miller, for petitioners.
Walter E. McDougle, for respondents.
George W. Johnson, pro se.

Before PRITCHARD, Circuit Judge, and PURNELL and KELLER, District Judges.

PURNELL, District Judge. The counsel in this case did not appear at the hearing, but George W. Johnson, referee and special master, appeared, read the record and proceeded to argue the case when he was stopped by a question from one of the judges sitting. This was a petition to revise and superintend in matters of law a proceeding in bankruptcy, and the writer takes occasion to say that the record is exceedingly unsatisfactory, and the conduct of the case on the part of the contesting creditors not commendable in the eyes of the court. It is not satisfactory, for instance, for counsel to say to this court that the facts appear in the record, instead of making a succinct statement of facts, especially when they do not appear at the hearing. The District Judge says, in an opinion filed, which is the best statement of the case to be found in the record:

"In compliance with this order [referring a petition for discharge to the referee as special master to take the testimony and find the facts], the referee on the 13th day of February, 1905, commenced the taking of testimony with a view to ascertaining such facts and up to April 18, 1905, had made a record of 342 full typewritten pages, consisting largely of wholly immaterial matters, captious objections, remarks of counsel, reiterations of the same questions, and demands, to such an extent as to trespass to the last limit upon the patience of any court required to read it. It is absolutely safe to say, in my judgment, that every fact adduced in this record that in the remotest degree could be deemed material could and ought to have been clearly and fully presented in a record of 50 such typewritten pages.

"This criticism, kindly made, is justified by the fact, that the end of it has by no means, apparently, been as yet reached, for these 'depositions' stand uncompleted and the referee's duty unperformed, because, on petition and application of the protesting creditors, an order was entered on the———day of April, 1905, in the nature of a rule, by this court, against said referee, to cause him to answer and show cause for his alleged misconduct in refusing to admit testimony offered, and refusing to certify for review questions arising before him touching the admissibility of such evidence, and by his rulings practically causing certain witnesses to refuse both to answer certain questions and produce certain written evidence. To this petition and rule the referee has made answer and has certified the evidence taken, and this matter above is now before the court for its consideration.

"It seems that the parties, all represented by counsel, started out under the idea that the referee was to sit as a court and determine upon what testimony was admissible and what was inadmissible, and that they were to be bound by his rulings in this particular. A large amount of the testimony was taken under this understanding, when, it appears, counsel for the opposing creditors objected and supporting the objection with authorities that convinced the referee that he had been proceeding wrongly, he reversed his ruling, and determined that notwithstanding his opinion and judgment was

against the admissibility of certain evidence he would nevertheless permit the witness to answer the questions and allow the evidence to go to the court. To correct the error of his first method of procedure the referee recalled the witness Prewett, about whose testimony the trouble had arisen, and allowed all rejected matter to be enquired of under his statement and ruling that the objection should be sustained. Thereupon the witness Prewett refused to produce certain books demanded of him, and the referee refused to compel him to do so and further refused to certify the matter to the court for revision, on the ground that, before so certifying, all the testimony should be taken and all questions of objection certified at one and the same time. It should be added that the protesting creditors insisted that his expressing his opinion touching the admissibility of the testimony encouraged witnesses to refuse to answer and produce such testimony. Thus it will be seen that substantially three practical points have arisen touching the practice to be observed by the referee in taking testimony before him. (1) How far has he the power to pass upon and determine the admissibility of evidence presented to him? (2) When is he required to certify objections made to his rulings to the court for revision? (3) What power has he to determine as to whether a witness is recalcitrant and in contempt or not, and, if held to be so, what proceeding should be taken against him?"

We cannot concur in the decision of the District Court that a referee "acting in his character as referee or as special commissioner has the right to exclude evidence which he deems inadmissible." For this holding In re Wilde's Sons, 11 Am. Bankr. Rep. 714, 131 Fed. 142, is cited, and the learned judge states there are many cases to the contrary. Even if the conflicting decisions are considered, the general orders passed by the Supreme Court are controlling; they have the force of the statute, are made pursuant to express authority in the statute. The same question was raised in Re Sturgeon, 14 Am. Bankr. Rep. 681, 139 Fed. 608 (Circuit Court of Appeals, Second Circuit), in which the court says:

"Per Curiam. Under General Order No. 22 (89 Fed. x; 18 Sup. Ct. vii), the duty of the referee is to receive the evidence which is offered, to note objections and to record the evidence; and if either party persists in offering incompetent or irrelevant matter in evidence, the other party has a remedy, because the rule provides that 'the court shall have power to deal with the costs of incompefent, immaterial, or irrelevant depositions, or parts of them, as may be just.' The equity practice is to be followed by referees. The order directs him to proceed as referee. The referee must take all the evidence and note objections."

And the latter clause of General Order 22 of the Supreme Court (89 Fed. x; 18 Sup. Ct. vii) provides:

"The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just."

No amount of argument could make the matter plainer. Any one who will can understand. To the same effect the equity rule and the decision in Re Natelle De Gottardi, 7 Am. Bankr. Rep. 723, 114 Fed. 328; Dressel v. N. St. Lumber Co., 119 Fed. 531, 9 Am. Bankr. Rep. 541, In re Covington, 110 Fed. 143, 7 Am. Bankr. Rep. 373, Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521; Mears v. Lockart, 94 Fed. 275, 36 C. C. A. 239. The Philadelphian, 60 Fed. 425, 10 C. C. A. 127, 1 Gould & Tucker's Notes (2d Ed.) 200, 259, 102. The referee

and special master followed a different rule at first, but afterwards reversed his order, took down all the testimony, noted objections with his rulings thereon, and certified the record thus made to the District Court. The reference was to relieve the court and under the authorities this was the proper course. The petitioners have nothing to complain of.

But suppose the general orders of the Supreme Court had not provided as rule 22 (89 Fed. x, 18 Sup. Ct. vii) does for such proceedings; the bankruptcy act provides that when not otherwise provided the equity practice shall be followed and an examination of the rules in equity touching proceedings before a standing master or master pro hac vice will disclose the fact that the general orders in bankruptcy are in accord with such proceedings. This contention of petitioners that a referee should on objection stop the proceedings and certify questions raised has no foundation on which to rest. To permit such practice would create useless confusion and accomplish no good end. General Order 27 (89 Fed. xi; 18 Sup. Ct. viii) provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

See In re Hawley, 8 Am. Bankr. Rep. 632, 116 Fed. 428; Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521.

The referee, therefore, was right in refusing to stop the proceedings and certify for revision his rulings upon this testimony. In fact, this being a matter referred to him especially to ascertain facts alone, designed to aid the court in performing its duty in determining whether the bankrupt should be discharged or not, no possible revision could be had. The utmost extent the court could go would be to discharge the referee from further consideration of the matter and take it up and decide it without his assistance. There was therefore no excuse for this rule against the referee on this ground. The above disposes of the first and second questions.

Third, what power has a referee to determine as to whether a witness is in contempt or not, and, if held to be so, what proceeding should be taken against him? This presents no difficulty, for as a matter of law it is well settled by the bankrupt act itself. In a case where a referee believes a witness improperly refuses to testify or produce written testimony, after being ordered to do so, in other words, to be in contempt for any reason, it is his plain duty to set forth the contempt upon his record, certify the facts to the district judge, who will deal with the question as if the contempt had originally arisen in the District Court. The statute is explicit on this subject, and reference in such matters first to the statute, the proceeding and jurisdiction being strictly statutory, will, in most cases, solve doubts which otherwise plague and trouble the legal mind. Section 41 of the bankrupt statute (Act July 1, 1898, c. 541, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3437]) provides:

"Contempts before referees. a. A person shall not, in proceedings before a referee (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or refuse to appear after having been subpœnaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law:

* * * * * * *

"Contempt proceedings, penalty. b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the act complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."

The power to punish for contempt committed before referee is conferred by section 2, cls. 13, 16 (30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), read in connection with the section quoted. The power to punish for contempt is vested in the court—judge. It is a judicial power and cannot be referred or delegated. Smith v. Belford, 106 Fed. 658, 45 C. C. A. 526, 5 Am. Bankr. Rep. 291; Boyd v. Glucklick, 116 Fed. 131, 53 C. C. A. 451, 8 Am. Bankr. Rep. 393. But this proceeding is against, not the witness for refusing to obey an order of court, but the referee for refusing to make an order requiring the witness Prewett, a man not shown to be connected with the bankrupt, but a partner of his son, to submit his books; not the part of such books which it was suggested by counsel pertained to the partnership or the bankrupt's connection therewith, but his books entire, to be examined. Nor does it appear this witness Prewett refused to answer any proper question he was directed by the referee to answer. There is no element of contempt set out in the record on the part of either the referee or the witness. Romine, the bankrupt, and Prewett, the witness, deny most positively that G. R. Romine, the bankrupt, was a partner, which was alleged on information and belief, based on street conversation, and Prewett is called as a witness for the party making the allegation. He was his witness and the party calling him was bound by his testimony. This is elementary, as is the rule that a party cannot contradict or cross-examine his own witness. The course pursued can be viewed in no other light than an attempt to violate and ignore all the rules of evidence regarding this witness. Prewett denied most positively that G. R. Romine had any interest in the partnership, produced the original written agreement under which such partnership was formed between himself and John W. Romine, duly acknowledged, also the agreement by which such partnership had been dissolved on January 2, 1904, his cashbook, journal, ledger, the notes demanded, the statement of bankrupt's account with the firm, and stated that he had disclosed all that his books would show relating to his connection with either J. W. or G. R. Romine, the bankrupt. Petitioners' counsel persisted, without specifying what they wished to prove, in a general demand for all the books, and the referee ruled it was not necessary for them to be produced. This ruling was proper and

one the referee had authority in his quasi judicial capacity to make, subject to review by the district judge upon the whole record being certified as provided in the statute. It was not a proper time or subject, as was afterwards held by the judge, for a rule to show cause. There is no merit in the petition to regulate and review, hence it is adjudged that the District Court be affirmed in the order discharging the rule on the referee and the petition dismissed. This conclusion renders a consideration of the demurrer by G. R. Romine unnecessary. He seems to be only remotely interested in this petition to revise and review, if at all, and was not a necessary party. He will recover his costs in this court. The petitioners will be taxed with the costs in this court and it is suggested that the District Court tax the contesting creditors with all "wholly immaterial matters, captious objections, remarks of counsel, reiterations of the same questions and demands" included in the depositions taken before the referee or special master and all unnecessary costs incurred at their instance.

Petition dismissed.

THE INTERNATIONAL.

THE VENTURE.

(Circuit Court of Appeals, Third Circuit. January 30, 1906.)

No. 47.

COLLISION—YACHT AND TUG WITH TOW—YACHT DRIFTING IN RIVER CHANNEL.

A sloop yacht with a number of persons on board was making her way up the Delaware river at night with the flood tide. The wind was very light, and finally failed, leaving the yacht drifting without power of control from the western side of the river toward the center of the channel. No proper lookout was kept, but the master saw a tug and tow approaching from up the river when half a mile distant. Nothing was done to control the yacht until too late, and she continued to drift until she came into collision with one of the tows and was sunk. The tug also, which had three barges in tow abreast with a hawser and bridle, saw the yacht when half a mile distant almost directly ahead, but continued her speed and also her course, until she had passed a meeting vessel, when she changed to port, but did not at once signal the barges to do the same, and when she did later they were unable to clear the yacht. *Held*, that both vessels were in fault; the yacht for failure to keep a lookout and for not anchoring near the shore when the wind failed, but permitting herself to drift into the track of passing vessels, and the tug for not stopping, instead of trying to pass between the yacht and the meeting vessel with her tow, the danger being apparent, and also for not sooner signaling her tow to change course.

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

For opinion below, see 125 Fed. 419.

John G. Lamb, for appellant.

Chester N. Farr, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the United States District Court for the Eastern district of Pennsylvania, in the cases named in the caption. 125 Fed. 419.

Benjamin D. Welch, as master of the yacht "Venture," filed his libel in the said district court, against the Philadelphia and Reading Railway Company, as owner of the steam tug, "International," in a cause civil and maritime, to recover damages resulting from a collision between the said yacht and certain barges, towed by the tug "International," on the Delaware river, on the night of July 14, 1900.

An answer was filed by the respondent, and also a petition for limitation of liability under the act of Congress, in that behalf, praying for an appraisement, and "that all claims by any persons whomsoever, for loss, damage or injury to persons or property caused by the said collision, shall be heard and determined in this court, and apportioned according to law." Petitions, as stated, were accordingly filed, for the purpose of recovering damages aforesaid. The learned district judge found both parties at fault, with the result that the damages were divided and a commissioner appointed to make inquiry and hear testimony as to what persons had suffered damage by reason of said collision, and the amount thereof. Upon the report of such commissioner, a final decree was entered by the court below, from which the present appeal has been taken. A careful reading of the testimony convinces us that the court below was right in the disposition made of this case, and that the opinion filed fully supports the conclusion arrived at by the learned judge. We therefore adopt the same as the opinion of this court, and quote it, as follows:

McPHERSON, District Judge. "By one of these libels, the sloop yacht 'Venture' seeks to recover damages for a collision by which she was sunk and became a total loss. The other proceeding was taken by the Railway Company, in order to limit its liability under the Act of Congress. I find the facts to be as follows:

"In the afternoon of July 14, 1900, the sloop yacht 'Venture,' a small pleasure craft, 42 feet long and 13 feet beam, started from Camden with a party of eighteen persons on board, both men and women, for a sail upon the Delaware river. They proceeded down the river, aided by the ebb tide, to a point not far below Lincoln Park, landing at the park about seven o'clock, because of the failure of the wind, with the purpose of waiting until a breeze should spring up, and also until the tide should turn. They remained at the park until about half past eleven o'clock, and then, as the tide was at the flood and a light breeze from the southwest was blowing, they started to return. The yacht was of light draft, drawing no more than 2 or 3 feet of water, and accordingly her master kept along the eastern shore of the river, in order to be out of the way of larger vessels proceeding up or down the river in the channel. Shortly after one o'clock the yacht reached League Island, where the river bends to the eastward and then resumes its northerly course, forming the Horseshoe Bend. Here they crossed the river to the western shore, and proceeded slowly along that shore as far as the upper end of the Ironside bar or shoal. At this point, the set of the tide, by reason of the bend, is toward the eastern or New Jersey shore; and here the very light breeze that had been helping them in some degree, left them entirely and the yacht merely drifted with the tide. Indeed, it had done little else than drift during their progress up the river, for the breeze had been barely sufficient to give the boat steerage way. The crew consisted of two

men, the captain and a mate. Both were in the stern of the boat, aft of the sail, which was swung over the starboard quarter. The captain was at the wheel, in such a position that he could not see up the river except by stooping and looking under the boom; and the mate was seated on the rail near the captain, in a little better situation, perhaps, to see approaching objects, but certainly not in the right place for a lookout under the circumstances. The night was clear and moonlight, and there was no difficulty in seeing lights of approaching vessels a long distance away. As the yacht drifted toward the center of the channel, the captain and the mate saw the lights of the tug 'International,' coming down the river with a tow. The tug is a powerful ocean-going vessel, 130 feet long, 26 feet beam, drawing 16 feet, and of 400 tons registered tonnage. The tow consisted of three large and heavy barges, loaded with coal, lashed together abreast, and attached by a bridle to a wire hawser about 60 fathoms long. The barges from starboard to port, were the 'Hercules,' 200 feet long and 27 feet beam, drawing 13½ feet of water and of 756 tons registered tonnage; the 'Girard,' 186 feet long, 35 feet beam, drawing 16 feet and of 841 tons registered tonnage; and the 'Glendower,' 193 feet long, 34 feet beam, 16 feet draught, 855 tons registered tonnage. When the tug was seen by the yacht, she was probably half a mile away, and each was showing her green light to the other. The yacht was headed somewhat toward the Pennsylvania shore, with her boom out to starboard and her sail set in order to catch an occasional puff from the south or west, but she was not under control, for the wind was not strong enough, or constant enough, to give her steerage way, and she was drifting with the tide toward the center of the channel and the track of other vessels. No effort was made on the part of the yacht to change this condition of affairs until the two boats had come very near to each other. There is some dispute concerning the distance that separated the tug and the yacht when they passed each other, but it makes little difference whether the distance was 30 feet, as one witness says, or 100 feet, as it seemed to another witness. In either event, the situation was plainly perilous, and the captain of the yacht, seeing that a collision was likely to occur with the tow, sent the mate forward with an oar to attempt to move the yacht to port, and an ineffectual effort in that direction was made. It was of no avail, however, and in a few moments the yacht came into collision with the barges and was sunk.

"From the point of view of the tug, the facts are these: The tug with its tow was coming down the river in the center of the channel, and as she approached the coal piers at Greenwich Point she saw down the river the red light of a tug having a schooner in tow, and the green light of the yacht. At this time, the 'International' and the yacht were at least a half mile distant from each other, the other tug being probably not much more than a quarter of a mile away. The situation was evidently dangerous. On the eastern side of the river was Greenwich Point anchorage, which was occupied that night by a number of vessels at anchor, and the available surface of the channel was thus reduced to a width of no more than 750 feet. Moreover, the yacht was then nearly in line with the tug, for the master of the tug testified that, when he first saw the yacht, after he had straightened down on a new course, she was 'just a little mite on the starboard bow.' The tug with the schooner in tow blew one whistle, indicating that she would pass to port, and this signal was returned by the 'International.' At this time, three possible courses were open to the "International.' She could attempt to pass to the westward of the 'Venture,' where perhaps there may have been somewhat more room, but as this course required the tug to cross the bow of the yacht, and would have also involved the risk of collision, I think it was properly declined. Another course was to continue in the center of the channel and attempt to pass between the tug and tow, and the yacht. The third course was to come to a stop, or proceed with the utmost caution, until the dangerous passage should be safely accomplished. The master of the 'International' chose the second course, and without changing his direction or slackening speed determined to pass between the two ves-

sels. There is some conflict in the testimony concerning his manœuvres immediately before the collision took place, but I do not think the conflict is material. The evidence seems to me to establish clearly the fact, that after the schooner had passed the barges, the course of the 'International' was changed two or three points to port, in order to get as far as possible out of the way of the yacht, but by this time the current had carried the 'Venture' so far out into the channel that while the change was sufficient to carry the tug clear, it was not possible then to pull the tow out of the way. This might, perhaps, have been done if the course of the tow had also been altered at the time when the change was made by the tug, but no signal to this effect was given to the barges until an appreciable time after her own course was altered, and there was, therefore, a distinct, and what may have been a material, delay in this attempt at co-operation. The result was that the unwieldy tow kept its course without sensible change, the mast of the yacht was caught by the bridle of the tow, and the yacht slipped along the bridle until she struck the stem of the 'Hercules,' and then swung around into the space between the 'Hercules' and the 'Girard' where she was overturned and sank. All on board were rescued, except one woman, who was drowned, for whose death damages are claimed by her parents, but the survivors all suffered some loss of property, for which also compensation is claimed in the present proceeding.

"Upon these facts, it is clear to my mind, that both vessels were at fault. The 'Venture' had no business to be in the channel, in the way of large ships proceeding up or down the river, while she was drifting helplessly with the tide and could not be directed. The wind failed while she was still close to the Pennsylvania shore, and the anchor should then have been dropped, unless the captain found it possible so to direct the boat that she would not move further out. He knew that the tide was carrying him out to the middle of the stream, and if he could not steer the boat near the shore, it was plain negligence, as it seems to me, to allow her to drift out to the middle of the river, where a collision at any time might be inevitable. The John S. Smith (D. C.) 27 Fed. 398; The Media (D. C.) 45 Fed. 79. It was negligence, also, not to keep a proper lookout. Possibly, an earlier discovery of the approaching tug might not have availed, but this is not certain, and, unless it be clear that the absence of a proper lookout did not contribute to the collision, such absence is a fault. The 'International,' also, was negligent, in my opinion, in not stopping at a safe distance from the approaching vessels, or in not slowing down and proceeding with the utmost caution. The Jesse Knight (D. C.) 45 Fed. 590; The Havana (D. C.) 54 Fed. 411; The Medusa (D. C.) 46 Fed. 303. The situation clearly was one of great danger. Only a narrow lane was offered her for passage, and she had behind her a tow more than a hundred feet broad; enough to occupy nearly one-seventh of the whole breadth of the available channel. Certainly, under such circumstances, to go on without slackening speed was to take an unjustifiable risk, and I have no doubt at all, that this failure to act with the proper caution contributed materially to the accident. She did slow down and stop briefly after she came abreast of the yacht, but it was then too late. It was a fault, also, not to signal the barges more promptly to change their course to port. The master of the tug admitted delay in the signal, excusing it on the ground that, 'I did not think it was necessary, and it is not customary unless there is imminent danger.' To my mind, the danger was imminent enough to require the promptest action, and to omit to call for such help as the barges might be able to afford, little as it might be, was negligence.

"I find, therefore, that both parties were at fault, with the result that the damages must be divided. There is not enough testimony in the record to enable me to determine in every case how much damage has been suffered, and the inquiry upon this point must, therefore, go to a commissioner, who is directed to hear such further testimony as may be offered, and to report a suitable decree."

The decree of the court below is hereby affirmed.

UNITED STATES v. DEARBERG BROS.

(Circuit Court of Appeals, First Circuit. December 22, 1905.)

No. 73 (3,527).

CUSTOMS DUTIES—PROTEST—SUFFICIENCY—REFERENCE TO SIMILITUDE CLAUSE.

Where an importer protests against the assessment of duty on the ground of an alleged application of the similitude clause of Tariff Act Aug. 27, 1894, c. 349, § 4, 28 Stat. 547, unless the protest contains reference to said provision, it is not sufficiently distinct and specific to meet the requirements of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

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

For decision below, see 135 Fed. 245, affirming a decision of the Board of United States General Appraisers, which had reversed the assessment of duty by the collector of customs at the port of New York.

The importers had contended that certain horsehair braids should have been assessed with duty at the rate applicable to silk braids, basing their contention on the similitude clause in Tariff Act Aug. 27, 1894, c. 349, § 4, 28 Stat. 547, which prescribes that imported articles not enumerated in the tariff shall be chargeable with duty at the rate provided by the act on the enumerated article which it most resembles; but they failed to refer to this provision in their protests. The Board, however, on the authority of one of its former decisions (G. A. 5,171 [T. D. 23,852]), held that it was not necessary to invoke the similitude clause, and that the protests, notwithstanding the omission, sufficiently answered the requirement in Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], that grounds of protests shall be stated "distinctly and specifically."

This conclusion was contrary to a prior decision of the Circuit Court of Appeals for the Second Circuit in Hahn v. Erhardt, 78 Fed. 620, 24 C. C. A. 265, in which it was held that: "In all cases in which the importer intends to rely upon the similitude clause for the purpose of identifying his merchandise with some enumerated article of the tariff, and means to place his objection to the action of the collector upon the ground that the collector has not given due effect to that provision, he should state the fact in his protest; and if he fails to do so his objection is not stated distinctly and specifically, within the meaning of the statute."

Since the decision in the Hahn Case, however, the Circuit Court of Appeals for the Third Circuit had held merchandise to be subject to the provisions of the similitude clause, as contended by the importers, though their protests had not referred to the clause. In re Guggenheim Smelting Company, 112 Fed. 517, 50 C. C. A. 374. The government had applied to the Supreme Court for a writ of certiorari, on the ground that the decision in this case was contrary to that in the Hahn Case, which application was denied. United States v. Guggenheim Smelting Co., 186 U. S. 485, 22 Sup. Ct. 942, 46 L. Ed. 1260. The Board construed this action of the Supreme Court as tantamount to a disapproval of the doctrine announced in the Hahn Case, and as supporting the decision in the Guggenheim Case.

The Circuit Court affirmed the decision of the Board on similar considerations.

Charles Duane Baker, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importers.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Order reversed.

BATTIN v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. February 1, 1906.)

No. 42.

1. INSURANCE—ACTION ON LIFE POLICY—LAPSE FOR NONPAYMENT OF PREMIUM.

A policy of life insurance provided for annual payment of premiums, and that, on default in any such payment when it became due, the policy should at once cease and determine; that no premium should be considered paid, unless a receipt should be given therefor; and that the payment and receipt of any premium less than a full annual should not continue the policy in force longer than three months in case of a quarterly payment, or six months in case of a semiannual payment. In an action to recover on the policy after the death of the insured, it was alleged that when the last preceding annual payment came due, which was more than three months before the death of insured, he paid a portion thereof, and was given a credit for the remainder; but the evidence showed without contradiction that several years before he had requested a change from annual to quarterly payments, which had been assented to, and that all his payments thereafter were made quarterly; that the payment alleged, which was the last, was made and received as a quarterly payment, and it was expressly so stated in the receipt given therefor. *Held* that, under the terms of the policy, it was continued in force by such payment for only three months, and had consequently lapsed before the death of the insured, and that the court properly directed a verdict for defendant.

2. SAME—PLEADING AND PROOF—ALTERNATIVE RECOVERY.

In an action by the beneficiary to recover the full amount of a life insurance policy, in which it was conclusively proved that the policy had lapsed prior to the death of the insured, plaintiff was not entitled to recover as an alternative the paid up value of the policy, to which she would have been entitled, but which she had never consented to accept and did not ask for in her pleading, which was based solely on the theory that the policy remained in full force.

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

J. A. Culbert, for plaintiff in error.

E. N. Willard, for defendant in error.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge. By its policy of insurance, dated August 20, 1894, the Northwestern Mutual Life Insurance Company promised to pay to Mary F. Battin, wife of William J. Battin, the sum of $5,000, in 60 days after proof of the fact and cause of his death. He died on January 28, 1902; and after the required proofs had been duly presented, and the said period of 60 days had elapsed, payment of the said sum of $5,000 was demanded by Mrs. Battin and was refused. Thereupon she brought her action against the insurance company, and, upon the trial thereof, the learned judge directed the jury to return a verdict for the defendant.

The policy was issued, as is therein stated, in consideration of the then present payment of $146.80, the receipt whereof it acknowledged,

and of the annual payment of a like sum on each 20th day of August in every year during the continuance of the policy. It contained this condition:

"(1) If the said premium shall not be paid at or before the time within mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine; and no premium after the first, hereby acknowledged, shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary, and the payment and receipt of any premium less than a full annual shall not have the effect to continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semiannual payment."

The plaintiff's statement of claim averred that:

"On August 20, 1901, when the said premium of one hundred and forty-six dollars and eighty cents ($146.80) became due and payable, the said William J. Battin paid on account thereof the sum of thirty-eight dollars and seventy-five cents ($38.75), which was accepted by the defendant company as a payment on account of the said premium, and a credit was given to the said William J. Battin for the unpaid balance."

The defendant demurred to the statement of claim, and assigned as cause, inter alia, the following:

"(1) Having admitted the nonpayment of $146.80, which was due on the 20th day of August, 1901, the declaration sets forth no waiver of the condition above quoted, and therefore the declaration shows that the policy was null and void at the time of the death of the said William J. Battin, which, it is alleged in the declaration, occurred on the 28th of January, 1902."

When the case was here before (130 Fed. 874, 65 C. C. A. 358), we held that the demurrer was not sustainable upon the ground thus assigned, because the clause that has been quoted from the statement of claim alleged a fact which "clearly indicated an election by the company to waive the forfeiture, and Battin was entitled to rely upon that election." This decision, as is always the case upon such demurrers, was made upon the assumption that the fact alleged in the declaration was true; but, that its actual truth might be determined, this court directed that the defendant should have leave to plead over. This it did, and with the result that, upon the ensuing trial, an issue was presented as to whether the payment of $38.75, which was made by William J. Battin on August 20, 1901, was, as the plaintiff asserted, accepted by the defendant company on account of an annual premium of $146.80, or was, as the defendant contended, made and accepted as and for a payment in full of a quarterly premium. This question was the decisive one, and, undoubtedly, if there had been evidence from which it might have been reasonably resolved in either way, its determination would have been for the jury. But the proof was all one way. It conclusively supported the contention of the defendant. The agent of the company, with whom Mr. Battin directly communicated, testified that at the end of the first year of the insurance Mr. Battin requested a change from annual to quarterly premiums, that this was assented to by the company, and that thereafter the dealings of the parties conformed to the change so made. This testimony was uncontradicted, and was corroborated by the premium receipts, which,

from and after August 20, 1895, were delivered and accepted. They were all, except as to date, the same as that which was given upon the particular occasion more immediately in question, and of which the following is a copy:

"Northwestern Mutual Life Insurance Company, Milwaukee, Wis.

Premium for three months..... $38.75
One-fourth of annual dividend.... 9.28
Cash payable..... $29.47
.....
Premium as above received this 20th day of Aug., 1901.
[Signed] W. J. Welsh, Agent.

For terms of mutual agreement see policy.

Received the quarterly premium due Aug. 20, 1901, as per statement in the margin hereof, on policy No. 307320 insuring the life of W. J. Battin.

This receipt must be countersigned before delivery by
W. J. Welsh, Gen'l Ag't,
Scranton, Pa.
[Signed J. W. Skinner,
Secretary."

The point suggested at the end of the brief of the plaintiff in error is devoid of merit. It is true that an agent of the defendant company, in a letter referring to the policy sued upon, did say:

"The policy is now in the hands of the company under assignment for a loan of $195. According to the policy contract the beneficiary is entitled to a paid-up value of $1,077.00, subject to the company's interest as assignee."

The plaintiff, however, never consented to accept this "paid-up value," but, on the contrary, always insisted that she was entitled to the full amount of $5,000. Her statement of claim set out her cause of action as arising solely out of the defendant's refusal "to pay the said $5,000," and it closed with the express declaration that she brought her suit "for the full amount of the said policy, with interest as aforesaid, having first demanded of the defendant the payment of said $5,000, which the defendant refused, and continues to refuse, to make." Accordingly, the case was tried upon the understanding that the plaintiff's demand was for the whole amount of the policy, and no intimation was at any time made that, as an alternative, she should be awarded its paid-up value. Under these circumstances, it would be quite impossible to hold that the court erred in omitting to submit any such alternative aspect of the case to the jury, even if such omission had been assigned for error; and, as it has not been, the consideration which we have given the subject is more than it was entitled to.

The specifications which relate to the rulings of the court upon questions of evidence have not been overlooked; but as we are of opinion that, upon any view which could be taken of those questions, a case for submission to the jury would not have been presented, they need not be discussed.

Upon consideration of the whole record, our conclusion is that the court below was right in directing a verdict for the defendant, and therefore its judgment is affirmed.

STREETER et al. v. SANITARY DIST. OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1905.)

No. 1,067.

1. CONTRACTS—EVIDENCE—MATERIALITY.

In an action on a contract, evidence of negotiations between the parties for a modification of the contract which was not made is immaterial.

2. SAME.

In an action on a contract for the doing of certain work by plaintiff for defendant, where it was shown that defendant, acting under a provision of the contract giving it that right, employed others to complete the work, paying therefor less than the contract price for the work so done, reports made by defendant's engineer, showing the amounts saved and stating them as credits on plaintiff's contract, were immaterial as evidence and properly excluded; the question of plaintiff's right to such credits being one of law.

3. SAME.

In an action to recover for work done under a contract, in which defendant pleaded in recoupment a claim for damages for the alleged failure of plaintiff to do the work as required by the contract, evidence that the other contractors did similar work for defendant in the same way as plaintiff is immaterial.

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

The plaintiffs in error, plaintiffs below, claimed that the defendant owed them on a contract for work on the drainage canal a balance of $88,893.50 and interest thereon. As shown by the plaintiffs' brief, the defendant interposed six items of recoupment on account of the plaintiffs' alleged failure to complete the work according to contract, amounting substantially to $250,000. The case was tried by the court without a jury and a general finding was made in favor of the plaintiffs for $18,998.98 and interest. In this court, reliance for a reversal was rested upon the alleged errors of the trial court in refusing to adopt the plaintiffs' theories of law as applied to evidence of waiver and estoppel respecting the defendant's items of recoupment.

We interrupted the argument of the merits with the inquiry whether there were any questions raised that could properly be reviewed. The hearing upon the merits was suspended, and the questions of practice were submitted on briefs. We held (Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190) that no assignments of error could be considered except those with respect to the admission or rejection of evidence upon the trial. The mandate was that the judgment be affirmed unless the plaintiffs within 10 days, should file a request to be heard upon the remaining assignments. That request having been filed, we proceed with the case.

Adams A. Goodrich, for plaintiffs in error.

Seymour Jones, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

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

If an action at law is tried by the court without a jury, the improper admission or rejection of evidence is not of itself necessarily a ground for reversal. The evidence improperly admitted or rejected must be of such a kind and force that it should work a different result from that arrived at by the trial court. Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190.

During the progress of the work the plaintiffs sought an amendment of their contract whereby they would receive larger pay. The matter was referred by the board to a special committee, who brought in a majority report recommending that no change in the contract be made, and a minority report, signed by one member, favorable to giving the plaintiffs increased compensation. The majority report was adopted by the board and no change in the contract was made. The court refused to admit the minority report in evidence. The present action at law was based by the plaintiffs upon their contract as originally executed. It is impossible to see how the admission in evidence of the minority report of one member of the special committee could affect the result at which the court arrived.

And while the question of increased pay for the plaintiffs was under consideration, the plaintiffs wrote a letter to the board, in which they stated the reasons why they were asking the change in the contract. This letter was offered in evidence by the plaintiffs, and rejected by the court. What we have said in regard to the minority report applies as well to this letter.

After the plaintiffs had been at work for some time, the board, acting under a reservation in the contract, employed Angus & Gindele at a smaller rate of compensation to complete the plaintiffs' contract for them. Thereafter the chief engineer filed five reports with the board, in which he reported the amount of work done from time to time, the rates in the original contract, the prices at which the work had been let, and stated that the difference was a credit in favor of the plaintiffs. These reports were offered in evidence by the plaintiffs, and were rejected by the court. Inasmuch as the offered evidence only tended to show that the defendant understood the legal effect of its action in employing Angus & Gindele, there was no error in the rejection, because the duty of the defendant under the contract was a matter of law for the court to determine therefrom, and the defendant's action on the contract was in consonance with the court's interpretation.

The plaintiffs objected to the admission of testimony which went to show the amount of damages the defendant had sustained by reason of the work's not being done according to the contract. The ground of objection was that the evidence was immaterial, and the reason given for its immateriality was that the provisions of the contract in those respects had been waived by the board. It is evident that this testimony was not immaterial, if those provisions of the contract were not waived. To determine the question whether they were waived or not would require us to examine all of the evidence and apply the law, and thus take up those assignments of error which in our prior opinion in this case were found to be without any basis in law for their presentment on the record as made.

Objection was also made to an item of $10,000, offered by the defendant and admitted by the court, concerning revetment work. The ground of objection was that the original contract did not call for this revetment work. As the items of recoupment totaled $250,000, and as

the court cut down the plaintiffs' claim a little less than $70,000, it is evident that striking the $10,000 item out of the $250,000 would not affect the result at which the court arrived.

The chief engineer of the defendant was asked by the plaintiffs whether contractors on other sections of the drainage canal had been doing their work in the very way which the defendant was claiming was in violation of the plaintiffs' contract. The court refused to permit the witness to answer. In this there was no error, as the offered evidence was utterly irrelevant.

The judgment is affirmed.

BRINCKERHOFF v. ROOSEVELT.

(Circuit Court of Appeals, Second Circuit. January 17, 1906.)

1. CORPORATIONS—LIABILITY OF OFFICERS—NEGLIGENT MANAGEMENT OF CORPORATE BUSINESS.

   An officer of a corporation, who, as such officer and one of the trustees, made a sale of property which constituted its only assets, and afterward procured the passage of a resolution by which a mortgage taken to secure the purchase money was canceled, leaving the corporation with no assets, except certain securities of doubtful value, is personally liable to the corporation for the amount of the purchase price of the property.

2. SAME—SUIT BY STOCKHOLDERS—LACHES.

   Directors of a corporation are assumed to act for its interests, and a stockholder is justified in relying on such assumption until the contrary appears, and is not chargeable with laches which will defeat a suit brought by him in behalf of the corporation to compel restitution for a loss resulting from the unlawful or negligent acts of the trustees, where such action was commenced shortly after he acquired knowledge of their action.

   [Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 807.]

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

On appeal by the defendant, Robert B. Roosevelt, from a decree of the Circuit Court for the Eastern District of New York requiring him to account for the sum of $127,984 (less a small contingent deduction), which was lost by the Holland Building Association through the negligence and mismanagement of the said defendant while acting as its president. The complainant, Brinckerhoff, a stockholder in the said association, having qualified, as far as it was possible to do so, under equity rule 94, brought the action on behalf of himself and the other stockholders. The complainant appeals from so much of the decree as limits the damages to the sum just stated, and also from that part of the decree which requires a tender to the defendant of the so-called Brigantine securities as a condition precedent to the payment by the defendant of the money directed to be paid by him. For the purposes of carrying out the decree the court appointed the Franklin Trust Company of Brooklyn receiver.

The facts are stated in the opinion of Judge Thomas, which is reported in 131 Fed. 955.

F. S. Duncan, for complainant.

G. H. Yeaman, for defendant.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The facts are so fully and carefully considered by the Circuit Court that little more is required. The cancellation of the bond and mortgage covering No. 33 Nassau street, New York —property now occupied by the Bank of Commerce—left the Building Association without available property. The mortgage, unquestionably worth its face value, was canceled and nothing remained but so-called securities, which, if not worthless, were unavailable and discredited. This act of spoilation was done with the knowledge, consent, and procurement of the defendant, and he is liable for the consequences. It matters not that he may have supposed that by aiding the trust company at the expense of the building association he was, considering his relations to each, doing a laudable act. The courts are not permitted to take such matters into consideration. It is enough that he occupied fiduciary relations to the association, its creditors and stockholders. It was peculiarly his duty to protect and preserve the property and when it appears that instead of so doing the association was, through his procurement, stripped of every dollar of available assets, it follows as a necessary conclusion that he must respond to those who have suffered through his act.

We agree with the Circuit Court in thinking that even though it be conceded that at the time of the sale of No. 33 Nassau street the equity of redemption was worth more than $100,000, the conveyance to the trust company for that sum cannot be regarded as a breach of duty by the defendant. Although the evidence shows that prior to the sale the directors of the association were not particularly solicitous for its interests, there is insufficient proof to warrant a finding of wrongdoing on their part at that time. For this reason we think that complainant's contention as stated in his first and second assignments of error cannot be maintained.

In the remaining assignments the complainant asks that the decree be amended by striking out all portions thereof requiring the delivery of the Brigantine securities to the defendant as a condition precedent to the payment of the money found due from him. Certainly the decree should not fail because of the complainant's inability to comply with this condition. He insists that these securities are beyond his control. Indeed, it seems to be admitted by all that they are now in the possession of a receiver, appointed by the Circuit Court for the Southern District of New York, in an action pending therein by this complainant against the Holland Trust Company, and that the success of that action depends upon the ability of the complainant to make delivery of said securities in case the court should decree in his favor. There is, we think, considerable force in the complainant's contention that, as the action is one sounding in tort, the defendant is not entitled to an assignment of the securities as a condition to the payment of damages occasioned by his negligent acts. In this view, a proper solution of the difficulty might be to strike out from the decree the provisions directing the delivery of the Brigantine securities without prejudice to an application by the defendant, on payment of the amount directed to be paid by the decree, to be subrogated in the action pending in the Southern District, where

the equities can be fully determined. We are not possessed of sufficient information to deal with this question; we do not know that the receiver in the second suit will, on demand, refuse to deliver the securities, and we do not know their present value. In view of these circumstances, if the parties are unable to agree upon a modus vivendi, we think the Circuit Court should be permitted to amend its decree so as to insure its speedy enforcement either by striking out the provision for delivery of the securities or by ascertaining their present value and deducting the amount from the sum to be paid by the defendant.

The action is not barred by the statute of limitations or for laches, for the reason that the complainant did not discover the wrongful conduct, which is the foundation of the action, until a few months prior to its commencement. Directors are assumed to act for the interests of their stockholders, and the latter have a right to rely upon the assumption that they are acting honestly until the contrary appears. There was nothing to excite suspicion in the present instance. The mere fact that the complainant knew, or should have known, that the exceedingly valuable building of the Bank of Commerce was being erected on the premises, No. 33 Nassau street, if entitled to any significance, should have lulled rather than excited suspicion, for it indicated that the association had made a most favorable disposition of its property. It surely was no notice, especially during the time that dividends were regularly paid, that through the action of its directors the association had been despoiled of every vestige of available property.

We have examined the other assignments of error argued by the defendant, and are of the opinion that none can be sustained.

The decree is affirmed, with costs, and the cause is remanded to the Circuit Court to make such modifications and amendments, not inconsistent with this decision, as it may deem necessary.

McDONNELL v. OCEANIC STEAM NAVIGATION CO., Limited.

(Circuit Court of Appeals, Second Circuit. January 5, 1906.)

No. 71.

1. MASTER AND SERVANT—DEATH OF LONGSHOREMAN—DEFECTIVE HATCH COVERING—FELLOW SERVANTS—NEGLIGENCE.

Deceased, a longshoreman, was killed by being precipitated into the hold of a vessel by the falling of a hatch cover. He had been working with a gang for several days unloading and loading the vessel; the practice being for the gang to cover the hatch at night and uncover it again in the morning. The night before the accident the cover that fell had been placed by new men. The next morning, while deceased was in the act of removing the adjoining cover, he placed his entire weight on the cover in question, which caused it to fall. There was no inherent defect or improper construction in the cover, except that it was about two inches shorter than the space between the beam and the coaming, which was an ordinary condition compensated for by the use of wedges which had not been inserted the night before. *Held*, that the

negligence, if any, was that of deceased's fellow servants in setting the cover without wedging it, for which there could be no recovery.

2. SAME—EMPLOYERS' LIABILITY ACT.

There being no pretense that the hatch cover fell by the negligence of an employé of defendant intrusted with and exercising superintendence, or that the accident was attributable to the defect which arose from, or had not been discovered or remedied owing to defendant's negligence, there could be no recovery, under the New York employers' liability act (Laws 1902, p. 1784, c. 600) making an employer liable for injuries to a servant by the negligence of his superintendent or foreman.

3. SAME—RES IPSA LOQUITUR.

Where a longshoreman was precipitated into the hold of a vessel and killed through the negligence of his fellow servants in failing to properly set a hatch cover the night before, the mere happening of the accident was insufficient to establish negligence on the part of the master under the doctrine of res ipsa loquitur.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 881.]

4. SAME—INJURIES TO SERVANT—CARE REQUIRED.

A master is only required to use reasonable care in providing suitable instrumentalities for the use of his servants.

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

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

Alexander, Watriss & Polk, for plaintiff in error.

Henry Galbraith Ward, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are plain, simple and undisputed. The plaintiff's intestate, a longshoreman who for six years had been in the employ of the defendant, was killed by falling through a hatch on the defendant's steamship Victorian because one of the covers (No. 6) on which he stepped gave way and precipitated him into the hold.

The hatch opening in question is about sixteen feet long and ten feet wide, surrounded by an iron coaming, one foot in height. An athwartship beam divides this opening in the middle, which is again divided by fore and aft beams, one end of these beams resting on the athwartship beam and the other resting in a groove on the coaming. The fore and aft beams and the coamings are provided with flanges about two inches wide to support the hatch covers, which are boards five feet long, two feet wide, and two inches thick, having rings near diagonally opposite corners to assist the stevedores in handling them. These covers are numbered so that there is no difficulty in ascertaining the proper place for each.

The Victorian arrived at New York on Wednesday, October 28, 1903. The accident happened on Monday morning following. During the intervening time, with the exception of Sunday when no work was done, the deceased was a member of a gang of six who opened the hatch in question and continued to work there, covering it at night and uncovering it in the morning. On Saturday, when the work of load-

ing began, additional men were needed and six other co-employés of the deceased joined his gang, so that on that night the hatch coverings were placed in position by the entire force of twelve men instead of six men as theretofore, the particular cover which fell being handled by the new men.

At the time of the accident on Monday morning only the original six men were present. While in the act of removing cover No. 7 the deceased placed his entire weight on No. 6 and walked a couple of paces on that cover when the port end fell, causing his death as before stated. This cover was marked by his working mate but it was not seen by any of the witnesses thereafter. There is no pretense that it broke or gave way through any inherent defect or improper construction except that counsel for defendant conceded at the argument that it was about two inches shorter than the space between the beam and the coaming. It appears, however, that this is an ordinary condition which is compensated for by the use of chocks or wedges to hold the cover snugly in place.

Upon these facts we are of the opinion that no recovery can be had against the defendant. If negligence be shown at all it was that of the deceased or of a fellow servant engaged in the same general employment.

We are unable to see that the employers' liability act of New York (chapter 600, p. 1748, Laws 1902) is in any way applicable to the foregoing facts. So far as the present controversy is concerned the law leaves the relations of master and servant very much as they were prior to its passage, except that it imposes an additional liability on the master by making him responsible for the negligence of his superintendent or foreman. Hayward v. Key (C. C. A.) 138 Fed. 34; Crosby v. Lehigh Valley R. Co. (C. C. A.) 137 Fed. 765.

There can be no pretense that the hatch cover fell by reason of the negligence of an employé of the defendant intrusted with and exercising superintendence or that the accident was attributable to a defect which arose from, or had not been discovered or remedied owing to, the negligence of the defendant.

This is not a case where the doctrine of res ipsa loquitur is applicable. The defendant was not required to exercise the greatest possible care in providing suitable instrumentalities. In the case of a servant it is sufficient if the master exercises reasonable care in this respect. No defect is shown in the cover that fell or in any of its connections or supports. It had been in use on this particular hatch for at least four days and had frequently been removed and placed again in position by the deceased and his colaborers. No one, so far as the proof shows, had discovered anything unusual regarding it. The mere fact that it was placed in position on Saturday night by a longshoreman belonging to a different "gang" from intestate's gang is, of course, immaterial. The exact cause of the dropping of the cover is not shown and, probably, can never be shown. There is nothing but conjecture where proof is needed. If it be assumed that the cover was too short it does not follow that the defendant failed in its obligations to these longshoremen. It was their duty to handle the hatch covers,

to put them on and take them off, and if they did not fit tightly to wedge them in with chocks. Failure to do this cannot be imputed to the master as a fault. In other words the master provided a hatch which would have been safe enough if it had been properly handled by his employés. Upon the most favorable theory for the plaintiff it seems clear that if the cover had been properly wedged the dropping into the hold would have been impossible. It was the duty of the deceased and his fellow workmen and not of the defendant to see that this was done.

We think these views are sustained by the following authorities: Preston v. Ocean S. S. Co., 33 App. Div. 193, 53 N. Y. Supp. 444; De Graff v. N. Y. Central R. R., 76 N. Y. 125; The Elleric (D. C.) 134 Fed. 146.

It is of course unfortunate that the circumstances of the accident are such that the plaintiff is deprived of direct proof as to the manner of its occurrence, but we are not permitted for that reason to depart from the universal rule that the burden rests upon the plaintiff to prove a cause of action and that mere inferences are not substitutes for proof.

The judgment is affirmed.

IMPERIAL WOOLEN CO. v. LONGBOTTOM.

(Circuit Court of Appeals, Third Circuit. February 2, 1906.)

No. 7.

FRAUDULENT CONVEYANCES—TRANSFER BY DEBTOR FOR BENEFIT OF CREDITORS —ESTOPPEL.

An insolvent manufacturer, at the instance of a committee of his creditors, entered into a contract by which he conveyed to them all of his property, and they conveyed it to a corporation organized by them to carry on his business for the benefit of all of his creditors. It was agreed that all whose claims were less than $100 should be first paid in full; that the debtor should manage the business under the committee's direction, and should receive a salary to be fixed by them; that, if any surplus should remain after the debts were paid, it should go to him; and that he should have the privilege of repurchasing the property at a price which was greater than its value at the time and about 50 per cent of his indebtedness. All of the creditors except one signed the agreement, and such one, while refusing to sign, expressed no objection to the plan, which was carried out. Six months afterward the nonparticipating creditor commenced an action against the debtor and attached the property. *Held*, that the transfer was not fraudulent either in fact or in law, and could not be impeached by such creditor, especially in view of its silence at the time and delay in asserting its objection.

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

Ira J. Williams, for appellant.

John Dickey, Jr., for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The opinion of the court below in this case is reported in 133 Fed. 556, and to that opinion we refer for a

full statement of the facts of the case. The scheme involved in this controversy was devised by the creditors of Robertshaw for their own protection and benefit. Under the provisions of the article of agreement all creditors whose claims were under $100 were to be paid in full, and all the other creditors were to participate in the full benefit of the scheme. No creditor was to be excluded. It was provided in and by the agreement that Robertshaw should sell, transfer, and deliver all his assets to a committee of his creditors, who were to organize a corporation to be entitled "The A. L. Robertshaw Manufacturing Company," which corporation was to carry on, for the benefit of the creditors, the business in which Robertshaw individually had been engaged, and to which corporation the committee of creditors were to convey all the assets of Robertshaw. Accordingly, Robertshaw conveyed and delivered to the committee all his assets, and the committee conveyed the same to such corporation. We here quote a paragraph from the opinion of the court below:

"At the request of the creditors Robertshaw agreed to conduct the business under the supervision of the committee at a reasonable salary to be fixed by them, and it was stipulated that he at any time should be permitted to purchase the entire plant at a price 'not less than forty per cent. of the face value of his whole indebtedness.' This plan of payment was devised by the creditors and the committee, and subsequently agreed to by Robertshaw upon its being represented to him that it was the most feasible way of paying his obligations and protecting his creditors, and it is conceded that it was the intention that all creditors should be included, as the petitioner's name appeared in the agreement as one of the parties of the first part, although it did not sign for the reason stated by the president, James Dobson, when Mr. Joseph H. Truitt called upon him prior to the transfer of the property that 'he would have nothing to do with a joint stock company, as Mr. Robertshaw had already failed previously, and he proposed to take just what there was in it, whatever it would be.' The creditors, and their committee, proceeded with the execution of the agreement and their plan of payment under the impression that there would be no objection on the part of the Imperial Woolen Company, petitioner."

The agreement was signed by all the creditors of Robertshaw (except the Imperial Woolen Company), on September 11, 1901, and shortly thereafter the A. L. Robertshaw Manufacturing Company began business. None of the creditors of Robertshaw have objected to this arrangement save the Imperial Woolen Manufacturing Company, which, on April 12, 1902, caused an attachment execution to be issued on a judgment for $1,723.16 it had obtained against Robertshaw, and to be served on the A. L. Robertshaw Company.

It is plain to us, as it was plain to the judge below, that the transaction in question was absolutely free from the taint of actual fraud. Undoubtedly it was entered into and carried out with the honest purpose of benefiting all the creditors of Robertshaw, and exclusively in their interest. Is it open to the objection that it was a fraud in law as to the petitioning creditor, the Imperial Woolen Company, which now seeks, by virtue of its execution attachment, to be paid in full out of the assets of the bankrupt, the A. L. Robertshaw Manufacturing Company, against which a petition in involuntary bankruptcy was filed on September 12, 1902? To this question we now address ourselves. Here we first quote from the opinion of the court below:

"The whole transaction from its inception shows that the transfer was in the interest of creditors. Robertshaw did not devise it or suggest it, but assented to it as the best method of paying his honest indebtedness. His employment was for the advantage of the creditors whose claims he was honestly endeavoring to liquidate, and he contracted to work for them for three years. * * * Nor is there anything inconsistent with an honest purpose either in the debtor or creditors in the fact that Robertshaw may purchase the property in the future, or that he was to have a return of any surplus remaining after payment of indebtedness without interest. The facts and circumstances in the case show all this was done for the benefit of the creditors, as it is plain that the price at which he was allowed to purchase was in excess of the value at the time of the transfer, and there would be no surplus returned after payment of claims without interest, unless Robertshaw as manager of the business created that surplus by successful conduct of the plant after the transfer, as the property transferred was only about fifty per cent. of the claims."

There was no reservation of a benefit to Robertshaw at the expense of those he owed. The privilege of purchase was remote and contingent and did not amount to a reservation of anything conveyed to the creditors. No secret benefit was secured to him. The whole plan was open and above board. The terms of that plan were fully disclosed to the creditor appellant.

We think the conclusion of the court below is well sustained by the authorities, in view of the peculiar facts of the case and the undoubted honesty of the transaction. In Smith v. Craft, 123 U. S. 436, 8 Sup. Ct. 196, 31 L. Ed. 267, it was held that a bill of sale of a stock of goods in a shop, by way of preference of a bona fide creditor, is not rendered conclusively fraudulent as a matter of law against other creditors, by containing a stipulation that the purchaser shall employ the debtor at a reasonable salary to wind up the business. In Huntley v. Kingman, 152 U. S. 532, 14 Sup. Ct. 688, 38 L. Ed. 540, the court recognized, as a doctrine of the common law, that a debtor in failing circumstances has a right to prefer creditors, though the fund for the payment of other creditors be lessened or absorbed thereby. And speaking of instruments to effect such preferences, the court said:

"The tendency of courts in modern times has been not to hold instruments of this character to be fraudulent and void upon their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed not to secure bona fide creditors but to enable the debtor to continue to carry on his business under cover of another's name."

Not only do we find nothing in the agreement here involved which would vitiate this transaction, as against the creditor appellant, but we altogether disagree with the proposition of the appellant that the transaction itself amounted to a hindering and delaying of it as a creditor. The preference bona fide by a debtor of certain creditors is not illegal, and is not within the inhibition of the statute of Elizabeth. Uhler v. Maulfair, 23 Pa. 481, 483. In Shibler v. Hartley, 201 Pa. 286, 287, 50 Atl. 950, 88 Am. St. Rep. 811, the court said:

"It may be considered, as the established result of our cases, that, if a creditor takes a judgment or conveyance, or payment in any form, to secure an actual debt, the transaction will be valid against other creditors, although he knew (1) that the effect would be to postpone the others, (2) that the debtor intended it to have that effect, and (3) although he took it to aid

that intent as well as to protect himself. The criterion is not the effect, but the fraudulent intent. Without that the transaction cannot be impeached."

Now, in the present case, there was not even a preference as against the appellant. It was protected by the transaction in question equally with all the other creditors of Robertshaw, and the appellant's right to participate pro rata with them is not denied. But, had this transaction been a preference as against the appellant, it even then would not have been impeachable, and the execution attachment would have reached nothing. Much less can the appellant successfully impugn the actual transaction.

But this case has another aspect adverse to the appellant. The testimony, as we have seen, shows that, while the president of the appellant company refused to become a formal party to the agreement by joining in its execution, what he said at that time, we think, justified the other creditors in their assumption of the appellant's acquiescence in the proposed scheme for the benefit of all the creditors. Then, again, the appellant undoubtedly had full knowledge of what was proposed, and if it intended to object, good faith, we think, required it to signify definitely its opposition before the other creditors embarked in the transaction. Instead of doing so, it permitted them to carry out the plan, and forebore to act in opposition to it until after the lapse of six months. In the meantime the corporation provided for in the agreement had been organized, and, acting under the direction of the committee of the creditors, had acquired Robertshaw's assets and had incurred new obligations. Under the circumstances, we think that the appellant is estopped to defeat the consummated transaction by its belated attachment execution.

For the foregoing reasons, the order of the District Court is affirmed.

STONE v. SHALLUS.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1906.)

No. 618.

1. CUSTOMS DUTIES—FRUIT IN PACKAGES—ALLOWANCE FOR DECAY.
   The rule that fruit imported in a rotten and wholly worthless condition does not constitute dutiable merchandise applies as well to fruit in packages as to fruit in bulk, and in the assessment of duty on fruit imported in packages allowance should be made for the decayed portions.

2. SAME—DAMAGE ALLOWANCE.
   Customs Administrative Act June 10, 1890, c. 407, § 23, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930], forbidding an allowance for damage in the assessment of duties, unless the loss exceeds 10 per cent. of the invoice, does not apply in the case of decayed fruit which is in a wholly worthless condition when imported; and the wholly decayed fruit imported in packages may be culled out, and duty paid on the merchantable quantity remaining, regardless of its percentage.

3. SAME—CONDITION PRECEDENT TO ASSESSMENT—ACTUAL IMPORTATION.
   The general doctrine regarding the assessment of duties is that they can be levied upon such articles only as are made dutiable by Congress and are actually imported into the United States.

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

For decision below, see 137 Fed. 674, affirming a decision of the Board of United States General Appraisers, which had reversed the assessment of duty by William F. Stone, collector of customs at the port of Baltimore on merchandise imported by Frank H. Shallus.

John C. Rose, U. S. Atty.

Before PRITCHARD, Circuit Judge, and WADDILL and KELLER, District Judges.

KELLER, District Judge. The petition filed by the collector of customs for the district of Baltimore is for the review of a decision of the Board of United States General Appraisers, dated September 14, 1903, in the matter of the protest of Frank H. Shallus against the decision of the collector of customs at Baltimore, Md., as to the rate and amount of duties on certain rotten oranges which were separated from the original packages in which they were imported per the steamship Buccaneer, November 20, 1900. The protest was numbered 47,383–B–1,202.

Both the appellant in his brief, and the court in its opinion refer to this case as relating to an importation of something over 1,000 barrels of oranges, of which 215 barrels were opened and assorted, and from which 63 barrels of "slush" were obtained. We presume that several cases were heard at the same time in the Circuit Court, and, if so, this will account for the misstatement of the facts found in the brief of appellant and the opinion of the court; but the fact is that the petition printed in the record in this case relates to a consignment of 700 boxes of oranges, all of which were repacked by permission of the collector, and out of which 87 boxes of "slush" or worthless matter were culled. As a matter of fact, the record shows that evidence was taken at the same time relating to protest No. 46,936–B–1,056, which did relate to a consignment of 1,078 barrels of oranges, shipped per Oxus, March 7, 1900, and to protest No. 47,383–B–1,202, which related to 700 boxes of oranges shipped per Buccaneer from Kingston, and entered for consumption November 20, 1900. As the same principle applies to the assessment of duty upon each of these importations, the only importance in the discrepancy between the petition in the record and the opinion of the court lies in the confusion to which it naturally gives rise.

We will proceed now to state the facts as they appear in the record relative to the importation which was the subject of the controversy referred to in the petition. Upon the arrival of the Buccaneer at the port of Baltimore the importer applied to the collector for permission to open this consignment of 700 boxes of oranges at the dock, in the presence of an inspector, and repack the same. This was permitted under a regulation of the Treasury Department (T. D. 21,831, Dec. 12, 1899), and out of the 700 boxes of oranges enough rotten oranges or "slush" were found to fill 87 boxes. This slush was weighed, and, as its weight was not equal to 10 per cent. of the

weight of the entire consignment of 700 boxes, the collector declined to allow any abatement therefor, and collected duty at 1 cent per pound upon the entire weight of the consignment, including the rotten oranges or "slush," and the importer paid the duty and filed his protest. The contention of the importer was that the contents of the 87 boxes of "slush," being worthless and having lost its identity as oranges, had ceased to be merchandise of any kind before its entry into the United States, and that, under the decision of the Supreme Court of the United States in Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178, all of this "slush" constituted a shortage upon which no duty should have been levied. Upon a hearing before the Board of United States General Appraisers, the protest of the importer was sustained, and the 87 boxes of "slush" treated as shortage. From this decision of the Board of General Appraisers the collector appealed to the Circuit Court, which affirmed the decision of the Board of General Appraisers. The collector has now appealed to this court.

The general doctrine continuously and consistently applied by the courts to the question of assessment of duties upon importations is that they can be levied upon such articles only as are made dutiable by Congress and are actually imported into the United States. In Marriott v. Brune, 9 How. 619, 13 L. Ed. 282, which was the case of a protest by the importers against a collection of duty upon sugar which during the voyage had leaked out of the hogsheads in which it was imported, the Supreme Court announced its view as to the proper principles applicable to this class of cases in the following language:

"The general principle applicable to such a case would seem to be that revenue should be collected only from the quantity or weight which arrives here; that is, what is imported, for nothing is imported till it comes within the limits of a port. See cases cited in Harrison v. Vose, 9 How. 372, 13 L. Ed. 179. * * * As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom house; that is all which goes into the consumption of the country; and that alone is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more."

Speaking of the importation in that case, which, under the law of 1846, was dutiable at an ad valorem rate, the court goes on to say:

"When the duty was specific on this article, *being a certain rate per pound, before the act of 1846, it could, of course, extend to no larger number of pounds than was actually entered.* The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed." (Italics ours.)

The court then instances the various ways in which an article sought to be imported may be nonexistent at the time of the arrival of the vessel in the American port, citing among them the case of natural decay, and proceeds:

"If there be a material loss, it can make no difference to the sufferer or the government whether it happened by natural or artificial causes. In either case, the article, to that extent, is not here to be assessed, nor to be of any

value to the owner. To add to such unfortunate losses the burden of a duty on them, imposed afterwards, would be an uncalled-for aggravation, would be adding cruelty to misfortune, and would not be justified by any sound reason or any express provision of law."

In Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178, the Supreme Court held that that portion of a cargo of pineapples which on arrival within the limits of a port of entry of the United States was found to be so decayed as to be utterly worthless is not dutiable, though the loss was less than 10 per cent. of the total invoice, as entirely worthless articles are not within the provisions of Customs Administrative Act June 10, 1890, c. 407, § 23, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1930].

The sole ground of distinction between this last case and the one at bar is that in the case of Lawder v. Stone the importation was of pineapples in bulk in the hold of the vessel, and in the case at bar the importation was of oranges in boxes, and the shortage by rot was not discoverable or discovered until these boxes were opened at the dock under the supervision of a government inspector. We cannot see that the natural and appropriate conditions of importation can affect the broad principle of right laid down by the Supreme Court in the two cases just cited. Pineapples and cocoanuts are susceptible of importation in bulk. Oranges, from their greater liability to crushing, are less so. But it does not seem to us that, so long as the government receives the full duty leviable upon the entire weight of the oranges which actually come into the country as such, the manner of their packing creates any essential difference. It is admitted in the record that the matter culled from the 700 boxes of oranges and placed in the 87 boxes was utterly worthless "slush," and that it had lost its identity as oranges, and was only fit for the garbage heap.

In the case of Lawder v. Stone, 187 U. S. 281, at page 293, 23 Sup. Ct. 79, at page 84, 47 L. Ed. 178, the court says:

"When Congress enacted the customs administrative act of 1890, it must be presumed to have possessed knowledge of the decisions of this court to which we have referred and the consistent application made of the doctrine of those decisions by the officials charged with the execution of the tariff laws, as evidenced by the cited treasury decisions. In the light of this fact, it would require a clear expression by Congress of its intention to adopt a contrary policy, before a court would be justified in holding that such was the purpose of the legislative branch of the government. Section 23 of the customs administrative act contains no such clear expression of an intention to alter the prior practice, but the contrary. The reference in section 23 to an allowance for 'damage' and the provision that the abandoned portion of the cargo should 'be sold by public auction or otherwise disposed of for the account or credit of the United States' manifestly imports that it related to an article which, when the duty attached, was possessed of some value, and therefore negatives the idea that Congress was concerning itself with that which was destitute of all value. When, therefore, it was enacted that in a certain contingency no allowance should be made for 'damage to goods, wares, and merchandise imported into the United States,' it is reasonable to construe this language as not referring to an article, case, or package, which, though in the semblance of merchandise, had become absolutely valueless by reason of natural causes or casualty occurring thereto while the article, case, or package was in transit to the United States."

The force of the decision in the case of Lawder v. Stone is sought to be escaped by counsel for the government by reason of the use by the Supreme Court in that part of its opinion just quoted, of the terms "article, case, or package," and by the contention that in the case of Lawder v. Stone the duty was levied under the act of 1894, upon the number of pineapples imported, whereas by the present act the duty is levied upon the number of pounds of oranges imported. He says that, were oranges dutiable by number, the case might be construed to make each separate orange a unit of transportation, but that the case is different where the duty is levied upon the weight of all the oranges. We are not impressed with the force of this reasoning, and regard it as entirely indifferent whether the duty be leviable upon the fruits by the pound or by the dozen (as in the pineapple case), so long as it is clear that the government has received the duty upon all the pounds or dozens of the fruit actually coming into the country. While it is true that the consignment consisted of "700 boxes of oranges," it was not upon such consignment, eo nomine, that the duty was payable, but upon the number of pounds of oranges imported; and upon the discovery of the fact that these boxes, or any of them, contained worthless slush, the same principle which allowed abatement in the number of pineapples, should and does, we hold, authorize abatement of the weight of such "slush" from the total weight of the importation. It is not the "box" of oranges which is the unit of importation. It is the "pound" of oranges.

There is no error in the judgment of the Circuit Court of the United States for the District of Maryland, and the same is accordingly affirmed.

KEASBEY & MATTISON CO. v. AMERICAN MAGNESIA & COVERING CO.

(Circuit Court of Appeals, Third Circuit. January 24, 1906.)

No. 34.

1. PATENTS—ORIGINAL INVENTOR—MACHINE FOR MOLDING PIPE COVERINGS.
   Evidence considered, and *held* insufficient to overcome the presumption, arising from the granting of the patent, that the patentee was the original inventor of the machine of the Keasbey patent, No. 397,860, for molding tubes or cylinders for covering steam pipes.

2. SAME—VALIDITY—DESCRIPTION OF MACHINE.
   A patent for a machine, described as one for molding tubes or cylinders, is not invalid, because in the use of the machine it makes only half tubes or cylinders capable of being fitted together and so designed.

3. SAME—INFRINGEMENT—MACHINE FOR MOLDING PIPE COVERINGS.
   The Keasbey patent, No. 397,860, for a machine for molding tubes or cylinders from plastic material such as are used for covering steam pipes, was not anticipated by anything in the prior molding art, from which the machine of the patent differs essentially, owing to the difference in the materials used and the requirement of uniform density to render the product nonconductive and serviceable for pipe covering, and the patent discloses patentable invention. Claim 1 also *held* infringed.

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

For opinion below, see 137 Fed. 602.

Edmund Wetmore, for appellant.

Wm. Houston Kenyon and Alan D. Kenyon, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This suit was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, in equity, for an injunction, and accounting, and damages, by the appellant, the Keasbey & Mattison Company, a Pennsylvania corporation, against the appellee, the American Magnesia & Covering Company, also a Pennsylvania corporation, for infringement of letters patent No. 397,860, issued to the patentee, Henry G. Keasbey, February 12, 1889, the title to which, by due and legal assignments, was vested in the complainant company.

The patent was for a new and useful improvement in machines for molding tubes or cylinders, and the patentee states the object of his invention to be "the production of an apparatus or machine for forming or molding tubes or cylinders of plastic material, such as are employed for covering steam and like pipes, by which the tubes or cylinders are formed perfectly, rapidly and cheaply." The defenses relied upon in the court below, were:

(1) Non-infringement.

(2) That claims 1, 3, and 5 of the patent in suit (the ones here involved) are invalid, because the combination of these claims is disclosed in the prior art.

(3) That the combination of the patent in suit was an invention of Wilfred S. Griffiths, and not of Henry G. Keasbey, the patentee.

(4) That the apparatus of the patent in suit was in public use two years before the application for a patent.

(5) That in view of the prior art, it required no more than mere mechanical skill, at the date of the alleged invention, to construct the combinations of claims 1, 3 and 5 of the patent in suit.

(6) That claims 1, 3 and 5 are not true combinations, but are mere aggregations, and therefore invalid.

The court below found that the patented device was the invention of Wilfred S. Griffiths, and not of the patentee, Henry G. Keasbey. The court did not, therefore, consider any of the other defenses, but, on the ground stated, entered its decree dismissing the bill with costs.

The questions raised on this appeal by the specifications of error, involve not only the one upon which the court dismissed the bill, but also, the validity of claims 1, 3 and 5 of the patent, and, though the view taken by this court will to some extent render necessary the discussion of those other questions, the action taken by the court below upon the claim that the patented device was the invention of Griffiths, and not of Keasbey, gives to it a dominating importance.

In a short opinion, the learned judge of the court below says:

"If I had enjoyed the advantage of seeing and hearing the witnesses, I should have felt better qualified to judge between the two conflicting accounts that have been presented to the court, but as I have nothing before me except the cold record, I must rely upon the tests of inherent probability and corroboration. So far as the former test is concerned, there is not much to choose, I think, between the contradictory statements of the rival claimants. Standing by itself, each account is plausible, and each is susceptible of attack at certain points, as the briefs of counsel have not failed to make clear. In a position of such perplexity, I have, therefore, felt bound to give considerable weight to the corroborating testimony of several other witnesses, which supports the account of Mr. Griffiths. * * * The weight of the evidence seems to establish the fact, that the patented device was invented late in the year 1885, by W. S. Griffiths."

From a careful reading of the testimony, as disclosed in the record, we can appreciate the perplexity produced thereby in the mind of the learned judge. We have, however, reached a different conclusion as to the disposition to be made of the case under the circumstances. There is undoubtedly a clear and absolute conflict of testimony between Keasbey, the patentee, and W. S. Griffiths, in regard to the main fact of invention of the device of the patent in suit. It is not disputed that Henry G. Keasbey, the patentee, as manufacturing partner of the firm of Keasbey & Mattison, had conducted experiments, for the purpose of devising an apparatus for molding pipe and boiler covering of magnesia, asbestos and water, prior to any relation of Wilfred S. Griffiths thereto. Keasbey testifies that his attention was called to devices for molding tubes or cylinders, in November 1885, by the purchase from their firm, by a man named Hanmore, of large quantities of carbonate of magnesia, and that it was discovered that Hanmore was using it for steam pipes, for the prevention of radiation of heat; that Hanmore afterwards told him, that if the covering for application to steam pipes, composed of carbonate of magnesia and asbestos paper, could be molded successfully into sectional covering, there would be a large demand for it; that Hanmore then showed Keasbey a small tin mold, which he had with him, and a short half section of pipe covering about six inches in length. Keasbey then returned to Ambler, and had a tin mold made, and molded one or two sections of covering with it. As the tin inclosure prevented evaporation, Keasbey testifies that he had a mold made of brass wire gauze (of which he makes an exhibit), lined it with muslin, filled it with the Hanmore composition, and dried it in an oven in the analytical department of his establishment, which was heated by steam; that, owing to the open character of the mold, the water easily evaporated, and in a very short time the contents were turned out on a plane dry surface, until the drying was completed; that he molded in this way several sections of a suitable size, to cover a half inch pipe, and applied it to the pipes then in use in the laboratory. Satisfied by his experiments, that it was possible to successfully mold the Hanmore composition into sectional coverings, Keasbey then determined to begin the development and perfection of an invention suitable for the purpose. He testifies that the day following the finishing of the half inch coverings, he took them from the steam pipes, to which they had been applied, and started across to Wilfred S. Griffiths' office (Grif-

fiths being the superintendent of the works, under Keasbey & Mattison), to show them to him, and give him directions with regard to starting work on the invention he had in view. He met Griffiths coming out of his office, showed him the half sections, and explained that he wished to have some machine and smith work done for the apparatus he had in mind; that this was the first time Wilfred S. Griffiths ever heard or knew of magnesia sectional covering. Keasbey then describes, in detail and at great length, the form of mold which he directed Griffiths to have made for experimental purposes, and relates all of the steps and all of the difficulties which he encountered during his experiments, and how he overcame them.

This summary by counsel for appellant, of Keasbey's testimony, though entirely correct, does not convey to the mind in full, the impression made by Keasbey's testimony when read in extenso. Its coherence and intelligent handling of the subject-matter of the inquiry, bespeak a trained mind, and one familiar with the discussion of mechanical operations and devices. In the course of his testimony, Keasbey produced a series of drawings, some 12 in number, illustrating the successive steps in the development of the invention as claimed by him. It is true, that all but four of these drawings were recently made, presumably for the purposes of the suit. They were, however, made while he was in England, away from his office and papers, a fact which speaks forcibly of his thorough acquaintance with the subject of the patent, and makes it impossible to believe that, if his testimony is in fact untrue, its untruth could be the result of anything but deliberate purpose and intent. If his testimony is true, his claim to the invention described in the patent is established and unassailable. No attempt is made directly to impeach Keasbey's general character, or his character for honesty and veracity, but we are asked, upon the testimony of Griffiths, to disbelieve all that he has said, and to accord to Griffiths absolute credence in the truth of his story, as to his having invented the device of the patent in suit.

Griffiths' story is, in brief, that he was superintendent of the factory of Keasbey & Mattison, and that after Mr. Keasbey became interested in the manufacture of magnesia pipe and boiler covering, at Ambler, Pennsylvania, and had unsuccessfully attempted to make samples of molded magnesia sectional pipe covering, Griffiths, discovering that he was so engaged, said to him: "I will show you how to make pipe covering out of magnesia"—and, leaving him, immediately set about making a suitable mold out of yellow pine wood, being a half cylinder or circle, covered with a flat top lid, to which was attached a core of the form of a half cylinder. This mold, with core and lid attached, were bolted together, furnished with a head and tail piece, with side rods and swinging movement, and to the head piece was attached a pipe, and to this pipe an ordinary hand force pump. He says:

"I then prepared the proper mixture of magnesia, asbestos and water, after I had changed the valves in the pump just mentioned, so as to permit of the successful pumping of this asbestos mixture without clogging the valves of the pump. When this apparatus was ready, I forced the magnesia and asbestos fibre mixture into the mold of the apparatus, which I just described, and immediately and at once, produced a half section of magnesia

pipe covering, of a size suitable to fit two inch pipe, whereupon I showed the section of pipe covering thus produced, to Mr. Keasbey, and, as I handed it to him, he said: 'That is exactly the thing we want.' We carried it into one of the drying rooms on a flat wooden tray, and he, Mr. Keasbey, then went with me to see the apparatus which I have just described, in which this first section of magnesia pipe covering was molded. I explained to Mr. Keasbey how it was operated, and immediately made more sections of pipe covering in it, and continued to make more thereafter, almost daily, until quite large quantities had been produced. Mr. Keasbey, as soon as he saw the first section of pipe covering which I had produced in the apparatus just described, immediately discontinued his efforts to mold plastic magnesia and asbestos fibre in a tin mold."

This is the important part of Griffiths' testimony, and, as is apparent, flatly contradicts that of Mr. Keasbey. His cross-examination shows some significant failures of memory, as to the parts and dimensions of this apparatus which he has thus generally described. But we do not propose to follow, or reproduce, or further allude to, the effects of this cross-examination. It suffices to say, that it does not serve to strengthen Griffiths' testimony. As the court below evidently relies upon the so-called corroborating testimony produced by the appellee, in support of Griffiths' testimony, the same has received our careful attention. Six or seven employés of Keasbey & Mattison, during the time in which Griffiths says he was occupied in devising the apparatus described in the patent in suit, testify as to seeing Griffiths engaged upon making the parts of the molds constituting this apparatus. There is the evident bias of a strong partisanship in the testimony of all of these witnesses. Some of them had been out of the employ of Keasbey & Mattison for 14 or 15 years. Several of them were only 14 or 15 years old at the time of which they were testifying. As to all of them, the interval between the happenings testified to and the time of giving testimony was 17 or 18 years. The purport of the testimony of most of them, so far as they testify to matters of fact, was that they had seen Griffiths occupied in constructing parts of the apparatus, or experimenting in its operation, and most of them, if not all of them, testify, when asked who invented the pipe covering apparatus which they saw Mr. Griffiths with, answer unhesitatingly that Mr. Griffiths was the inventor, or that the understanding was that Mr. Griffiths was the inventor. Whether Mr. Griffiths told them that he was the inventor, or whether they gathered from him the understanding that he was, does not appear. This testimony of opinion, of course, is of little value. We may conceive, that the witnesses were all honest in stating their belief and understanding, as to Griffiths being the inventor. This understanding could easily have been derived, and probably was derived, so far as the testimony shows, from the mere fact of seeing Mr. Griffiths alone at work upon the molds, or experimenting with the apparatus, without having seen Mr. Keasbey in connection therewith, or without having heard the instructions which, Keasbey testifies, he gave to Griffiths, to construct these molds and make these experiments. Here, as is often the case where human testimony is to be weighed, or its conflict reconciled or accounted for, it is important to consider what effect the determination, one way or the other, will have on our estimate of the honesty and character of the conflicting witnesses.

As we have said before, Keasbey's character is unimpeached, and his testimony unassailed, except by the contradiction of Griffiths. The record places him before us as a man of intelligence and dignity, and as one possessing a mind trained in the consideration of mechanical problems. He was shown to have been the inventor and the patentee in more than one patent, besides the patent in suit. He has not only sworn in the application for his patent, but also, upon the witness stand in this suit, that he is the inventor of the device here in question. He has explained how he came to conceive the idea which he afterwards developed, and the successive steps in its development, with a particularity as to time, place and circumstances, which excludes any possibility of innocent mistakes, if he has misrepresented any of them. If Griffiths is right in his belief that he was the inventor, and that Keasbey derived from him the happy thought out of which the invention in question sprang, Keasbey has sworn falsely and stands before us as a perjurer. On the other hand, it may well be conceived, that a bright, self-centered and vain man could have persuaded himself that, in carrying out the instructions given him by Keasbey, he was really entitled to the credit of inventing the machine that he was contriving, and that the mechanical assistance given to Keasbey, in developing his invention, was the most important part of the invention itself. The workmen, also, who saw him thus engaged upon the tasks set him by Keasbey, or assisted him in its mechanical execution, may well have conceived the idea (of which Griffiths probably did nothing to disabuse their minds), that Griffiths was the inventor of the machine which he was contriving, and of the process with which he was experimenting. This consideration is of controlling force, in determining, in a case like the present, the relative weight of conflicting testimony.

There are also other matters of great significance, which bear upon the question now before us. Mr. Griffiths had testified that Mr. Keasbey had never claimed that he had made or suggested this apparatus, or any feature of it, or that any part of it was his own idea. "Q. 83. Either then or at any other time? A. At no time did Mr. Keasbey ever make such a claim or representation to me, and I never even knew the apparatus had been patented until after I left their employ in 1891."

Mr. Keasbey's attention was afterwards called to this testimony of Griffiths, and asked whether it was true. We quote from the record his answer:

"A. It is not true; at least six months before, and probably nine months, before I placed the details of my invention in the hands of my patent attorneys to draw up the application, I informed Mr. Griffiths of my intention to apply for a patent, and in the interval, I spoke to Mr. Griffiths probably twenty times of my intention to apply for a patent, and when the time had arrived to prepare for the application, I went to Mr. Griffiths, and I told him that the time had arrived, and went over the blue prints of the drawings for this machine; blue prints which showed the details of its construction, and had made other drawings of the apparatus, showing it assembled or in its entirety. These last drawings were made in the regular drawing room or drafting room of our works, which drawing room or drafting room adjoined Mr. Griffiths' office, and Mr. Griffiths knew perfectly what

those drawings were being made for, and they were under his eye frequently, and I feel confident that he assisted and made part of those drawings himself. When I had placed the matter in the hands of my patent attorneys, in fact on the very day that I placed those drawings with them, I told Mr. Griffiths that I had done so, and when the application went to the Department, I again told him that it had gone to Washington, and when the patent was granted, Mr. Griffiths knew from me that the patent had been allowed and we have talked it over many times together. During our many conversations previous to the application for the patent, when we were discussing the question, Mr. Griffiths never once, by word or in any manner, shape or form, intimated to me that he had any claim to the invention as a whole, or in part. Had Mr. Griffiths been able to claim any part of this invention, or all of it, I should have recognized his claim, without his having to speak about it. There was no reason for any concealment on my part of these facts from Mr. Griffiths or any one else."

This statement of Mr. Keasbey is clear, straightforward, and unequivocal. It is either true or willfully false, and it is not without special significance to note, that when Mr. Griffiths is asked, on cross-examination, whether Mr. Keasbey, Dr. Mattison, or any other person informed him before he left the employ of Keasbey & Mattison, that Henry G. Keasbey, of Ambler, had had granted to him a patent for the machine in question, he answered, "To the best of my recollection, I never received such information from anybody"; and when the question was again asked, but limited to Mr. Keasbey, he answered, "To the best of my knowledge and recollection, he never did." This will not do as an answer to the unequivocal testimony of Keasbey, which, it seems to us, must, under these circumstances, in accordance with well settled rules of evidence, be taken as true, and if so, we have Griffiths fully informed as to Keasbey's intention to apply for a patent, of his application therefor, and of the fact that it had been issued to him without any protest or claim on his part, that he, and not Keasbey, was the true inventor of the patented device. This testimony, then, is properly of great importance in determining the weight of the evidence on one side or the other. Upon this crucial question, there is no corroboration, either way, and Keasbey's testimony in this respect stands uncontradicted by any testimony sufficient for that purpose.

We have hitherto considered merely the credibility of the testimony, under the circumstances disclosed in the record. We have now to allude to a most important factor in determining the weight of evidence, a factor which seems to us to have been overlooked by the learned judge of the court below. It is, that the burden of proof is on the one who disputes it, to repel the presumption of originality arising from the patent. This is a well established rule of evidence, and is the result of long judicial experience in considering the foundations of belief. In a case like the present, it is not a mere balancing of the weight of testimony on one side or the other, but it is a requirement that this presumption of originality of invention must be overcome by proof which fully satisfies the mind, respecting the fact. Keeping this well settled rule in mind, in considering the evidence in this case, we have no difficulty in finding, that Keasbey's right under the patent to be considered the original inventor of the patented device, has not been successfully assailed by the defendant.

This brings us to the specifications of error that concern the validity of the patent attacked by the defendant, on the alleged ground of want of novelty and anticipation.

As we have seen, the letters patent are declared to be for a machine for molding tubes or cylinders, and the patentee declares, that his invention "has for its object the production of an apparatus or machine for forming or molding tubes or cylinders of plastic material, such as are employed for covering steam and like pipes, by which the tubes or cylinders are formed perfectly, rapidly, and cheaply." The specifications then proceed:

"To attain the desired objects, the invention consists, first, in a given construction of mold for forming the tube; second, in a press of suitable construction for containing the mold; third, in an improved apparatus for feeding the material to the mold; and, finally, in the novel construction, arrangement and adaptation of parts, all as hereinafter described and claimed."

The claims alleged to have been infringed, are the first, third and fifth, and are as follows:

"(1) A machine or apparatus for making plastic tubes, having a press with a mold therein, a reservoir, a supply-pipe leading from said reservoir to said mold, a pumping device for forcing tube material from the said reservoir to said mold, and an air-chamber communicating with said supply-pipe and between the pumping device and the mold, said parts being combined substantially as described."

"(3) In a machine for making plastic tubes, the combination, with the press having the mold arranged in a case therein, of the head and tail pieces closing the ends of the mold, the head-piece being capable of a swinging movement, substantially as and for the purpose described."

"(5) In a machine for making plastic tubes, pipes, or cylinders, the press containing the mold, and the head and tail pieces connected together for closing the ends of the mold, in combination with the feed-pipe provided with a cock or check for supplying material to the mold, substantially as described."

That the device set forth in the patent is useful, is not denied, and is abundantly proved to be so by Griffiths, the defendant's witness, who claims to have invented it, and by the fact that, as we shall see, the defendants have, in its essential features, copied it. It may be admitted at once, that there is no novelty in the general means, by which plastic material is impressed with the form of the molds into which it is poured or introduced. It is common knowledge, that the molding of metals in a fluid state, and of plastic non-metallic material, is one of the oldest of the arts. But on this account, it is not to be said, that the particular apparatus for molding a specified material, the elements of the construction of which are so combined as to produce a new and useful result in the molding art, cannot involve patentable invention. In so old an art, it is not surprising that the defendant has been able to swell the record, by references to patented devices showing its practice in innumerable instances, and for an almost infinite variety of purposes. We may dismiss, therefore, from our consideration, the great number of patents cited, which merely describe the manufacture of pipe or boiler coverings, but claim no special apparatus for molding them.

What is claimed for the apparatus of the patent in suit, is not sim-

ply, that by it, a given desired form can be impressed on the plastic material, consisting of water holding powdered carbonate of magnesia in suspension, through which is distributed fibrous asbestos as a holding material, but that it is so poured into the mold by a constant and even pressure, that uniform density of the residuum, after the squeezing out or draining of the water, is produced; the pressure, by which the water is eliminated and the residuum conformed to the mold, being hydraulic pressure from within, and not mere mechanical pressure from without, the mold press being especially constructed with a view to the draining of the water and to the closing of the ends thereof simultaneously, for the prevention of leakage, by efficient resistance to the hydraulic pressure. Patents for making semi-tubular drain tiles out of clay, which are afterwards baked like earthenware, are clearly not concerned with the essential features of the patent in suit. The patents of Schaffer and Milroy, relied upon by the defendant, are of this type. Each of these describes a mechanical pressure, acting on the dough-like material of the clay. Fluid material cannot be used in them, and they are not adapted to mold material by hydraulic pressure. There are other devices in the function of the machines of this patent, unnecessary now to dwell upon. The same general criticism may be made of the patents for molding many miscellaneous articles, also of those for molding paper pulp by heavy pressure, patents for brick machines, for pressing tobacco into plugs or blocks, and patents for cotton and hay presses. It would extend this opinion to an inordinate length, to discuss these various patents, collected and exhibited to us by the counsel for defendant, and serve no good purpose, as, in our opinion, though all collected from the wide field of the molding art, they are not applicable to the patent in suit. If it is claimed, it has not been shown, that by any of the devices cited could tubes and cylinders of plastic material for covering steam and like pipes, have been made, or that from any of them could be extracted, a plain and easily understood explanation of how an apparatus, such as is described in the patent in suit, could be produced. It is admitted, that the precise machine of the patent in suit did not exist in the prior art, and defendant's witness, Griffiths, claims to have devised it.

But the defendant contends that, however this may be, the device of the patent in suit was a mere adaptation, for the purpose stated, of the filter presses, long in use prior to the date of the patent, and one of which was used by Keasbey & Mattison, in their works at Ambler. These presses consisted of a number of rectangular frames, an inch or two deep, placed in series and connected by an aperture through their centers, through which, by a pump, was forced water, containing carbonate of magnesia in suspension, but without, of course, any asbestos fibre, as the object of the presses was merely to form in the frames, cakes of magnesia, after the water had been drained away, suitable for convenient handling and sale in their original form, or when subdivided into smaller parts. Not only was the form and structure of these presses entirely different from those of the patent in suit, but the object aimed at was entirely different. Special fea-

tures of the apparatus of the patent were designed, and were necessary to produce, not only the cylindrical shape of the sections, but such a uniform density of their substance, as would preserve the cellular structure thereof, necessary to utilize the non-conductivity of the air which permeated it. So also, the lagging machines in use, by which slabs of the same material were molded. These could be built up into approximately arc form, and used as insulators, around the surface of locomotive boilers. These were merely larger cakes, made in the same way as the cakes of the filter presses, but tubes or cylinders for covering steam pipes could not be made upon them. As to these presses, so much relied upon by the defendant as anticipations of the device of the patent in suit, we quote, with approval, the testimony of Mr. Benjamin, the expert witness for the complainant:

"These presses operate by hydraulic pressure exerted in the fluid material which they receive. They represent the state of the art in presses of this general type as it existed prior to the invention of the machine of the patent in suit, and it was upon such machines as this, as I understand, that the machine of the patent in suit directly improves. The necessity for the improvement arose from the fact that none of these old filter presses were competent to make plastic tubes or cylinders, or even to produce pipe and boiler covering capable of meeting commercial requirements. Their object was not so much to produce cakes of plastic material in solid form as it was to extract or filter out the liquid which existed in the plastic material, and, therefore, it was not necessary to see to it that such cakes or blocks as were produced were by reason of their uniformity or general structure competent to serve the purposes of a pipe or boiler covering, or, indeed, any purposes at all. It appears that the defendant does use, as I understand, the so-called lagging machine illustrated by the model for the purpose of making a covering or lagging; but it is plainly obvious that the defendant does not use that machine to make plastic tubes or cylinders. * * * Nor can I find from the prior art that any one has ever attempted to make tubes or cylinders suitable for boiler covering on this old form of filter press; nor, so far as I am concerned, can I see any way in which it can be done; nor from the record in this case can I find that the defendant has shown any way in which it can be done. Generally, in these old filter presses there is a series of frames, each one of which if filled with solid material determines the shape of the mass. Where the fluid plastic material is forced into these frames successively, passing through apertures in the partitions, it becomes, I think, impossible to produce block which will be of the same density in each frame. As material enters the first frame, it tends to fill it and to obstruct the path of the following material into the next frame, and by the time the material reaches the last frame of the series, it is compelled to force its way through all the accumulations in the preceding frames, with the obvious result that the packing must be greater and the mass rendered more dense, and this progressively in the frames as they approximate the point of entrance of the flow. Commercially this is a very serious objection, because upon the density of the covering, depends greatly its insulating efficiency, and, as I have frequently pointed out, an increase of density which tends to obliterate the air cells on which insulating efficiency depends, as a matter of course, reduces that efficiency and besides involves waste of material. * * * On comparing this old type of press with that of the present patent in suit, I find certain plain structural differences. Thus, as I have said, the machine of the patent in suit can make plastic tubes or cylinders, and the old filter press cannot. Not only that, but it can make plastic tubes and cylinders which will be uniform in their density; or, in other words, for equal thickness will have uniform insulating properties. It is not a press which contains a multiplicity of molds through which the material must be successively forced, or any mold so constructed and arranged as that any material difference in density is possible between different parts of the object produced.

As the apparatus is illustrated in the patent in suit, it is simply one mold into which the fluid material is directly delivered. It is not necessary to take off nuts or slack up tie rods, or go through any such proceedings as is required in the old filter press, in order to get the mold out to put it in. The whole arrangement is such that when the press is opened, the single mold is readily introduced into its proper position, and when the follower is brought down and the head piece forced inward, the joints of the mold are at once tightly closed, so as to prevent any leakage of the fluid material, due to the hydraulic pressure at these points. This removal of the mold in the press of the patent in suit is, therefore, an easy and quick operation, and therefore, even after the feed cock is closed, an interposed air chamber in the supply pipe is abundantly capable of taking care of the delivery of the constantly moving pump during the period of removing, emptying and replacing the mold."

There is no such combination as is described in claims 1, 3 and 5 of the patent in suit, in any of these old filter presses.

The point made by appellee's counsel, that "the patent professes to be for machines for molding tubes and cylinders," and that the devices shown in the patent, are, without change, incapable of making tubes or cylinders, and can only make half tubes or half cylinders, does not appeal to us. An apparatus that molds tubes or cylinders in sections of half tubes or half cylinders, capable of being fitted together, and so designed, is an apparatus for molding tubes or cylinders, as much as if the completed tube or cylinder came from the mold.

In regard to the point made by the defendant, that it required no more than mere mechanical skill, at the time of the alleged invention, to construct the combinations of claims 1, 3 and 5 of the patent in suit, it is perhaps only necessary to say that a careful consideration of the subject has not brought us to this opinion. It was more than a mere advanced step in an old art. There was no prior art of molding tubes or cylinders. The patent was in a certain sense a pioneer patent. To produce from a mold a tube or cylinder of insulating material, cheaply and efficiently, so that the insulating function of the cellular structure should be preserved uniformly throughout the substance of the tube or cylinder, was not an obvious suggestion of the general molding art.

While we are inclined to think that both claims 3 and 5 have been infringed by the defendant, we are of opinion that the evidence clearly shows an infringement of claim 1, as reasonably limited by the qualifying words, "said parts being combined substantially as described." We would so think, even if it were conceded that the old element of an air chamber in the combination described in claim 1, was similarly placed in the old filter presses. That it was so placed, however, we do not think has been shown.

The decree, therefore, of the Circuit Court should be reversed, with costs, and directions given to the Circuit Court to enter its decree, declaring the validity of the patent, and adjudging that claim 1 of said patent has been infringed by the defendant, and in other respects granting the relief in conformity with this opinion.

And it is so ordered.

MISSISSIPPI GLASS CO. v. FRANZEN.

(Circuit Court of Appeals, Third Circuit. February 2, 1906.)

No. 55.

1. WITNESSES—PARTY CALLED BY OPPOSITE PARTY—RIGHT TO CONTRADICT TESTIMONY.
   A party who calls the opposite party as a witness is not concluded by his testimony, but may contradict him.
   [Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1097, 1269.]

2. PATENTS—CONTRACT TO ASSIGN—EVIDENCE CONSIDERED.
   Evidence considered, and *held* to fairly sustain the claim of complainant that certain inventions, made by defendant, and for which he applied for patents after leaving complainant's employment, were made during the term of such employment, and were within the terms of a contract by which he agreed to assign to complainant all rights to any inventions made by him while the employment continued.

3. SPECIFIC PERFORMANCE—CONTRACT TO ASSIGN INVENTIONS—CONSIDERATION AND MUTUALITY.
   A written contract by an employé, by which he agreed, in consideration of his employment at a stated salary, to assign to his employer all inventions made by him during the term of his employment, which was terminable at any time by either party on notice, is based on a sufficient consideration, and does not lack mutuality, and is specifically enforceable in equity, where it has been fully executed by the employer by retaining the employé until he voluntarily left its service.
   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 71; vol. 44, Cent. Dig. Specific Performance, § 204.]

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

For opinion below, see 138 Fed. 924.

A. J. Baldwin and Wm. L. Pierce, for appellant.

Marshall A. Christy, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The Mississippi Glass Company (here the appellant) filed its bill in equity in the court below against Nicklas Franzen to compel the defendant to assign to the complainant letters patent of the United States, No. 741,125, dated October 13, 1903, granted to the defendant upon an application filed June 17, 1903, for a novel method of manufacturing that class of glass having wire imbedded therein, and commercially known as "wire glass"; also to assign to the complainant his application, serial No. 164,495, for a patent for the apparatus involved in said method. The defendant entered the employ of the complainant at its wire glass factory at Port Allegany, Pa., as assistant superintendent, on the 5th day of September, 1901, at the salary of $100 per month; the contract providing that either party might terminate the employment by giving 15 days' notice in writing to the other. This paper bears date August 31, 1901, but before the employment began, and before the defendant was permitted to enter the complainant's glass works, he signed and affixed his seal to a written contract bearing date September 4, 1901, which contains the following provisions:

"First. The employer is engaged in the manufacture of glass, glassware, and mechanical devices in connection therewith, and that such manufacture is carried on by means of certain secret formulas, methods, processes, tools, machinery, patterns, and appliances, and the same are the property of the employer, and intended to be kept and guarded by the employer as secrets; and that all knowledge and information which the employé now possesses, or shall hereafter acquire, respecting such secrets, and all inventions and discoveries made by said employé during the term of his employment, shall at all times, and for all purposes, be regarded as acquired, and held by the employé in a fiduciary capacity, and solely for the benefit of the employer."

"Fourth. That the employé will, when required, make and execute any and all assignments in writing which may be deemed by the employer proper and necessary to transfer and vest in the employer the entire right, title, and interest in all inventions and discoveries made by the employé during the term of his employment."

The defendant remained in the complainant's service, under his contract of employment, until the 9th day of May, 1903, a period of over a year and eight months, when he voluntarily quit the complainant's service. The bill of complaint alleges that the inventions in question were made by the defendant during the term of his employment with the complainant.

The defendant interposes two defenses to the bill, namely: First, that the inventions in question were not made by him during the term of his employment with the complainant, but prior to his entering its employ; second, that the contract was not enforceable in equity, being without consideration and not mutual. The court below dismissed the bill upon the ground that it was not affirmatively proven that the defendant made the inventions during the term of his employment with the complainant.

In our treatment of the case we will first consider the question of fact as to when the inventions were made by the defendant. And here we have to say that notwithstanding the complainant called Franzen, and examined him, inter alia, as to the time when his inventions were made, the complainant is not concluded by what he testified, or prevented from contending upon the whole evidence that the inventions were actually made while Franzen was in its employment, although he asserted the contrary when on the witness stand. A party who calls the opposite party as a witness is not bound by his testimony, but may contradict him. 1 Whart. Ev. §§ 484, 489. The case of Dravo v. Fabel, 132 U. S. 487, 490, 10 Sup. Ct. 170, 171, 33 L. Ed. 421, decides nothing to the contrary. Speaking of the testimony of the defendants, whom the plaintiffs made their own witnesses, the court said:

"While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be given such weight as under all the circumstances it is fairly entitled to receive."

The evidence shows that before Franzen came to the Port Allegany works he had been employed as a workman in plate glass factories, but never in a wire glass factory; that he never had made any wire glass, and (according to his own testimony) had never seen wire glass made, save on one day in 1897 or 1898, when he visited the

Davis Glass Company's works at Latrobe, Pa. Lemaire, the manager at the complainant's works, who hired Franzen, testifies that at his first interview with Franzen this occurred:

"I asked him whether he knew anything about the making of wire glass, and he said he did not, in any way; that he had never anything to do with wire glass."

Freeman, the master teaser at the complainant's works, testifies that Franzen told him "that he knew nothing of wire glass"; and Eley, another employé at the complainant's works, testifies that Franzen "told me that he never had seen any wire glass made before he entered the employ of the company, and he had no idea of it whatever." Franzen admits that he may have said to these witnesses that he had never made any wire glass, but denies that he said anything more. Franzen claims, and has testified, that he made the two inventions in question before he left the plate glass works at Walton in 1901, and before he came to the complainant's works at Port Allegany. Nevertheless he did not apply for a patent until June 17, 1903, and not until after his 20 months' experience in the complainant's wire glass factory. Franzen testified that he first made sketches or drawings of the inventions in question, "perhaps eight or nine years ago" (i. e., in 1895 or 1896), adding, "I assume that I made drawings similar to that method over 10,000 times until I came to what is patented now." These drawings he testified were made "some time after 1888 until 1889, when my idea was completed, when it was firm in my mind how to accomplish the best method of manufacturing wire glass." When asked if he had in his possession any drawings substantially the same as those of his patent, he answered:

"I think they are all destroyed, but there is a possibility there may be one yet. That would be small sheets; rough sketches. The regular drawings, they are all destroyed."

He testified that he first consulted counsel about the subject of his invention in the beginning of June, 1903, when he went to Washington and saw Mr. Foster, a patent lawyer, and that he took with him two rough sketches, which were made in 1898 or 1899, or it might be long before, adding:

"There was a bunch of them made, and after I picked out what I wanted of them, the rest I burned."

In answer to the question, "Are these two sketches in existence?" he replied:

"A. No, sir; I don't think I have them. I brought them home with me from Washington. When I seen the lawyer in Washington, I showed him those sketches. He made a better sketch himself, then, so he would probably better understand it. After the explanation was through, I took my papers, and the lawyer took what he made there, and told me that was sufficient."

Now, after this testimony was given by Franzen, the complainant put in evidence nine sketches or drawings relating to the patented invention, eight of which it was shown Franzen had submitted to Mr. Foster just before the patent was applied for. These eight sketches or drawings, when laid before him, Franzen admitted were

made by him at Port Allegany in May or June, 1903. The ninth drawing was made by Mr. Foster at Washington. Four of the above-mentioned eight sketches or drawings which Franzen made in May or June, 1903, were on sheets of the office stationery used by the Mississippi Glass Company at its Port Allegany works. To the question, "What actual trials have you ever made of the method of the patent in suit, to make wire glass by the same?" Franzen replied:

"No actual trials at all; just by knowing the nature and the working of hot glass with other metals, learned me that the method of making wire glass by my patent would work."

Four of the complainant's employés testify that, about two months before Franzen left the complainant's service, they were present when Franzen made experiments in the manufacture of wire glass at the complainant's works. This took place on a Sunday night after midnight, outside of the regular running time of the factory. Franzen arranged the machinery in the manner shown in his letters patent No. 741,125, with three rolls, and conducted three experiments introducing the wire at different points. One of the sheets produced was made by the identical method described and claimed in and by the letters patent. Franzen had prearranged with these persons to have them present on this occasion. One of them (Totten) was the night engineer, and he testifies that several days before Franzen had asked him to start the engine on this Sunday night, as he wanted to do some work on the tables. Franzen cautioned each of these four persons not to say anything about the experiment. Franzen admits that the midnight and secret transaction, testified to by the other witnesses, took place, and that wire glass was then made by the method stated in the first claim of his process patent No. 741,125; but he denies that it was a test of his method, or intended so to be. His explanation is that his purpose was to discover what caused glass manufactured at the works to be "lappy," or seamy.

It appears from the evidence that the eight sheets of drawings which Franzen made at Port Allegany in May or June, 1903, and submitted to his patent attorney, and from which the latter produced the drawings of the method patent No. 741,125, show the following apparatus, all of which were used at the complainant's factory in the manufacture of wire glass during the time Franzen was there employed, namely: A moving table, a water-cooled roll, a bracket or yoke, a gunn or guide projecting over and on top of roll 3, and a screw plate, spring, and pressure screw above the uppermost roll. Franzen states that he saw a moving table and a gunn or guide at the St. Gobain works at Stolberg, Germany, in 1888, but admits that he first saw a water-cooled roll for the manufacture of wire glass at the complainant's factory at Port Allegany, and says that he does not know whether or not the bracket or yoke was used anywhere else. Franzen admits that the apparatus described in his application, serial No. 164,495, and that shown in his method patent, are substantially the same.

Jacklin, an employé of the complainant, testified that Franzen told him as a reason for leaving that "he wanted to apply for a patent,

and couldn't do it while he was employed by the Mississippi Glass Company." Millard, an employé of the complainant, testified that Franzen told him he was going to quit, assigning as the reason that "he was going to get a patent, and he had to quit before he could get it." John H. Freeman, an employé of the complainant, testified that Franzen, shortly after he left the employ of the complainant, attempted to interest him in a co-operative company for making wire glass under an invention of his, and the witness states:

"I said to him, 'Nick, this probably is borrowing trouble.' He says. 'Why?' I says, 'On a secrecy contract.' He says, 'The secrecy contract don't amount to a damn.'"

The witness states that Franzen did not intimate that he had made the invention before he entered the complainant's employ. John A. Clay, an employé of the complainant, testifies that he had a conversation with Franzen after he had left the company's employ about starting a co-operative company under his patent; that he (the witness) asked Franzen if it was practical, and Franzen said he knew it was. And in answer to the question, "And how was it Franzen knew it was practical?" the witness testified, "He told me he had tried it; he had tested it." And that in answer to the further question, "And tested it where?" Franzen said, "At Port Allegany, at the Mississippi Glass Factory."

The defendant testified that he had never shown the drawings illustrating his invention to any one, but that he had "roughly" explained his invention to Charles and William Mickey, who at the time were his fellow workmen at Walton, telling them "that it was possible to make separate sheets and unite them into a solid sheet again, or something in the meaning of— I mean I meant to tell them that. I may have used other words, and I believe that I spoke to them that wire glass could be made, making two separate sheets and put the wire between." These men Franzen called to corroborate himself. William Mickey testified that Franzen, upon his return from a visit to Latrobe, had said: "I have a better idea of manufacturing wire glass than any I have ever seen yet." Charles Mickey is much more definite as to what Franzen said, and, indeed, he goes far beyond what Franzen himself states he explained to him. Franzen produced a small book, which he stated he used at Walton for "sketches, memoranda, and such things"; but we do not see that it contains anything that sheds light upon the matter in controversy.

In the nature of the case, it was scarcely to be expected that the complainant could prove that the inventions in question were made during the term of Franzen's employment by the direct or positive testimony of any witness speaking from his own actual or personal knowledge. Naturally the complainant's reliance would be on circumstantial evidence, which often leads to a conclusion more satisfactory than direct evidence can produce.

This record, we think, presents circumstantial evidence which fully justifies the conclusion that the inventions in controversy were made by Franzen during the term of his employment with the complainant. Prior to his employment, Franzen had not made any wire glass,

nor had he worked in a wire glass factory. His own declarations (which we regard as satisfactorily proven) at the commencement of his employment in the complainant's factory, were that he knew nothing whatever about the making of wire glass. According to his own admission, he had never made, before he came to Port Allegany, any trial or test of the practicability of the method of manufacturing wire glass which he claims he had long previously conceived. He produces no contemporaneous or anterior drawing illustrating either of his inventions—the process or the apparatus. His delay in applying for a patent is extraordinary and inconsistent with the completion of the invention at the time he alleges. It is a fact almost controlling that the invention was first put in operative form in the complainant's factory and by Franzen during his employment there. The secrecy and concealment from his employer of his experiments on that occasion discredit his claim that he perfected his invention before his employment began. Franzen's explanation that his Sunday night experiments were for the purpose of discovering the cause of "lappy" glass is not reasonable. Franzen's application for a patent was made only 39 days after he had voluntarily left the complainant, and his avowed reason for leaving was that he wanted to get a patent, and could not while he was employed with the complainant. His drawings, which formed the basis of his application, were made by him at Port Allegany in May or June, 1903, and four of them were upon stationery then in use in the complainant's office. The statement of Franzen that he took to his patent attorney in Washington two rough sketches made in 1898 or 1899—implying that the patent application was prepared from those two sketches—is disproved; the drawings submitted by him to Mr. Foster being those made in May or June, 1903. Moreover, these drawings illustrate the very apparatus then in use in the complainant's wire glass factory, some of which Franzen had never seen anywhere else, and which it is incredible could have entered into his mental conception at the time he alleges he made the inventions.

And here we may observe that a mere mental conception, not tested or reduced to practice, nor followed by any embodiment of the idea, is not invention. Upon the whole evidence we are entirely convinced, and accordingly find, that the inventions in question were made by Franzen during the term of his employment with the complainant.

We now pass to the other branch of the defense, namely, that the contract was not enforceable in equity upon the theory of lack of consideration and lack of mutuality. This contract, however, was not without consideration. It was not only by its own express terms in consideration of the employment of the defendant, but this contract was signed and delivered before the employment actually commenced, and before the defendant was permitted to enter the complainant's factory. The two papers dated August 31st and September 4th constituted one transaction. The hiring, the engagement to pay wages, and the introduction of the defendant into the complainant's establishment and to its methods and processes, constituted a valid con-

sideration for his agreement to assign his inventions made during his term of employment. This question was considered by the Circuit Court of Appeals for the Fourth Circuit in the case of Hulse v. Bonsack Machine Co., 65 Fed. 864, 13 C. C. A. 180, and it was there held that a contract of this character was founded on sufficient consideration, and was valid and enforceable specifically in equity. In Thibodeau v. Hildreth, 124 Fed. 892, 893, 60 C. C. A. 78, 79, 63 L. R. A. 480, which involved a contract between an employer and employé similar to the one here, and based on the consideration of employment, the Circuit Court of Appeals for the First Circuit said:

"This contract is neither unconscionable nor against public policy. Such an agreement is not uncommonly made by an employé with his employers, and it may be necessary for the reasonable protection of the employer's business."

The same doctrine is laid down by Robinson in his work on Patents (volume 1, § 414).

We are unable to accept the proposition that the contract here in question lacked mutuality. Undoubtedly there was reciprocity of obligation. Moreover, we are dealing with an executed contract. The defendant enjoyed the benefits of his contract for a period of over one year and eight months, and then left of his own accord. He is therefore in no position to question the right of the complainant to equitable relief by decree for specific performance.

The doctrine of nonenforceability in equity of a contract for lack of mutuality has no application to an executed contract. Green v. Richards, 23 N. J. Eq. 32, 35; Hulse v. Bonsack Machine Co., supra; Grove v. Hodge, 55 Pa. 504, 516. In the last-cited case the court, speaking by Judge Strong, said:

"Want of mutuality is no defense to either party, except in cases of executory contracts. It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one the obligation was fulfilled, the contract was executed, when it was made. As to the other party, it remained executory. A consideration may be either something done, or something to be done, or a promise itself. When it is something already done, it is idle to talk of want of mutuality. That is to be considered only when the obligations of both parties are future."

With reference to the argument based upon clause third, it is enough to say that there was no breach of contract by the employer, and hence the provisions of that clause become altogether immaterial and inapplicable under the facts of this case.

We think both defenses ought to have been overruled, and that a decree for specific performance should have been entered in favor of the complainant. Accordingly the decree of the Circuit Court is reversed, and the cause is remanded to that court, with directions to enter in favor of the complainant a decree of specific performance in respect to both the inventions, in accordance with the prayers of the bill.

CIMIOTTI UNHAIRING CO. et al. v. BOWSKY.

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

No. 1.

1. PATENTS—INFRINGEMENT—MACHINE FOR REMOVING HAIRS FROM FUR SKINS.
The Sutton patent, No. 383,258, for a machine for removing hairs from fur skins, claim 8 considered, and *held* infringed.

2. SAME—PROFITS.
A finding as to the profits made by a defendant by the use of an infringing machine sustained, where it accorded with his own testimony given in another suit.

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

Appeal from a final decree, entered on the report of a master, awarding to complainants the amount of defendant's profits made by his infringement of letters patent, No. 383,258, granted to John W. Sutton and owned by complainants. For opinions below see 95 Fed. 474; 108 Fed. 82, 85.

The opinion of the Supreme Court reviewing the entire field of litigation in the lower courts and sustaining the Sutton patent, after restricting somewhat the scope of the eighth claim, is reported in 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100.

See 113 Fed. 698, 699.

Henry Schreiter, for appellant.

Louis C. Raegener and S. L. Moody, for appellees.

Before WALLACE and COXE, Circuit Judges, and THOMAS, District Judge.

COXE, Circuit Judge. Few patents have met with more persistent and strenuous opposition than the Sutton patent in suit. All controversy as to the validity of the eighth claim and as to the proper rules for its interpretation has at last been set at rest by the decision of the Supreme Court. But two questions arise on this appeal: First. Did the defendant infringe? Second. Did the master err in his method of computing the defendant's profits?

The Supreme Court holds that the Sutton patent is for a meritorious though not a broad initiative invention, and that it is entitled to some range of equivalents. The opinion says:

"Due weight is given to the Sutton patent when it is given credit for dispensing with the plate which Covert had in addition to the brush, and which he supposed would carry down the fur away from the cutting mechanism, but which Sutton has accomplished in giving, in a measure, at least, this added function to the brush of not only parting the fur, but carrying it down and away in preparation for the clipping by the knives. Any one who accomplishes the same purpose by substantially the same mechanism, using the elements claimed in Sutton's patent, may be held to be an infringer. Sutton has taken the step which marks the difference between a successfully operating machine and one which stops short of that point, and that advance entitles him to the protection of a patent."

It is argued that the defendant's machine does not contain the fifth element of the claim, namely, "mechanism whereby the rotary brush is moved upward and forward into a position in front of the stretcher-bar."

The defendant testifies that the rotary brush employed by him does not brush the fur from the edge of the stretcher-bar leaving the water hairs standing before they have been burnt away by the metallic conductor heated to incandescence, but, on the contrary, that it brushes the water hairs off after they have been burned. In other words, he contends that the brush performs no function of the claim but operates only to brush out of the fur the remnants of the singed hair. When asked if the brush "materially assists in brushing down the fur and causing new water hair to rise up" he answers:

"If it does that it is accidentally and was not intended because the brush does not touch the fur hard enough to produce that effect mechanically."

It is argued that this function is performed by the joint action of the apron and the stationary brush which seems to be the exact equivalent of the "stationary card E" of the Sutton patent. The defendant is, therefore, forced to maintain that the fur can be brushed aside and the water hairs made to stand up at the part by the use of the "card E" alone; a propositon which is refuted by the entire art and by all the testimony in the case. It was because a stationary brush would not do the work that not only Sutton, but all the prior inventors were seeking to discover some device that would do it. Sutton found it in the rotary brush and no commercially successful machine has been built since which has omitted this feature. It is true that the defendant's brush does not move in the same orbit as the brush of the patent, but this is true of all the machines heretofore held to infringe. In two of them, indeed, the brush did not move at all, the stretcher-bar moving back and forth from the brush to the cutters, and yet it was held that the two constructions were equivalents, the defendant's device accomplishing the same result in substantially the same way. There is nothing magical in the course taken by the brush, as shown in the Sutton drawings. Any other course, which produces the desired condition at the edge of the stretcher-bar, will do as well, and an infringer cannot escape because he has made ingenious mechanical changes in the mechanism which actuates the brush.

As has been pointed out again and again during this protracted litigation the essence of Sutton's invention is the arrangement of the rotary brush so that it will separate the fur from the stiff water hairs, permit the latter to stand up on the edge of the stretcher-bar and brush down the former on the off side of the bar so that it will not be cut by the knives or burnt by the electric conductor. That the defendant uses such a brush there can be little doubt. His brush is not as effective as that of the patent; it does not do the work so well; but that it brushes away the fur and permits the stiff hairs to be burnt off without injury to the fur is established beyond reasonable doubt.

Our reasons for reaching this conclusion may be summarized as follows:

First. Unless the fur is removed from the edge of the stretcher-bar it will be burnt and the pelt destroyed. Nothing is shown in the defendant's mechanism which does this except the rotary brush. The apron will not do it; the card will not do it; and yet that it is done is

undisputed. Nothing is left to do this work but the rotary brush. The inference that the work is done by the brush is well-nigh conclusive. It is difficult to believe that the defendant would have mounted the brush on movable bearings and moved it forward and backward along the lower surface of the bar, involving the risk of an infringement suit, if the sole function of the brush were to remove the singed hair. A brush on fixed bearings, far removed from the edge of the bar would do this as well.

Second. Stephen Hanna, a witness called for the defendant, testified that in June, 1897, he fixed up a machine for the defendant like that shown and described in Figs. 5 and 6 of the Jenik patent; that in the machine there was a rotary brush "like 'C' in the Jenik patent;" that this brush "permitted the water hairs to stand up in order to be acted upon by the platinum strip;" that subsequently he made a change so that the brush moved up and down behind the stretcher-bar. Turning to the Jenik patent we find the brush C described as follows:

"A successive strip of pelt is pulled through the teeth of the comb K and the coarse and stiff hairs singed off by the blade approaching the pelts each time exactly when one of the six rows of bristles of the brush C has passed over and brushed away the fur from the edge of the bar, and the gap, following it, allows the stiff hairs to rise."

Third. The defendant's expert submits four illustrative sketches which, apparently, show the stiff hair and fur standing up on the edge of the stretcher-bar. After the brush has been moved into contact the fur and hair are shown brushed down out of harm's way, and when the brush recedes the stiff hairs spring up ready for the singeing blade precisely as in the Sutton machine. In his testimony the expert says:

"It might be that the movable rotary brush of the defendant's machine, while in its uppermost position, may catch up and draw some part of the fur from the edge of the stretcher-bar, and thereby help to separate the fur from the water hairs protruding on the edge of the stretcher-bar."

In short, the position of both the defendant and his expert seems to be that though the defendant infringes the infringement is unintentional, negligible and accidental. The defendant's brush is moved into a position in front of the stretcher-bar, in the sense that it is ahead of the bar, though not directly in front; it brushes some, at least, of the fur from the edge of the bar and it permits the water hairs to spring back ready for the knife or singeing blade. This is enough; it is not an excuse that it is less effective than the Sutton brush.

Fourth. Three intelligent witnesses for complainants, entirely familiar with the art, testify that the defendant's machine contains all the elements of the eighth claim of the Sutton patent.

We think the Circuit Court was right in finding infringement. The contention that the master erred in finding that the defendant made a profit of 75 cents per dozen on the pelts unhaired by him is based upon a misconception of the proof. The defendant was confronted with his testimony in an action for libel against the Cimiotti Unhairing Company and testified that his answers in that suit were true as he believed them to be in the absence of his books. He there testified that he made 75

cents per dozen profit on the skins unhaired by him. The proposition is now advanced that in giving his answer he only referred to the skins unhaired during the month preceding the service of the injunction. We do not think the testimony warrants this interpretation.

He was asked to state what work he did with his machines. In answer he said that at first, while they were getting the machines in order, the business was not so flourishing, but at the close, after they were in good running order, "we made at least a thousand dozen a month—the last month." He was then asked: "What were you receiving per dozen for unhairing those skins?" The contention that "those skins" referred only to those unhaired during the last month places a very strained and unnatural construction upon the language used. It is stated in the complainants' brief that this contention is here presented for the first time and we are unable to find anything in the record to the contrary. The defendant could have made any explanation of his testimony he desired, and had the question been raised before the master the complainants would have had an opportunity to show that the profit was the same during the entire infringing period.

It is enough, however, to say that we think the testimony does not justify the defendant's interpretation. We have now considered the questions discussed at the bar. Other errors are assigned in the brief, and though we have examined them with care we think none of them is well founded or requires extended comment.

The decree is affirmed with costs.

IRONCLAD MFG. CO. v. DAIRYMAN'S MFG. CO.

SAME v. ORANGE COUNTY MILK ASS'N.

(Circuit Court of Appeals, Second Circuit. February 1, 1906.)

No. 188.

PATENTS—INFRINGEMENT—MILK CANS.

The Haigh patent, No. 607,433, for a milk can, is limited to the specific means shown for uniting the reinforcing neck portion with the neck portion of the body of the can, by an interlocking flange as its only novel feature, in view of the prior art, and it is not infringed by a construction which does not employ such interlocking means.

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

For opinion below, see 138 Fed. 123.

R. N. Kenyon and Henry D. Williams, for appellant.

Frank S. Black, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The decree appealed from adjudged the validity, and the infringement by the defendant, of claim 1 of letters patent No. 607,433, granted July 19, 1898, to Henry B. Haigh for a milk can. The assignments of error challenge the correctness of the decision in both respects. The controversy between the parties is presented in a very voluminous record, and the proofs disclose a mass of evidence, most of which is of little value upon the issues really involved. The question of the validity of the patent is to be determined by ascertaining what it describes and claims which had not been described in previous patents, and construing the claim so far as its language will permit so as to secure to the patentee that which was really new and patentable in view of the prior art. The art to which the patent relates is a very simple one, and the description and drawings in the patent in suit and in the prior patents show so plainly what had been done before and what was new that no expert testimony can materially clarify or obscure the inquiry. The question of infringement is to be determined by ascertaining whether the cans manufactured by the defendant embody all the essential elements of the first claim of the patent in suit. There is no dispute of fact in regard to the features of the cans manufactured by the defendant, and the opinions of the experts upon the question whether or not they embody all the essential parts of the claim are of no assistance to the court, because their value depends altogether upon the construction to be given to the claim, and this is a matter wholly for the court.

The patent relates to a class of milk cans—those having a neck made of two layers of metal—which was well known in the prior art and had been the subject of numerous patents. Cans used in transporting milk upon wagons and in railway trains are subject to rough handling, and it is desirable that the neck be stronger and more rigid than the other parts, in order to resist the strain to which that part is especially liable. It is also important that there be no seams or crevices or rough

surfaces on the inside to interfere with a thorough cleansing when the milk has been removed, as otherwise they are not "sanitary," in the sense in which that term is used by milk dealers. To save the extra expense of making the entire can of heavy metal, while sufficiently strong in the neck, inventors, at an early period, conceived the feasibility of making the body of a single sheet of metal, with a neck reinforced by an additional layer. This could have been readily done by superimposing an extra layer on the outside of the neck, if it had been practicable to make the neck and body of a can from the same sheet of metal by the swaging or stamping process required by facility and economy of manufacture. When the body and neck parts have to be swaged or stamped each from its own sheet, in order to unite the two parts so that they would not pull apart in use, it seemed necessary to solder or rivet them together; and this not only added to the cost of manufacture, but produced an "unsanitary" can.

The patent to Hatch of March 5, 1872, for an improvement in milk cans, in which the neck is referred to as the bowl of the can, and the body as the breast, describes a breast of sheet metal stamped by suitable dies with an upwardly projecting portion adapted to receive the neck or bowl of the can, and a bowl stamped with a downwardly projecting section so formed as to be received into the upper end of the breast; the two parts being soldered together and constituting a neck of two layers of metal, and one overlapped by the other. By this construction an overlapping edge is presented at the inside lower end of the neck. This edge is to be "filed down so as to present a smooth surface at this joint" to facilitate the cleaning of the can.

The patent in suit is for an improvement in cans of this type, which consists in joining together the two overlapping layers by an arrangement which dispenses with soldering or riveting them together. As particularly described in the specification, this is effected by providing the inner one of the overlapping layers (termed neck members) at its extreme end with projecting flange, "bent or turned outwardly at a relatively sharp angle to form a locking flange," and the outer one with an annular recess adapted to receive the flange. When the parts are assembled together, the flange "rests" in the recess, and the parts engage sufficiently to form a flush joint. The specification states that preferably the neck member of the mouth will be of the same area as the neck member of the breast, and preferably one member will completely overlap the other throughout the area thereof. It also states that, "when the parts have been assembled and firmly locked together, they are subjected to the usual coating or tinning operation, whereby the seams are filled and the joints are firmly cemented together by the coating metal, which acts as a soldering medium." In the drawings the neck thus formed is shown to be of two layers throughout its area; each neck section extending from the breast to the mouth of the can. The locking flange and recess, as shown in the drawings, interlock merely in the sense that the recess completely houses the flange in such an engagement as to unite the two layers together by a flush joint at the end of the inner neck member. The claim is as follows:

"(1) A milk can comprising a breast member provided with a neck portion, and a mouth member provided with a neck portion; one of said neck portions extending within and being overlapped by the other neck portion, and one of said neck portions having a flaring reinforcing and locking flange, and one of the said members having an annular recess for the reception of said flaring flange, whereby the breast member and mouth member are locked together by a flush joint interlocking means."

It will be observed that, although the drawings show a can of two layers throughout the vertical width of the neck, the claim is not limited to such a construction. Unless each of the neck members is of the same area as the other, the two cannot completely overlap. The specification states that they are "preferably" of the same area, and that they are "preferably" to overlap completely, in order to eliminate any limitation which might be implied if these terms had not been used, and thus to save the claim from being so narrowed that a can otherwise like that described would not be covered by its terms, if the neck were not of double layers throughout the entire neck area.

The patented can manufactured by the complainant is, beyond doubt, an excellent article for the uses which it is designed to serve, and enjoys a commercial success and a measure of popularity with milk dealers which affords emphatic testimony of its superiority. Whether this popularity is not attributable to superiority of workmanship rather than to any patentable improvement which it embodies may be questionable. All the components of the first claim, except the so-called interlocking means, were old separately and collectively in the prior art; and, when the application for the patent was pending, the Patent Office rejected for want of novelty a claim originally contained in it, which enumerated all these components except the interlocking means. The applicant acquiesced in the rejection, and amended his claim by adding the interlocking means. Thus it was conceded, and the complainant is precluded from asserting the contrary, that, except for the interlocking means, there was no novelty in the invention claimed.

A reference to three only of the numerous prior patents which have been introduced in evidence by the defendant suffices to show that, if any patentable novelty was contributed to the claim by adding these means to the other component parts, it resides in a very narrow compass.

In the patent to Tiepke of December 6, 1887, for an improvement in milk cans, the mouth of the can is referred to as the bowl. This patent shows the double layer neck formed by an extension of the bowl and an extension of the breast, and one extension being inserted within and overlapped by the other, "and firmly united, as by soldering." The can of this patent has also a double layer breast; the bowl being extended so as to inclose not only the neck, but also the breast. In this can there is no overlapping edge inside the neck, and the extensions of the breast and mouth members are united by a flush joint.

In the patent to Tripp of January 10, 1893, the double layer neck is shown as made by overlapping the lower portion of the mouth with the upper portion of the breast; the extension of each part being integral with it, and so formed that the extension of the mouth will tele-

scope with the extension of the breast throughout the area of the neck. This construction presents a flush joint inside the neck at its lower end at the terminus of the mouth member.

The patent to Wolf of March 13, 1894, describes a milk can in which the overlapping portions of the neck are extensions of the mouth and breast, respectively, and made integral therewith. In the can of this patent the mouth extension is inserted in an annular offset formed in the breast extension, and which constitutes a recess for housing the mouth extension. When assembled, the two extensions present a flush joint at the place where they are connected on the inside of the neck. This can does not have a double layer neck which extends the whole distance between the mouth and the breast, nor does the inner one of the overlapping neck members have a flaring interlocking flange.

These prior patents disclose that Haigh was not the first to devise means whereby the breast member and the mouth member are joined together in the neck portion of the can by a flush joint connection, and that his only departure from the prior art consists in his peculiar method of constructing a flush joint connection. In view of the Wolf patent, it is obvious also that there was no novelty in constructing a flush joint connection in the double layer neck of the can, by which the mouth and breast members engage, and the end of one is completely housed in the end of the other, and does not present an outlying edge on the inside of the neck. Whatever patentable novelty there is in the assemblage of the parts enumerated in the claim in controversy must consequently be found in the details of construction which differentiate the so-called interlocking means of the claim, which are strictly only engaging means, from means such as are shown in the Wolf patent. It follows that the claim must be limited to a can which has the specific locking means enumerated in the claim.

It may be true, as is asserted by the complainant, that the patented can is the first which was ever actually manufactured and put upon the market which had a neck of double layers connected by a flush joint, or in which there was no soldered surface upon the inside. But whether such cans as are described in the prior patents were ever actually made, or not, is an immaterial consideration. These patents show so plainly what they purport to show that he who runs can read; and their effect in negativing the novelty of the claim cannot be impaired by any argument that they are impracticable structures.

As has been said, the Wolf patent does not show a projecting flange. Nor is the recess therein shown of the peculiar form adapted to receive and engage a flaring flange. Nevertheless, they would seem to engage sufficiently to obviate the necessity of soldering the inside of the neck, notwithstanding Wolf proposed to solder or rivet his overlapping edges. The engaging devices of the patent in suit approximate more nearly to locking devices in function than do those of the Wolf patent, and it may be true, as is insisted by the complainant, that they are adapted to secure a tighter joint. It is doubtful whether without the aid of soldering or riveting they would always suffice to hold the breast member and the mouth member from pulling apart

in use, and it appears that the complainant, in manufacturing its cans, solders the joint on the outside of the can. If they suffice, however, when the parts are assembled, to engage them so tightly that the seam on the inside of the neck will be completely filled after the usual spinning and retinning operations have been applied to the can, whereas a seam like that of the Wolf patent cannot be made sufficiently tight without the further operation of soldering, the change in the form of the engaging devices is an improvement of sufficient value and utility to support a patent.

The question whether the making of the change was invention, or whether it was anything more than application of ordinary mechanical adaptation in devising suitable means to an end, is not entirely free from doubt. In the view which we have reached upon the issue of infringement, this is a question which need not be considered.

The can of the defendant which is alleged to infringe, and which is referred to in the proofs as the "John Street can," does not have the flaring flange which is an indispensable part of the first claim of the patent in suit. Not only does it not have a flaring flange, but it has no flange whatever, and nothing which in any sense performs the function of a locking flange. The recess in this can differs as much from the recess in the patented can as that does from the recess in the can of the Wolf patent. The two parts interlock or engage only in the sense that the same parts do in the can of the Wolf patent. Regarded separately or collectively, the engaging devices differ as essentially from those of the can of the patent as those do from the engaging devices of the Wolf patent. We conclude that infringement was not established.

The decree is reversed, with costs of this court, and with instructions to the court below to dismiss the bill with costs.

PARRAMORE v. SIEGEL-COOPER CO.

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

No. 83.

PATENTS—INVENTION—STOCKING SUPPORTER.

The Parramore patent, No. 629,391, for a stocking supporter, claims 1 and 2, are void for lack of patentable invention in view of the prior art if not fully anticipated by the Andrews patent, No. 550,551.

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

On appeal from a decree of the Circuit Court for the Southern District of New York adjudging claims 1 and 2 of patent No. 629,391, granted July 25, 1899, to R. W. Parramore, valid and infringed, and granting an injunction and an accounting. This court, Judges Wallace, Lacombe, and Shipman sitting, sustained the patent in suit in Parramore v. Taylor, reported in 114 Fed. 97, 52 C. C. A. 45. A writ of certiorari to review this decision was denied by the Supreme Court, 186 U. S. 484, 22 Sup. Ct. 944, 46 L. Ed. 1261. In Parramore v. Cohn (C. C.) 116 Fed. 1022, the Circuit Court held that the devices shown in the patents to Andrews and Banfield seemed no nearer to the patent in suit than those considered by this court in the Taylor Case. In Kleinart Rubber C[o].

v. Stein the Circuit Court of Appeals for the Seventh Circuit, 133 Fed. 230, 66 C. C. A. 282, decided that the Parramore patent was anticipated by the patent to Andrews (No. 550,551). A petition for a writ of certiorari to review this decision was denied by the Supreme Court, 196 U. S. 641, 25 Sup. Ct. 796, 49 L. Ed. 631.

J. Edgar Bull, for appellant.

Edwin H. Brown and Louis C. Raegener, for appellee.

Before WALLACE and COXE, Circuit Judges, and HOLT, District Judge.

COXE, Circuit Judge (after stating the facts). The decision of this court in Parramore v. Taylor, 114 Fed. 97, 52 C. C. A. 45, leaves open the single question whether claims 1 and 2 of the patent are invalidated by the references which are now presented for the first time to this court. These are the patent to J. D. Banfield, No. 197,587, granted November 27, 1877, for a stocking supporter, and the patent to J. C. Andrews, No. 550,551, granted November 26, 1895, for an underwaist. Both sides agree that the claims must be construed to cover a new article and not the new use of an old article; that patentability must be found in the mechanical construction of the device and not in the manner of its use; that if the claims simply cover the new use of an old supporter they are invalid, and that, speaking broadly, the so-called "pad" is not an element of the claims.

The construction placed upon these claims by the complainant in the Taylor suit was that they cover the supporter as an article complete in itself, adapted for a certain use and do not include a corset or any part thereof as an element. The expert in that suit contended that whether the supporter be used as described in the patent or with other connecting means the fact "has no bearing on the Parramore hose supporter as an invention." A person making, using, or selling the patented device would infringe, and he would not be permitted to escape on the plea that it was intended for use on an underwaist or a belt. It follows, as a necessary corollary that such a structure in the prior art will anticipate irrespective of its connection, use or lack of use.

Figure 1 of Banfield's patent shows a stocking supporter upon which claim one of the patent, if broadly construed, can be read. The exhibits show an operative device, which holds up the stockings and holds down the corset, having a single hanger provided with an eye or loop adapted to be detachably engaged with the stud of a corset clasp. That such a supporter combines actual utility with commercial success is demonstrated by the fact that Taylor, the defendant in the previous suit in this court, made and sold nearly 40,000 of, substantially, similar supporters. The defendant contends that Taylor accounted for these supporters before the master and that they were included in the settlement subsequently made. However this may be there can be no doubt that large numbers were sold, went into actual use and, presumably, worked successfully.

The Andrews device comes nearer than Banfield to a complete anticipation of the claims as the invention was understood by counsel, experts and court when the patent was here in the former suit. It is no longer

possible to say that Parramore was "the first to design a complete detachable device which sustained both stockings from a single existing point of support on the corset." Andrews describes and shows precisely such a device and though it does not appear that it sustained two stockings, that it is capable of doing so does not admit of doubt. The exhibits and the photographs of the supporter in actual use demonstrate this. Several witnesses who actually wore the Andrews device testified that there was no difference between it and the Parramore supporter in efficiency and comfort. Other witnesses for the complainant testified that the Andrews supporter did not operate successfully; that it was uncomfortable, ephemeral and clumsy. This situation is not unusual in patent causes. The defendant undertook to prove that the Banfield and Andrews supporters were the embodiment of perfection; the complainant that they were the embodiment of stupidity; and, as generally happens, both succeeded. The defects pointed out by the complainant's witnesses were of minor details, which could be remedied by a moderate display of common sense on the part of the wearer. But be this as it may the witnesses on both sides substituted these supporters for the "Hook-ons," previously used, and wore them for 10 and 12 days and in the meantime their stockings were held up, their corsets kept in place and, presumably, their "straight fronts" preserved.

It may be admitted that the Parramore device is more perfect in structure, possesses more "selling points" and is more satisfactory in use than is the Andrews device, but that is not the question in issue. Many of these improvements were not new with Parramore and it is not pretended that he is entitled to them. The Andrews supporter shows all the elements of the first claim including the hanger, though the latter differs in shape from that shown in Parramore's drawings, and the testimony cannot be disputed that the Andrews supporter is adapted to do, and does do, precisely what the patented device does, though in a less perfect and artistic manner. It may be that the Andrews device strictly speaking is not an anticipation, but we have no doubt that its addition to the proof so limits the field of invention as to invalidate the claims involved for lack of patentability.

We agree with the conclusion reached by the Circuit Court of Appeals of the Seventh Circuit in the Stein Case, and are convinced that this court would have reached a similar conclusion in the Taylor Case had the records been the same.

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

HOLT, District Judge, concurs in result.

MORRIN v. ROBERT WHITE ENGINEERING WORKS.

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

1. PATENTS—INFRINGEMENT—REPAIR OR RECONSTRUCTION.
The Morrin patent, No. 463,307, for a steam generator covers an invention, the only novel and patentable feature of which is the peculiar ogee shaped generating tubes, and the replacing of all of such tubes in an old generator constitutes a reconstruction, and not repairs, and infringes the patent.

2. SAME—STEAM GENERATOR—REPLACEMENT OF TUBES BY USER.
The purchaser of a patented machine is entitled to make necessary repairs, and to replace worn out parts not separately patented so long as the identity of the licensed machine is not destroyed, and such repairs may be made by himself or by any one employed by him. In case of a steam generator having a number of tubes of peculiar shape, which constitute the only patentable feature of the structure, while a purchaser and user is not entitled to reconstruct all of such tubes, he has the right to replace one, which becomes burned out or otherwise inoperative without infringement, and the limit of his right between these extremes is a question to be determined on the facts in each case under the above rule.

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

The opinion in the court below is reported in (C. C.) 138 Fed. 68, where the facts are fully stated, and all of the leading authorities collected. The validity of claim 2 of the Morrin patent in suit, No. 463,307, was sustained in Morrin v. Lawler (C. C.) 90 Fed. 285, and Morrin v. Edison Electric Co. (C. C.) 90 Fed. 285, affirmed 99 Fed. 977, 40 C. C. A. 204.

Frank Harvey Field and Thomas Ewing, Jr., for appellant.

Henry M. Turk and Clifford E. Dunn, for appellee.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The validity of claim two of the Morrin patent No. 463,307 having been sustained by this court is no longer the subject of controversy. It is as follows:

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

We fully concur with the judge of the Circuit Court in holding that the tiers of generating tubes of the so-called "Ogee" form constitute the vital element of the combination. It was this which made it patentable. In order to describe the invention intelligently it was necessary to show an upright generator cylinder as a support for the tubes, but the improvement over the prior structures and the advantages resulting therefrom are all found in the new tube which permitted this arrangement in tiers as shown. Omit the tubes and nothing patentable remains. This being so, it follows as a necessary conclusion that the defendant in furnishing practically new sets of tubes for the Terre Haute company and for the American Manufacturing Company, was not merely making repairs, but was, in fact, furnishing a new boiler essentially reconstructed in all of its novel features. This was infringement.

The work done for Wurster & Co. in replacing four tiers of their boiler presents a more doubtful question, but as it is not an unfair inference that the work would have been continued but for the injunction, we are not disposed to disturb the action of the Circuit Court in this particular. If the decree had simply granted an injunction restraining the defendant from infringing the second claim of the Morrin patent by the repetition in the future of the acts complained of in the past, there would be no difficulty in sustaining it. But the decree goes further, and prohibits the defendant not only from making, using and selling new machines and reconstructing old ones, but also from "putting into practice, operation or use, steam generator tubes made according to and containing the pear shape or ogee form, like or similar to those which the said defendant has heretofore made, used or sold, or any steam generators or steam generating tubes containing or embodying the said invention * * * and from counterfeiting or imitating said invention and any part or parts thereof in any way whatsoever."

It is thus manifest that the defendant is enjoined from making the tubes for any purpose whatever, and that the repair of a single tube is within the prohibition of the injunction. In this respect we think the decree is too broad and sweeping. The theory of the rule invoked by the complainant is that a patentee of a combination cannot be deprived of his gains and profits by the conversion of an old and defunct machine under the guise of repairs. If a new machine be needed the patentee is entitled to furnish it, but on the other hand, the purchaser of a patented machine is entitled to make necessary repairs and to replace worn out parts, not separately patented, so long as the identity of the licensed machine is not destroyed. If this be lawful for the owner, it is equally so for the mechanic who is employed to do the work; the latter cannot be held as an infringer for making repairs which the former has an undoubted right to make.

It appears from the record that single tubes frequently are burned out and require replacement. To hold that the owner of a steamship or motor car, employing the Morrin generator, can not have his boiler repaired by the substitution of new tubes for those thus rendered useless without subjecting the mechanic who makes the substitution to the charge of infringement will be contrary to the trend of authority upon this subject. It was not seriously disputed at the argument that the repair of a single tube would not infringe the claim. It is equally clear that replacing the entire series is an infringement. Between these two extremes lies a debatable ground, the precise limits of which cannot be determined in advance. Whether the bounds of legitimate repair have been exceeded must be determined upon the facts of each case as it is presented. The mere fact that the patentee is able and willing to replace the injured part and make the repair is not alone sufficient to vest in him a monopoly of this work. If the purchaser sees fit to make necessary repairs himself, or employs others for that purpose, he has a right to do so, even though it be shown that he has theretofore been guilty of infringement. The commission of an unlawful act in the past does not warrant the prohibition of lawful acts in the future.

The necessity for repairs and the right to make them is recognized in

the catalogue published by the Clonbrock Company, complainant's former licensee, where it is stated that these repairs can be readily done by a good mechanic and that:

"The necessary tools to make any repairs are an ordinary expander tool, hammer and cape-chisel, and a tackle for removing any upper sectional casing above the furnace."

The right is also recognized, inferentially, at least, in the court below, where the learned judge, referring to the work done on the Wurstur boiler, says:

"The supply was not for an emergency. It is not as if a tube or a few tubes had broken, and in an exigency the purchaser applied to a local mechanic to supply them."

The difficulty with the present decree is that the defendant is restrained from doing precisely this work—supplying a broken tube in an emergency. We think work of this character may be lawfully done by the defendant, notwithstanding the fact that it is equipped to do the work speedily and efficiently, and notwithstanding the fact that in the past the work may have gone beyond the limits of justifiable repair. The defendant should not be molested if it keeps within proper limits in the future.

The decree should be modified to conform with these views and, as so modified, should be affirmed, but without costs in this court.

BRADLEY v. ECCLES.

(Circuit Court of Appeals, Second Circuit. February 8, 1906.)

No. 169.

1. PATENTS—INVENTION—USE OF OLD DEVICE IN DIFFERENT COMBINATION.
   The use of a ball and socket joint to accomplish the same purpose for which it had previously been used in the same art, in a different but old combination, does not constitute invention.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 27-32.]

2. SAME—THILL COUPLING.
   The Bradley patent, No. 485,856, for a thill coupling, is void for lack of patentable novelty.

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

This is an appeal from a decree (138 Fed. 916) for the complainant in a suit for the infringement of letters patent No. 485,856, granted November 8, 1892, to Christopher C. Bradley, for "thill coupling," and error is assigned of the correctness of the finding of the validity of the patent by the court below.

W. A. Megrath, for appellant.

H. P. Denison, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The patent, so far as it concerns the litigated claims, is for an improvement upon the thill coupling device of the patent to Wm. H. Hannan, granted July 14, 1891, and reissued August 16, 1892, which consists in substituting a ball and socket joint in place of the straight bearing joint between the draft-eye and the thill-iron of that patent. The joint of the Hannan patent consisted of a cylindrical coupling-pin embraced by a corresponding recess in the draft-eye as the bearing surface; the coupling-pin having collars to prevent its longitudinal movement in the draft-eye. In place of this joint the patent in suit has what is termed a wrist or knuckle, spherical in form, and which is embraced by a spherical recess in the draft-eye at its bearing surface; in other words, it has the ordinary ball and socket. The advantage of the ball and socket coupling over the straight bearing coupling is that it allows freer lateral play, permitting the thill to rock freely in any direction on the draft-eye, and to adjust itself within certain limits without binding or cramping. There is also an advantage in dispensing with the collars of the coupling-pin, as thereby strain and rattle are relieved. Doubtless the change introduced practical advantages into the device of the Hannan patent. We are unable to discover, however, that the substitution involved invention. All that was required was to remove the Hannan coupling-pin and replace it with the ball, and recess the draft-eye so as to afford the corresponding bearing surface, to effect the substitution of a coupling device which was well known in the prior art, and which had long been employed as the joint in thill coupling devices. The prior patents for thill couplings to Rice, to Bennett, to Kinney, to Bradley, to Smith, to St. John, to Lee and Ostrander, to Henwood, to Dresser, and others to which it is unnecessary to refer, show various adaptations of the ball and socket joint to thill couplings, and disclose that its advantages over a straight bearing coupling, as permitting freer lateral movement, had been recognized and had been utilized by those conversant with the art. When transferred to the Hannan device the ball and socket coupling did simply the same work which it had done in the previous thill coupling devices, and did not in the least affect the mode of operation of the other parts of the device. Its location in its new environment evinced merely good judgment, and the slight changes necessary for the suitable adaptation of the associated parts evinced only ordinary mechanical skill. In short, the patentee invented no new device; he used it for no new purpose; he applied it to an old combination. All he did was to apply it to an old purpose in a different, but old, combination. This does not rise to the dignity of invention. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 493, 20 Sup. Ct. 708, 44 L. Ed. 856.

We cannot escape the conclusion that the claims in controversy are void for want of patentable novelty.

The decree is reversed, with costs, and with instructions to dismiss the bill of complaint.

UNITED STATES FASTENER CO. v. BRADLEY.

(Circuit Court, S. D. New York. February 16, 1906. Rehearing Denied June 5, 1906.)

1. PATENTS—VALIDITY AND INFRINGEMENT—SEPARABLE BUTTONS.
The Pringle patent, No. 580,000, claim 1, for a separable button catch designed for use with a stud member to form a separable button or fastener, is for an operative device disclosing novelty and utility, and was not anticipated; also *held* infringed by the device of the Bradley patent, No. 735,655.

2. JUDGMENT—RES JUDICATA—DISMISSAL WITHOUT HEARING ON MERITS.
To constitute an adjudication of a cause of action which will bar a second suit thereon between the same parties, the judgment or decree must have been rendered after a trial or hearing on the merits, and it will not have such effect where it was a decree of dismissal in effect for failure to prosecute.

[Ed. Note.—For cases in point, see vol. 30, Cent Dig. Judgment, §§ 1028, 1040.]

In Equity. Action to restrain alleged infringement of United States letters patent and for an accounting. Defendant alleges that complainant's patent is invalid, and pleads noninfringement and former adjudication.

Donald Campbell (Hillary C. Messimer, of counsel), for complainant.

Joseph A. Arnold and James A. Carr, for defendant.

RAY, District Judge. The patent in suit, for "separable button," No. 580,000, issued April 6, 1897, application filed September 8, 1888, was granted on application of Eugene Pringle, assignor to Madison D. Shipman and Charles E. Bradt, and contains six claims, only one of which is in question. The complainant is now the owner of the patent. The claim in question reads as follows:

"(1) A separable button-catch comprising an apertured washer and an eyelet having a shank of less diameter than the aperture of the washer and having two enlargements securing it in the aperture of the washer and slitted lengthwise through the shank and the enlargements, as and for the purpose set forth."

The specifications say:

"My invention relates to improvements in the button-head and stud portions of separable buttons; and it consists in the devices and parts and combinations of devices and parts hereinafter described, and specifically set forth in the claims. The objects of my invention are, primarily, to provide in a button-head member of a separable button a tubular elastic stud holding or catching piece which is loosely held within the central opening provided in a disk or piece and provision for their attachment to the fabric, and, secondly, to provide specific means by which the improvements can be embodied in the button-head member and be secured to the fabric, and, further, to provide novel and economical means by which the stud member can be securely fastened to the fabric. * * * In the drawings, A is the elastic stud-catching piece which is made with the tubular body, a, and having flange, a^1 with its lower end. This piece has its wall slitted from top to bottom by slit, a^2, so that the said wall can be expanded by internal pressure exerted against its inner surface, as by the pressure of the head of the stud against the interior of the slitted body, a. B is the stud-catch holding-

piece having the vertical flange, b, and horizontal flange, b^1, and a central opening, b^2, of larger diameter than the outer diameter of the body, a, of the stud-catching piece, A. The stud-catching piece, A, is passed through opening, b^2, of piece, B, preferably from its lower side, and has its opposite and unflanged end portion turned down all around on the upper edge of the vertical flange, b, as shown in Fig. 1, so as to form with the body, a, of the stud-catch, A, and upper flange, a^3, as indicated by dotted lines in Fig. 7. When this upper end portion of the stud-catch, A, is turned on the upper edge of flange, b, of piece, B, the stud-catch will be held in the opening, b^2, or piece, B, with the body, a, of the former out of contact with the vertical flange, b, of the latter, so that the said stud-catch can be readily expanded in its diameter by the head of the stud when passing through the same. In Fig. 32 this stud-catch, A, is shown to be held in place in the catch-holding piece, B, when the latter is disconnected from the other adjuncts. In Figs. 34 and 35 is shown a thicker piece, B, of metal, operating as a substitute for the piece, B, (having flange, b), which obviates the use of the flange, b.

The stud is thus described:

"I is the stud, which stud is made with the shell or hollow form, and with the bulb form of head, i, as shown in Figs. 1 and 4, and is provided with a base-flange, i^1. The head, i, of this stud is slightly larger than the bore of the stud-catch, A, so that when passing through the latter it will expand the slitted wall, a, of the same."

The connection of the button-head portion with the stud portion is described as follows:

"When the button-head portion of this separable button is to be connected with the stud portion of the same, the head, i, of the stud will be pressed up into the bore of the elastic stud-catch, A, when the latter will be expanded by the force of the pressure of the former against the slitted wall, a, of the latter, and when the head of the stud has passed through said piece, A, it will securely hold with the upper side of the same and thereby unite the two portions of the fabric together. A pull of the stud away from the button-head will withdraw the latter."

A separable button such as is mentioned in the patent in suit is a fastener, the purpose of which is to temporarily secure together the two parts or flaps of a garment. The separable button complete consists of two principal portions; the stud portion attached to one flap and constructed with an enlarged or bulbous head, and the socket portion attached to the other flap of the garment so constructed as to catch or engage with the bulbous head of the stud. This socket portion or stud catching portion is formed with a central aperture through which the bulbous head of the stud portion passes when the two are engaged or disengaged. The one being attached to the one flap and the other to the other flap, when the bulbous head of the stud is pressed through the stud-catching portion, the two flaps of the garment are held together until it is desirable to disengage them. The disengagement is accomplished by pulling the bulbous head of the stud portion from the stud catching portion. To attach them together the head of the stud is pressed in to the stud-catching part, and to disengage them it is pulled out therefrom. To make this operation possible and effective in the patent in suit, the stud-catching portion is provided with a device capable of being resiliently expanded and contracted. It is expanded by the pushing in of the bulbous head of the stud or by pulling it out. It contracts automatically because of the nature of the metal of which it is composed. There are mechanisms or con-

trivances of this description where the resiliency is provided in the bulbous head of the stud, but in the patent in suit this is provided in the stud-catching member.

Claim 1 of the patent in issue here relates to the means by which suitable resiliency is provided in the socket portion or stud-catching part of the device. In this socket portion or stud-catching device we have a disk or washer with a central opening or aperture, mentioned also as the stud-catch holding piece, and at the edges of this central opening we have a vertical flange. The horizontal flange of the stud-catch holding piece mentioned in the specifications of the patent is the main body or portion of this disk or washer. Substantially this stud-catch holding piece is a flat disk or washer with a central aperture or opening having about its entire circumference a vertical flange of suitable width. The other portion of this stud-catching or socket portion and which is called the elastic stud-catching piece, consists of an eyelet or piece in the form of an eyelet, which is thrust through the aperture of the washer or stud-catch holding piece, and is there clinched in substantially the same manner that the common eyelet is clinched when papers or other substances are fastened together by means of an eyelet and an eyelet fastener. When this is done the result is two enlargements, one of the upper end of the eyelet and the other of the lower end thereof, one above and one below the aperture of the washer, and these enlargements retain the eyelet in its position in the central opening or aperture of the stud-catch holding piece. This eyelet has a lesser diameter than that of the aperture in the disk or washer, so that it is capable of being expanded without seriously affecting the disk, washer, or stud-catch holding piece. The vertical flange of the stud-catch holding piece is necessary when the disk or washer is thin, because then essential to the proper holding and maintenance in position of the eyelet. This flange is not necessary when the disk or washer is of substantially the same thickness as the length of the eyelet. The resiliency of the eyelet or stud-catching piece is provided in the following manner: It has its wall slitted from top to bottom, and the result is that the wall of this elastic stud-catching piece is expanded by the internal pressure against its inner surface when the bulbous head of the stud is pressed inward or is pulled outwardly. This eyelet or stud-catching piece being of elastic material and prevented from expanding too much by the edges of the opening or aperture in the disk or washer so as to break it, it resumes its normal position the moment the bulbous head of the stud has passed through either when pressed inwardly or pulled outwardly. The washer or disk or stud-catch holding piece is not slitted and does not expand or contract. In the construction of the patent, when the upper end portion of the stud-catch is turned outwardly on the upper edge of the vertical flange of the disk, washer, or stud-catch holding piece, the stud-catch will be held in position and out of contract with the flange to such an extent that the stud-catch is readily expanded in its diameter by the bulbous head of the stud when passing through. It appears from the file wrapper that the application for this patent was a long time in the Patent Office. Claim 1 was for "a separable button catch consisting of a perforated

washer and a slitted eyelet having two enlargements adapted to secure it in the aperture of the washer substantially as and for the purpose set forth." It is obvious that this claim is not claim 1 of the patent as finally allowed. There is a difference between a perforated washer and an apertured washer. There is a difference between a slitted eyelet and an eyelet having a shank of less diameter than the aperture of the washer; the eyelet being slitted lengthwise through the shank and the enlargements thereof.

The defendant contends that in claim 1 of the patent in suit only two elements are specified, viz., the apertured washer and the eyelet, slitted lengthwise; that the relation between the eyelet and washer is specified, but that neither the claim nor the specifications suggest even that these elements constitute a complete socket member for a separable button or a garment fastener. It is contended that the drawings and specifications show six elements, some of which are used to fasten the socket member to the garment, and that the specification treats the manner of attaching this member to the garment as the primary object of the invention. The defendant contends that therefore, if the claim in suit is interpreted to cover broadly the apertured washer with a slitted eyelet mounted therein, it is for an incomplete combination and an inoperative device. The defendant also contends that if this claim is construed to include means for fastening the washer, including the slitted eyelet mounted therein, to the garment, then the defendant's device, alleged to infringe, cannot be brought within the scope of the claim. It is also contended that, giving claim 1 either construction, it is anticipated.

It is true that the drawings show and the specifications describe, not only the socket portion or stud-catching portion, but distinct means for attaching or fastening same to the garment. These means, or this fastening device, are, however described in other claims of the patent, 2 and 3, in combination with the device of claim 1. Claim 2 reads:

"A button head comprising a slitted eyelet, an apertured washer to which the eyelet is secured, a fastening eyelet connected thereto passed through the material and clenched to a cap or shell, substantially as described."

The specifications explicitly state that the invention relates to improvements in the button-head and stud portions of separable buttons, and that the primary objects of the invention are to provide, not a button-head member, but in a button-head member of a separable button "a tubular elastic stud holding or catching piece which is loosely held within the central opening provided in a disk or piece and provision for their attachment to the fabric, and, secondly, to provide specific means by which the improvements can be embodied in the button-head member and be secured to the fabric, and further to provide novel and economical means by which the stud member can be securely fastened to the fabric." It would seem clear that, first, we deal with and have mentioned the stud-catching portion described in claim 1; and, second, we have the specific means for embodying this stud-catching portion in the button head and the specific means for attaching the whole or both to the fabric as described in claims 2

and 3. These specific means for attachment form some of the elements of distinct claims. Then we have the stud portion, stud with bulbous head, etc., mentioned in claims 4, 5, and 6.

This separable button catch, claim 1, is clearly distinct from the specific means for attaching same to the garment described in claims 2 and 3. It is a complete and perfect device in and of itself, for the purpose described, and is operative if it may be attached to the fabric or garment. On mere inspection it is evident that means for attaching it to the fabric are not, necessarily, those referred to in claims 2 and 3 and described in the specifications, the use of which would do away with needle and thread, but needle and thread, by the use of which this socket portion, or stud-catching portion, may be securely and expeditiously and economically attached to the garment. It may be attached by the common needle and thread, not the proper subject of a claim in a patent, or by the novel device described in the patent. I do not think it was necessary to specify in the specifications "needle and thread" as means or "provision" for their attachment to the garment, or to say that this stud-catching portion might be attached to the garment by the seamstress or housewife by using a needle and thread for the purpose. I think we may properly read into claim 1 means or provision for attaching the device to the garment or fabric.

From the time the claim for this patent in suit was filed to the time it was allowed many changes were made therein, and at every stage the prior art in all its aspects was thoroughly examined and exhaustively considered. The entire prior art so far as pertinent was cited. These facts appear from the file wrapper. May 20, 1896, claim 1 had assumed this reading:

"(1) A separable button catch consisting of a perforated washer and an eyelet having two enlargements adapted to secure it in the aperture of the washer, substantially as and for the purpose set forth."

January 15, 1896, the word "an," before "eyelet," was erased, and the words "a slitted" substituted in place thereof. June 20, 1896, the claim was rejected, and the examiner said:

"It is not believed that claims 1 and 2 set forth anything patentable over the references of record, involving, as they do, nothing more than a split eyelet set in a washer plate. It is thought that the references fully anticipate said construction."

On appeal, involving claims 1 and 2, the examiners said, August 17, 1896:

"Pringle's patent No. 429,177 meets both claims as they are drawn. The contention that these claims cover only two elements constituting the complete button, while in the mentioned patent there are also other elements constituting a cover for the post, and that therefore the claims are not met, cannot prevail. The omission of the cover, thereby losing its function, does not make of the remainder a new invention. It is the same thing, whether used with or without the cover. The following claim expresses the structural difference between the patented and the appealed article: 'A separable button catch, comprising an apertured washer and an eyelet having a shank of less diameter than the aperture of the washer, and having two enlargements securing it in the aperture of the washer and slitted lengthwise through the shank and the enlargements, as and for the purpose set forth.' This is a novel catch. It is superior to that of the patent for the reason that

the so-slitted eyelet has for a given normal diameter a greater range of expansion and resiliency. There results a grasp of the eyelet closer to the shank of the ball, with a more firm hold under the ball, making a stronger fastening. The change, though small, constitutes, we think, a material improvement. The above claim we regard as expressing the improvement, and as allowable. We recommend its insertion and allowance."

Claim 1 was changed or amended accordingly, and allowed. Its allowance was not the result of haste, or inadvertence, or ignorance of the prior art. The examiners deliberately hold that here is invention and that it is not anticipated. The defendant says:

"As stated above, the washer and the split ring alone do not and can not constitute a 'button-catch'; for, in the first place, they do not present the appearance of a button; in the next place, in practical use, they are between the flaps of the glove, where they are entirely concealed; and, in the third place, they alone are incapable of constituting a complete socket member, but require some means for fastening them to the garment. To construe claim 1, therefore, broadly for a washer and a split ring is to render the claim void for want of utility, for an inoperative device, and for an incomplete combination."

This court cannot agree with this contention. I assume that the "button catch" is designed to seize and hold the bulb-head of the stud. It is true that when this catch, or any button-catch device, is attached to one flap of a garment by some mechanical or metal means which in part protrudes through the garment and is fastened in some way on the outer side of the garment, and is thus exposed to view, it (this protruding and exposed part) is covered or concealed, usually, by something resembling a button. But this concealing device is in no way essential to the operativeness of the catch device. I see no point in the objection raised that the button catch is between the flaps of the glove or other fabric, as, for instance, the two parts of a lady's dress or cloak. If we would have an invisible apparatus, this is where they should be.

The third alleged objection urged has been met by the statement that this button-catch member, composed of the washer and slitted eyelet fixed therein, may be attached to the garment by the apparatus described in the patent, or by needle and thread (and it is not at all necessary that the stitches of thread go through the fabric), or in other ways. The Mandrill patent, No. 374,609, dated December 13, 1887, and the Platt patent, No. 181,979, dated September 5, 1876, are urged as anticipations of complainant's claim 1.

In the Mandrill patent, glove fastener, the button-catch member, is "a split expansible socket ring or annulus, the interior periphery of which is made smooth for the ready and free passage of the head of the post" (the bulbous head of the stud member), which socket ring is "made or formed of a single piece of metal, preferably sheet metal. This ring is split or cut from its outer to its inner diameter, as at a, so as to give or impart a yielding or spring action thereto. * * * This socket ring is provided with a tubular boss, B, which projects centrally from the rear side thereof, and this boss is provided with a longitudinal slot, b, which aligns, or coincides with the slit in the ring or annulus that divides the latter, thereby imparting or insuring a yielding action to both the boss and socket ring. * * *

The upper end of the split hollow cylinder is forced or pressed forward by a suitable implement within the inner diameter of the socket ring and caused to fit the same very closely and snugly. To secure the socket ring to the glove on one side of the usual slit therein, the tubular boss is first passed through the glove at a suitable point and then clinched or headed down on the same, thereby clamping the material to the head or flange formed by clinching one end of the boss and the socket ring." It is readily seen that this is nothing more nor less, in substance, than a complete vertically slitted eyelet, formed of the socket ring and tubular boss forced into the same, inserted into the fabric and clinched down on each side of same. Every time the "headed post" of this patent, the stud or real button member, is inserted or withdrawn into this expansible socket ring, or "button-catch" member, the fabric is correspondingly expanded, and, if resilient, it will also contract. In a little time, however, this repeated expansion of the fabric will leave the expansible socket loose in the fabric, when it will readily fall out. Hence a necessity for the apertured washer with the slitted eyelet seated in the aperture. Again, in this (the Mandrill) patent, the button-catch member shows on both sides of the fabric, and shows an opening of the size of the opening in the socket ring and also the flange thereof formed by the clinching process. It is self-evident that this does not anticipate the claim of the patent in suit now in question. Here we have the expansible eyelet (socket ring) within a central aperture of a washer which is attached upon one side of the fabric only and does not show at all on the other side, and the expansion and contraction of this button-catch member in no way affects the fabric to which the washer is attached. The same remarks apply to the Platt patent above referred to. Neither is an anticipation of the claim in suit.

Clearly the prior patent to Pringle, No. 429,177, of June 3, 1890, is not an anticipation. The improvement and the difference were pointed out by the examiners in the Patent Office in the language already quoted. It must be held that the claim in suit is for an operative device, and that it discloses novelty and utility, and was not anticipated. This court fully recognizes the authority of the cases cited to the effect that an invention is patentable only once, and that a patentee may have anticipated himself, and that limitations in a claim are binding on the patentee, and that the patentee is bound by either self-imposed limitations or those imposed as a condition of granting the patent. All this has become elementary in patent law. Clearly the invention was not abandoned. Through years the applicant clung to his claims and urged his application, with the consciousness of merit, perhaps, until finally successful in securing the allowance of a claim for what he had actually invented as an advance on the prior art. The fact that he met with opposition and rebuffs in the Patent Office does not argue that his alleged invention, when finally accurately defined, was without merit, but rather that great care and circumspection was used to guard against "double patenting" or the grant of a patent for a device without merit. The careful consideration given by the Patent Office gives strength to the presumption of validity.

This brings us to the question of res adjudicata, or prior adjudication, which has been urged at great length and with apparent confidence. The bill alleges:

"(10) And your orator further shows on information and belief that the said defendant prior to the 4th day of August, 1903, had begun and continued his aforesaid unlawful infringing acts; that on or about the last-mentioned date your orator brought its bill in equity in this court against the aforesaid Andrew J. Bradley, complaining that the defendant had infringed and threatened further infringement of said letters patent 580,000, to which bill the said defendant filed his answer on or about the 5th day of October, 1903, and issue was joined by the filing of replication on or about the second day of November, 1903.

"(11) That thereafter, and on or about the 1st day of November, 1904, without then, or at any previous time having considered or passed upon the merits of the said cause, and no testimony having been taken in said cause, nor the issues therein nor any such issues, this honorable court, by a decree bearing the date last mentioned, dismissed the bill of complaint in the aforesaid cause upon the bill, answer, and replication therein, with costs, by an order in the following terms: 'This cause came on to be heard at this term; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the bill of complaint herein be dismissed upon the bill, answer, and replication, with costs to be taxed.'"

The defendant fully pleads this as res adjudicata. On the trial, or during the taking of proof, it was stipulated:

"Fourth. That the garment fasteners manufactured by defendant and involved in this controversy are the same as those involved in a certain former suit between the same parties; that said former suit was filed in this court on or about the 4th day of August, 1903, and was determined by a decree on or about November 1, 1904, as set forth in the eleventh paragraph of the bill of complaint in the present suit; and that defendant has kept up, since the said decree of November 1, 1904, both before and after the bringing of the present suit, the same acts charged by complainant to be infringement of its rights, namely, the making and marketing of garment fasteners like complainant's Exhibits D and E herein.

"Fifth. That during the pendency of said former suit complainant was at liberty to take testimony for several months after the filing of replication in said former suit, but that complainant's failure to do so was in no wise due to lack of funds."

It is well settled that a decree or judgment in a suit between certain parties is a bar or estoppel to the prosecution of a second action upon the same claim or demand between the same parties, or their privies, if rendered upon the merits. If not rendered on the merits, it is no bar or estoppel. In such case such prior decree or judgment is a finality as to such claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But the judgment or decree must have been rendered upon the merits. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Hughes v. United States, 4 Wall. (U. S.) 232-237, 18 L. Ed. 303; Gould v. E. etc., R. R. Co., 91 U. S. 532, 533, 534, 23 L. Ed. 416; U. S. v. C. B. W. R. Co. (C. C.) 110 Fed. 864; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Clark v. Bernhard M. Co. (C. C.) 82 Fed. 339; Shaw v. Broadbent, 129 N. Y. 114–123, 29 N.

E. 238; Ward v. Boyce, 152 N. Y. 191, 201, 46 N. E. 180, 36 L. R. A. 549; Foye v. Patch, 132 Mass. 105–110. The rule is well stated in Hughes v. United States, 4 Wall., at page 237 (18 L. Ed. 303), where it is said:

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits."

In Shaw v. Broadbent, 129 N. Y., at page 123, and 29 N. E., at page 240, the court said:

"In order that a judgment should have the effect claimed, it is not enough that the party produces a record showing a judicial determination of the same question litigated in his favor, but it must also appear that it was rendered upon the merits, upon a material point," etc.

The complainant here expressly alleges that the decree entered in the former action between the parties was not entered upon the merits or after a trial or determination of the case on the merits, but in effect for neglect to prosecute and take evidence and present the case on the merits. This is, in effect, conceded by the defendant. The defendant now insists that the decree contains no reservation or statement that it is without prejudice to another action for the same cause. It is not necessary for this court to now determine whether the complainant would have been permitted to put in evidence aliunde to show that the decree in question was not rendered on the merits, if objection had been made that the decree was final and conclusive and could not be added to or in any way varied or impeached in this suit; that is, collaterally. No such objection was raised, and the allegation of the complaint was conceded to state the facts. The concession was not made subject to an objection that the evidence was incompetent and that the effect of the judgment or decree could not be varied, impaired, or impeached in this action. The former action is not a bar to this. It appears affirmatively that it was not dismissed on the merits.

We now come to the question of infringement. The alleged infringing device of the defendant is said to be made, and appears to be made, substantially in accordance with the claim and specifications of letters patent No. 735,655, dated August 4, 1903, and granted to Andrew J. Bradley. The specifications of that patent say:

"My invention relates to garment fasteners, and has for its principal object to simplify and cheapen the construction and manufacture of garment fasteners."

This patent has a single claim, which reads as follows:

"A two-piece socket member for a garment fastener, consisting of a continuous disk having its middle portion offset and an opening in said offset portion, the edge of said opening being turned back toward the plane of the disk, and a resilient split ring curled over the edge of said opening, whereby the edge of said opening limits the expansion of the ring and takes up strains in the plane of the ring, substantially as described."

This claim describes the socket member or button-catch member only, and in construction and operation it differs from the button or

stud-catch part of claim 1 of complainant's patent in two respects only. The socket member of the Bradley patent comprises a disk or plate which is the same in every respect as the washer of the complainant's patent, with the exception that the middle portion of this disk or washer is offset from the plane of the main portion of the disk; that is, it is curved upwardly. This disk of the Bradley patent, the washer of complainant's patent, has a central aperture. In complainant's patent the hole in the center of the washer or disk is called an aperture, while in the Bradley patent he says: "This middle offset portion has a hole in its center." About the outer edges of this disk or plate of the Bradley patent, washer of complainant's patent, Bradley has holes cut or punched through which to pass the needle and thread in sewing it to the garment. I have now described the only difference between the disk or plate of the Bradley patent and the washer of complainant's patent. There is no invention in these changes. To make them, if necessary or useful, would occur to any skilled mechanic. In fact, this court will take judicial notice of the fact that washers of this shape have been common and in use for various purposes for a quarter of a century. The same is true of the washer of complainant's patent. The specifications of the Bradley patent proceed to say:

"In this hole [speaking of the hole in the disk or plate] is arranged a split ring, 8, of resilient sheet metal. These two pieces—namely, the disk and the split ring—constitute the entire socket member."

That is, the socket member, or stud-catch member, or button-catch member, whatever we call it, consists of the disk, or, what is the same thing, the washer, and the split ring; the split ring of the Bradley patent being placed in the opening of the disk. As shown in the drawings and specifications of the Bradley patent, this split ring is nothing more nor less than the slitted eyelet of complainant's patent. The Bradley patent continues:

"In order to mount this ring, 8, in proper position, the edge of the opening in the offset portion, 6, of the disk, 5, is bent toward the plane of the disk. The main body of the split ring, 8, is in substantially the same plane as the disk, 5; but the inner edge of said ring is curled or bent outwardly and backwardly, so as to constitute a tubular thimble around the inclined inner edge of the opening, 7, in the offset portion. The ring is thus firmly mounted on the disk in position to allow it to enlarge and contract its opening. By reason of the manner in which the split ring is curled around the edge of the hole in the disk, the expansion of the ring is limited by its coming in contact with the edge of said opening, whereby the split ring is protected against undue enlargement, and all strains in the direction of the plane of the disk are transferred from the ring to the disk itself. The normal size of the opening in the ring is slightly less than the diameter of the head, 3, of the stud. The socket member is provided with holes, 1, 1, whereby it may be sewed on the garment. Aside from the hole, 7, for the split ring, and the holes, 1, 1, for the thread, the disk is continuous; that is, it has no radial slit therein."

By the words "the edge of the opening in the offset portion, 6, of the disk, 5," which edge is bent toward the plane of the disk, it is intended to say that that portion of the disk or plate around the central hole or opening therein is bent upwardly and backwardly toward the plane of the disk. This makes a flange, which is also found in complainant's patent and has already been described as forming a part

thereof when the washer is of thin metal. The curling or bending of the inner edge of the ring outwardly and backwardly is nothing more nor less than the bending outwardly and backwardly towards the plane of the washer of the upper and lower edges of an eyelet, when done by a proper instrument to fasten it in paper or other material. This split ring, when in position, is the slitted eyelet in position of the complainant's patent. This device described in the claim of the Bradley patent is the same as the device described in claim 1 of complainant's patent. Each consists of two elements, a washer, or disk, or plate, and a split ring, or slitted eyelet. In each case the disk, or plate, or washer has a central opening, and in this is fixed in each case the split ring or slitted eyelet, as the case may be. The differences are wholly in the shape of the washer or disk, and the fact that complainant's has no holes near the circumference of the washer. The operation of the two devices is the same. The Bradley patent speaks of and describes a stud member, and the specifications of the Bradley patent say:

"The stud member, A, being sewed on one portion of the garment, and the socket member, B, on another portion, are interlocked by merely pressing the stud-head, 3, into the opening of the split ring or thimble, 8. This opening is enlarged by the pressure sufficiently to let the head pass therethrough, whereupon the resiliency of said split ring or thimble contracts its opening and causes said ring or thimble to interlock with the head."

In short, when the bulbous head of the stud member has been pushed through the split ring seated in the opening of the disk, the split ring or slitted eyelet springs back into position and shuts down behind the head of the stud member. This is the interlocking described. In both the Bradley patent and the complainant's patent this stud-catch member, or socket member, for a garment fastener, consists of two portions, and both complainant's and defendant's may be attached to one flap of the garment on the proper side thereof by needle and thread, and will not show on the other side of this flap of the garment. Either can be attached to the garment by some other device, but such additional device is not necessary to make this stud-catch or button-catch member operative. The defendant's device copies in all material respects the complainant's device. There is a change of form, but not of principle, and the same means are used to accomplish the same purpose. We have the same elements in the same combination, used for the same purpose and producing the same result. The change in form given to the Bradley disk, or plate, or washer, does not differentiate it from the complainant's claim 1 of his patent, so as to avoid infringement. In point of fact the defendant and his experts substantially admit infringement.

The complainant is entitled to the usual decree for an injunction and an accounting.

THOMSON-HOUSTON ELECTRIC CO. v. ILLINOIS TELEPHONE CONST. CO. et al.

(Circuit Court, N. D. Illinois, E. D. February 26, 1906.)

No. 28,041.

1. PATENTS—EFFECT OF EXPIRATION—COMBINATION CONTAINING PATENTED ELEMENT.

   On the expiration of a patent for a combination, the use of such combination becomes free to the public, notwithstanding the fact that it contains as one of its elements a device covered by another patent to the same patentee which has not expired.

2. SAME—SUIT FOR INFRINGEMENT—ESTOPPEL.

   The seller of a machine intended to be used in connection with a device covered by a patent owned by him, and which is inoperative without such device, impliedly grants the right to the purchaser to use it, and is estopped to maintain a suit to enjoin such use as an infringement of the patent.

3. SAME—PRELIMINARY INJUNCTION—CONDUCTOR SWITCH FOR ELECTRIC RAILWAYS.

   A motion for a preliminary injunction to restrain infringement of the Van Depoele patent, No. 424,695, for a conductor switch for electric railways, by the use of the device of the expired patent No. 393,278 to the same patentee, denied.

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

Betts, Sheffield & Betts and Rector & Hibben, for complainant.
Thomas F. Sheridan and Nathaniel C. Sears, for defendants.

KOHLSAAT, Circuit Judge. This cause is based upon infringement of patent No. 424,695, issued to Charles J. Van Depoele April 1, 1890, for an improvement in suspended switch and traveling contact for electric railways, and is now before the court upon a motion for a preliminary injunction. The claims involved in the proceeding are those numbered 3, 4, 11, 19, 20, 23, 25, 26, and 27, which read as follows:

"(3) The combination, with an overhead wire for receiving an underneath contact, of a switch plate attached to the wire in about the same horizontal plane as the wire.

"(4) The combination of a track having switches, an overhead conductor above the track and having switches, and a car on the track provided with a contact-carrying arm arranged to engage the conductor at a point in rear of the front wheels of the car."

"(11) The combination, with an overhead line-wire, of a grooved contact device pressed against the wire and receiving the wire between the flanges of the groove, and a guiding switch-plate connected to the wire against which the said flanges bear in passing from one line to another."

"(19) In an electric railway, the combination, with branching overhead conductors, of an upwardly-pressed contact-arm carrying a grooved wheel embracing the conductor, and a switch-plate at the branching point adapted to receive the tips of the wheel-flanges, and provided with depending ribs, between which the wheel is free to move laterally to engage with one of the branch conductors.

"(20) In an electric railway, the combination, with an overhead switch plate having depending ribs, but open at its extremities, of main and branch conductors extending from its two extremities, respectively, a vehicle, an

upwardly-pressed contact-arm attached to the vehicle and tending to move laterally therewith, and a track-switch for the vehicle located so as to operate in advance of the conductor-switch."

"(23) The combination, with branching overhead conductors, of a vehicle having a laterally-swinging contact-arm pressed upward to engage the conductors, and a switch-plate at the branching point having depending sides, but open at its extremities, the interior width of the plate between the sides being greater than the thickness of the contact-wheel, whereby the wheel is free to move laterally with relation to the main conductor and engage one of the branching conductors."

"(25) In a branching electric railway, the combination of a track-switch, an overhead conductor-switch, and a vehicle having a rearwardly-extending contact-arm, whereby the track-switch will operate in advance of the conductor-switch.

"(26) In a branching electric railway, the combination, with a vehicle, of a track-switch, an overhead conductor-switch, and a contact-arm extending upward from the vehicle to the conductor, and so located relatively to the length of the vehicle and the two switches that the lateral movement of the vehicle will give a corresponding movement of the contact device on the conductor-switch.

"(27) In a branching electric railway, the combination, with a vehicle, of a track-switch, a contact device consisting of a trailing spring-pressed arm having a grooved contact-piece embracing the conductor and guided thereby, the said arm being joined to the car and tending to move laterally therewith, and an overhead conductor-switch adapted to engage the contact-piece and whereby the extremity of the arm is flexibly guided from main to branch conductor."

In substance it will be seen that the patent involves an overhead conductor in connection with a switch-plate, substantially in the same plane, made to receive an underneath contact with a trolley arm and having depending guides or flanges to direct the trolley wheel into the desired branch of the switch. In connection with this switch-plate, the claims call variously for necessary operating elements, such as surface tracks, switch tracks, a spring pressed and freely jointed trolley pole contacting from below with the overhead switch some appreciable distance behind the forward wheels of the vehicle, so that it may be directed by the movement of the car into the proper branch of the switch, a car or other vehicle moving upon the tracks, and a grooved contact piece or wheel on the arm or pole. The only feature of the patent deemed necessary to be considered here is the switch, which seems to me to be of a primary character, mainly in the fact that it leaves the trolley wheel free to respond to the actuating movements of the car communicated through the trolley arm. In adjusting the conducting wire to the switch, there was discovered a slight perpendicular jog. The wheel, traveling upon its flanges, would necessarily spring up somewhat as it left the open ends of the switch and again contacted with the wire. To improve upon the device of the patent in suit in this and other respects, and while the patent of this suit was pending in the Patent Office (delayed without the fault of complainant's grantor, it is claimed), complainant applied for, and received on November 20, 1888, patent No. 393,278 for what he terms certain new and useful improvements in switches for overhead conductors. This patent covers six claims, only claims 2 and 3 of which are set up in defense in defendant's brief. They read as follows:

"(2) A switch for electric conductors, comprising a contact plate or surface, ribs or arms attached to said plate and separate at their inner extremities to allow a contact device to pass from one to the other between them in contact with the plate, and electrical conductors secured to the ribs or arms, substantially as described.

"(3) A switch for electric conductors, comprising a contact plate or surface, ribs or arms electrically connected therewith, and conductors secured to the ribs or arms and arranged to permit the passage of a contact wheel from one to the other across the space between said conductors bridged by the plate or surface, substantially as described."

The device of these claims differs from that of the patent in suit in placing ribs or raised track pieces against the under face of the switch along which the grooved trolley wheel may travel with certainty. These ribs are shaped to fit the wheel groove, have electrical connection with the conductor, and are so adjusted as to receive the wheel in the same plane as that which it occupies with reference to the conductor. The ribs terminate before reaching the central portion of the switch plate, leaving the wheel free to move along the under side of the switch plate to the proper branch track. This device amounts to a substantial improvement upon the patent in suit and does not fall within the rule against double patenting. It does, however, appropriate the patent in suit bodily, so far as necessary for the new combination. Why any one prosecuting an interference with regard to the patent in suit so vigorously as to succeed in delaying its issue for four years should allow this improvement patent to go out without an attempt to protect his rights may well cast some doubt upon the warlike spirit of the contestants. It is the device used by the defendants.

On February 5, 1889, and while the patent in suit was yet in interference, as it is asserted, in the Patent Office, complainant's grantor was granted another alleged improvement patent for an improvement in overhead switches, No. 397,451. The 11 claims of this patent differ from patent No. 393,278, in that they call for a conductor connected with the upper portion of the switch box—that is, on top of it—and outwardly flaring openings between the flanges at the extremities of the box. Claim 1 provides for a "contracted portion" in one or more of the compartments of the switch box "adjacent to its extremity." Claims 2 and 3 thereof sufficiently set out the substance of the patent and read as follows:

"(2) A switching device for electric railways, consisting of an open-bottom metallic box or frame secured to and depending from the under side of a suspended conductor and formed with two or more branching compartments leading therethrough, the extremities of such compartments flaring outwardly toward the conductor to form lateral guides and inwardly to facilitate the passage of the contact device, substantially as described.

"(3) A switching device for electric railways, comprising an open-bottom box, conductors connected to the upper portion of the box, and a guide rib or ribs connecting the extremity or extremities of the switch-box with the conductor, substantially as described."

Patent No. 393,278, expired November 20, 1905, and prior to the commencement of this suit. Patent No. 397,451 expired the 5th day of this month (February, 1906). The patent in suit will not expire until April 1, 1907. The application for the issue of the last-named

patent was originally filed on March 12, 1887, and on division had this application was filed October 22, 1888. The application for patent No. 393,278 was filed August 22, 1888, and that for patent No. 397,451 on November 12, 1888.

The suit is brought to restrain the defendants from using a device covered by a patent which had expired at the time of the filing of the bill, and is based upon the proposition that, while the patent as a whole had gone to the public, yet, inasmuch as it required the use of the patent in suit as one of its elements, the combination could not be appropriated by the public until the expiration of the patent in suit without infringing the latter; thus in effect claiming that complainant has the right to the exclusive benefit of the improvement patent for a term of 20½ years instead of 17. The patent in suit has been sustained in several apparently well litigated suits. Thomson-Houston Electric Co. v. Elmira & H. Ry. Co., 71 Fed. 396, 18 C. C. A. 145; Same v. Ohio Brass Co., 80 Fed. 713, 26 C. C. A. 107.

For a defense to this application, defendants set up: (1) Expired patent No. 393,278 aforesaid; (2) expired patent No. 397,451 aforesaid; (3) that complainant is estopped from claiming the relief sought, because it had sold defendant locomotives which required the alleged infringing device to make them operative.

The claim of defendants that the above-named two patents contain all the elements of the patent in suit and are in substance identical therewith cannot be sustained. As above stated, patent No. 397,451, taking the drawings and specifications into consideration, attempts to improve upon the device of patent No. 393,278. It assumes to add to the latter a feature which appears in the drawings of both the patent in suit and No. 393,278, to wit, the "contracted portion adjacent to its [the switch's] extremity." It would take any one's ingenuity to discover any difference in this respect between the drawings of all three of these patents. There is a slight difference in the manner in which the contact with the conductors is obtained, for which no advantage is claimed or is conceivable. It is not, however, deemed necessary to determine now the validity of patent No. 397,451. It may be invalid, but it does not in term or substance lay any foundation for the defense of double patenting in this proceeding.

For the first time in the history of the litigation of these overhead switch patents, there is before the court the fact that one of the patents involving the use of the invention of the patent in suit as an element has expired. No case is produced to the court in which the effect of that fact upon the question here involved has been material. Nor have I been able to find any such case. That it has not been raised and settled before now in litigation growing out of the intricacies of some half a million patents is surprising. In the case of Thomson-Houston Electric Co. v. Ohio Brass Co., supra, the Circuit Court of Appeals for the Sixth Circuit treats the subject academically, and comes to the conclusion that, although the improvement patent has expired, yet, inasmuch as the primary patent constituting one of the elements of the improvement patent has not expired, the expired combination patent, as a combination, does not go to the

public, but is still under the control of the primary patent until the latter expires. The case turned upon other points, and this dictum of the court was delivered by way of argument. Clause 8 of section 8 of article 1 of the Constitution gives to Congress the power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." Pursuant to the foregoing, Congress, in section 4884, Rev. St. [U. S. Comp. St. 1901, p. 3381] authorized the grant of a patent for the term of 17 years. By section 4888, Rev. St. [U. S. Comp. St. 1901, p. 3383], the applicant is required to give such an exact description of the matter sought to be patented as will enable "any person skilled in the art or science to which it appertains or with which it is most nearly connected to make, construct, compound and use" it. An inventor has no natural right to a monopoly in the use of his invention once it is made public. His right rests wholly upon the provision of the Constitution and statutes above set out. The instant the statute ceases to be operative with regard to the patent, the right of the public intervenes. This right of the public is a natural right, suspended for 17 years by virtue of the statute. In U. S. v. American Bell Telephone Co., 167 U. S. 224, 17 Sup. Ct. 809, 42 L. Ed. 144, Justice Brewer, speaking for the court, says:

"All that the patent law requires is that when a patent expires the invention covered by that patent shall be free to every one, and not that the public has the right to the use of any other invention, the patent for which has not expired, and which adds to the utility and advantage of the instrument made as the result of the combined inventions."

Neither the statute nor the Supreme Court makes any exception covering the case of a combination patent which has for one of its elements the device of a patent not yet expired. If the device used by defendants herein, being that of an expired patent, is not now free to be used by the public after complainant has had 17 years' monopoly of it, then what interest had the public in that patent? If the right of the public to a disclosed invention is a natural right, how can a statutory limitation upon that right be extended by implication? When complainant took out this improvement patent, the patentee was required to disclose specifically all matters necessary to enable those skilled in the art to produce and enjoy the device. This statutory requirement must be read into the patent. What a farce to say that the public is entitled to all this, but must not avail itself of the knowledge! If the use of the device of the expired patent constitutes the appropriation of the whole of the patent in suit—that is, if all of its possible uses are involved—then there arises a case of double patenting.

In Palmer Pneumatic Tire Co. v. Lozier, 90 Fed. 732, 33 C. C. A. 255, the Circuit Court of Appeals for the Sixth Circuit says:

"If, therefore, the Huss patent for his fabric as a separate invention can stand, the public would infringe it if, after his tire patent shall expire, they undertake to practice the invention claimed in the tire patent, and which necessarily involved the use of his fabric. In other words, the monopoly of the first patent would be prolonged until the later patent shall expire. We think there is no escape from the conclusion that both patents now in suit

are void, and for a like reason. One cannot lawfully have two patents for one invention. When once the invention has been used as the consideration of a grant, its value for that purpose is spent, and there is nothing in it on which a second grant can be supported. And this rule holds good, though the scope of the patents may be different."

The facts of this case do not seem to me to warrant this assumption. When complainant launched the improvement patent, he sent out upon a 17-year cruise all the rights he had in his main patent in suit here as applied to that particular combination. It is within the rights of an inventor to dole out his inventions in piecemeal. There is no limit to the number of modifications for which he may secure patents, provided they amount to separate inventions. But, when he has done so, he subjects to the limitation of the 17-year clause so much of his basic patent as is involved in that combination. The patent thus obtained is a unit. The parts are merged in the whole. This principle is not new. The Circuit Court of Appeals for this circuit use the following language in the case of Victor Talking Machine Co. v. The Fair, 123 Fed. 424. 61 C. C. A. 58:

"Within his domain the patentee is czar. The people must take the invention on the terms he dictates or let it alone for 17 years. * * * Within the field of making, it has never been doubted, so far as we are aware, that he may subdivide as he pleases and offer to sell or leave in the most fanciful parcels on the harshest terms."

To the same effect is Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728.

These cases arise upon contracts made with purchasers or licensees, limiting the use by the purchaser; but I see no reason, on principle, why they should not apply to a division of the possible combination uses to which the patent may be put. I am unable, on principle, to see at this time why the device of patent No. 393,278, together with all of its elements kept in the exact combination of that patent, should not be deemed public property at the date of its expiration. Even were it otherwise, the facts of this case present a question of equitable estoppel which, for the purposes of this hearing, make it the duty of the court to deny the motion for a preliminary injunction. It appears that complainant sold or caused to be sold to defendants a number of electric locomotives, which are inoperative in the absence of the switch here involved. It is also in evidence that defendants have made purchases of similar locomotives of other make, and are using the switch in connection with the latter as well as the former. This would seem to be the ground of complaint. No exception was taken to the use of the switch while complainant's engines only were used. It has been frequently held that any one granting a thing, impliedly grants that also without which the thing expressly granted cannot be used. Pomfret v. Recroft, 1 Saunders, 331; Steam Stone Cutter Co. v. Shortsleeves, Fed. Cas. No. 13,334, 22 Fed. Cas. 1168, and cases cited; Edison Electric Light Co. v. Peninsular Light & Power Co., 101 Fed. 831, 43 C. C. A. 479; Montross v. Mabie (C. C.) 30 Fed. 234. Upon such a state of facts, the court would not be justified in granting such summary relief as now prayed for.

It appears that defendants are solvent and able to respond in damages, and that they have in hand large contracts and business interests, as well as government transactions, which would all be tied up by granting the preliminary injunction, a situation which is not necessary at this time and one not warranted on the facts. The motion for a preliminary injunction is denied.

AMERICAN BRAKE SHOE & FOUNDRY CO. v. RAILWAY MATERIALS CO. et al.

SAME v. WESTERN IRON & STEEL CO. et al.

(Circuit Court, N. D. Illinois, E. D. February 26, 1906.)

Nos. 26,629, 26,630.

1. PATENTS—INVENTION—ADAPTATION OF DEVICE TO NEW ART.
The strengthening of iron castings by the insertion of wrought iron bars or rods in the process of making belongs in the casting or foundry art, and not in the art in which the particular casting may be used, and the employment of the device in casting brake shoes, after its use for the same purpose in casting sleigh runners, annealing boxes and other articles did not constitute its transfer and adaptation to a new art, nor involve invention.

2. SAME—CASTING BRAKE SHOES.
The Herron patent, No. 423,996, for a brake shoe having wrought iron bars imbedded in the casting for the purpose of strengthening it is void for lack of invention, in view of the prior casting art.

In Equity. On final hearing.

Thomas F. Sheridan, for complainant.
William O. Belt, for defendants.

KOHLSAAT, Circuit Judge. The bills in these cases ask similar relief, and by agreement of the parties, the proofs taken are to be considered by the court in both cases. Complainant brings suit to restrain the respective defendants from infringing claim 2 of patent No. 423,996, granted to Charles Herron on March 25, 1890, for an improvement in brake shoes, and for other relief. The claim in suit reads as follows:

"2. In a brake shoe, the shoe A, having blocks, B, of steel set in its face below the surface, and the strips, C, of wrought iron, substantially as shown and described, and for the purpose specified."

Complainant's counsel at page 31 of their brief say:

"The last element of the claim is 'the strips, C, of wrought iron substantially as shown and described.' This element is intended to cover strips of wrought iron imbedded in the body of the brake shoe, or, more properly speaking, cast therein immediately behind the inserts for the purpose of strengthening the entire mass. These strips are placed in such position that any stress or strains which tend to break the shoe transversely will exert a pulling strain on them, and a crushing strain on the body of the shoe, thus applying the wrought iron of the one and the cast iron of the other to the exact force they are best adapted to stand. In this last element and its arrangement rests the novelty of applicant's invention, and in

combining this element with those that have heretofore been considered rests the patentee's claims to invention."

And at page 32, they further say:

"It is also well known in this art that wrought iron resists a pulling tension better than cast iron, but that cast iron withstands crushing strains somewhat better than wrought iron; hence Herron's conception lay, not in the fact that he imbedded wrought iron rods in a shoe—for this had been done by both Sargent and Curtice, without obtaining any good results—but on a construction in which the longitudinal strips were imbedded in such a position that they formed what might be termed a 'trussed' shoe, that has for the last 15 years withstood the tremendous strains of modern use. Did this amount to invention? Here is the crux of the case."

From the briefs and the state of the art as disclosed in the record, it is evident that the whole matter in controversy is found in the insertion and location of the wrought iron strips. The defenses are noninfringement, lack of invention, and other invalidity of the claim of the patent in suit. The specification of the patent, so far as the same is pertinent to this inquiry, is as follows:

"Strips or curved rods, C, of wrought iron are cast into the main body of the shoe for the purpose of strengthening the entire mass, it being in such a position that any stress tending to break the shoe in cross section will exert a pulling tension on said strip, C, and a crushing strain on the body of the shoe, thus applying the wrought iron of the one and the cast iron of the other to the exact force it is best adapted to successfully withstand. These strips may be as many in number as desired. The heavier the work to be done the more intense is the strain to be overcome or guarded against and the more strength to be supplied by these strips, C."

It appears from the record that the imbedding of metal rods or strips in a cast structure dates back to 1854 and includes numberless devices, such as annealing boxes, vises, skylight, and sash bars, burglar proof safes, sad irons, sleigh runners, armor plate, stove doors, etc. This was common foundry practice. Complainant's expert testifies that:

"Long before the application for the Herron patent, it was known and understood that a gray iron casting could be strengthened by imbedding in it a rod or rods of wrought metal—the rod or rods being suitably supported in the mold during the pouring of the molten metal of the casting. This may be taken, then, to be one of the elementary mechanical expedients within the reach and at the disposal of any inventor working in any of the mechanic arts at the time of the Herron invention and for years before the Herron invention."

Nor is any claim made that Herron was the first to recognize the value of the tensile strength of wrought iron rods imbedded in a cast iron structure. Arnold calls attention to this quality in his patent No. 54,838, issued May 22, 1866, for an "improved method of combining wrought iron with cast iron." And he mentions shafts, axles, car wheels, and railroad bars, as among the uses to which this compound can be applied. The Brown patent, No. 78,786, issued June 9, 1868, for an "improved process of combining wrought and cast metal," likewise refers to the use of wrought iron in a casting in order to make the tensile strength of the wrought iron available in aiding a cast iron structure to resist strains or concussions. In what complainant terms the brake shoe art, we find, among others, the

McConway reissue patent, No. 8,255, of May 28, 1878, showing a brake shoe reinforced by a malleable iron backpiece riveted to the cast iron shoe body; the Pollock patent, No. 410,989, granted September 10, 1889, showing a perforated metal or other plate cast in the shoe, and designed to hold rods in place during the process of casting; Curtice reissue patent of 1880 employing a wrought iron bar; Sargent's patent of 1887 for a composite brake shoe; a German publication made in 1871, wherein George Meyer in an article entitled "Report on the Experience Gained from the Experiments Made on the Upper Silesian Railway with Cast Iron Brake Shoes," sets out a construction of brake shoe having a round or flat safety rod of wrought or malleable iron, ¾ to 1 inch in width, riveted on the back of the brake shoe, and set in lugs provided at both ends of the shoe. The main purpose of this rod seems to have been to prevent part of the shoe from falling in case of fracture, and thus to prevent possible accidents. The strengthening feature of the rod, however, is also mentioned.

It is thus apparent that so far as the insertion, broadly speaking, of a bar of wrought iron in a casting is concerned, it is neither new nor serves a new purpose. It is there for the purpose of strengthening the cast metal brakeshoe and to hold the pieces together in the event the shoe breaks. Complainant urges that the employment of wrought iron rods prior to the patent in suit has been in nonanalogous arts; that the brake shoe art discloses no such use, and that to transfer a device from one art and adapt it to another involves invention. To transfer the device bodily from the annealing box or sleigh runner, or any of the other patents in the prior art, in order that it may perform the same duty in a brake shoe, does not constitute invention. The strengthening of metal castings by the insertion of wrought iron bars whether in annealing boxes, sleigh runners, or any other device requiring that result, is in the metal casting or foundry art. So far as the mere use of this kind of a casting is concerned, it consists only in the use of one casting of the prior art for another, to serve its old purpose. The case comes within the rule laid down by Judge Seaman in Indiana Novelty Mfg. Co. v. Crocker Chair Co. (C. C.) 90 Fed. 488, and the same case on appeal, 103 Fed. 496, 43 C. C. A. 287. Judge Grosscup, speaking for the Court of Appeals for this circuit in that case, says:

"Marble has not introduced into the world a new article, or a new means of making an old article. He did not conceive the wooden bicycle rim, or the desirability of its having a strong, close joint. The rim was already in existence, and the necessity for such a joint was already obvious; and, in the allied arts, the precise joint, in all features of mechanical construction, was already at hand."

The joint used by Marble on the bicycle rim was shown to have been previously used in the Davis chair and the archery bow. The court groups them all with respect to the patent in suit in the "art of joinery." Moreover, it is not satisfactorily shown by the evidence presented that the casting gains anything in strength from the wrought iron bar or rod. There is a very great difference of opinion between the witnesses on this point. It is impossible for the court to say

with certainty what the effect is. The evidence shows with fair degree of assurance that the wrought iron bar tends to chill the molten metal of the casting, thereby freeing the one from the other. Nobody seems to know what the result is, and the court cannot construct positive theory from shifting data. The hammer tests shown by complainant are not satisfactory, since the witness, who testifies in regard to them, also says that the test was somewhat unusual. It is hard to see that the resistance of a shoe to a sudden blow is an accurate measure of the tensile resistance of the shoe to the strain to which it is put in its contact with the wheel, and this difference in the character of the stress put upon the shoe detracts from the value of the experiment. What complainant says concerning the chilling and consequent weakening effect following the imbedding of cold inserts in the face of the shoe (page 33, complainant's brief) may well be true in regard to the chill attending the imbedding of the wrought iron strip. The record lacks evidence sufficient to justify the court in affirmatively finding that the casting is materially strengthened by the addition of the wrought iron strip or bar. However, whether it is or not, it is old and depends entirely upon its transfer to brake shoes for its novel features. This does not constitute invention. While complainant's expert makes some point of the location of the bar immediately back of the inserts so that the strain is first upon the wrought iron, and not upon the cast iron, there is nothing in the claim or specification to this effect. It is difficult to see how the strip or rod could be imbedded in the casting of a composite shoe without occupying about the same position as that of both the brake shoes here in question.

Whatever of commercial success the shoe in suit has had, may perhaps be accounted for from the fact that the tendency of the shoe to break and throw out its broken parts is avoided by the wrought iron strip. This feature is shown in the prior art. Moreover, the record in this respect is equally unsatisfactory in supplying data upon which a finding of merit in the Herron shoe can be predicated. It appears that complainants are manufacturing 300 tons of brake shoes per day, and of this amount but 3 per cent. are Herron shoes The composite shoes of all kinds, Herron included, used by the railroads are but a small per cent. of the total number of shoes used by the said railroads; the common cast iron shoe being still in almost general use. Clearly upon the record Herron does not belong to that class who performed the last step—the step which turned unsuccessful devices into a final success. Noninfringement is urged by defendants. The differences between the shoe of the patent in suit and that of defendants are minor, and would not be allowed to defeat a meritorious patent. Whether in the cases at bar these differences are sufficient to establish this defense need not be considered in view of the foregoing.

The bills must be dismissed for want of equity.

KOERNER v. DEUTHER et al.

(Circuit Court, W. D. New York. February 7, 1906.)

No. 21.

1. PATENTS—INVENTION—PRINTERS' DRYING RACKS.

The Koerner patent, No. 392,735, for drying racks for lithographers and printers, while of narrow scope in view of the prior art, was not anticipated, and discloses patentable invention in its feature of so constructing the trays or racks that they slide upon and interlock with each other to form a stack, and facilitate handling and moving. Also *held* infringed.

2. SAME.

The Koerner patent, No. 504,985, for a drying rack for lithographic or printed sheets, which covers an improvement on the device of the prior patent No. 392,735, to the same patentee, is void for lack of invention.

In Equity. On final hearing.

Macomber & Ellis, for complainant.

Wetmore & Jenner (William A. Jenner and Oscar W. Jeffrey, of counsel), for defendants.

HAZEL, District Judge. This action was brought to restrain the conjoint use and infringement of two letters patent, No. 392,735, dated November 13, 1888, and No. 504,985, dated September 12, 1893. Both patents were issued to the complainant as inventor, and both relate to improvements in lithographers' and printers' drying racks. The object of the invention was to enable easy and convenient sliding and stacking of the racks or trays one upon the other, and to overcome certain difficulties in the drying instrumentalities of the prior art. The earlier patent will be considered first. The specification speaking of the prior art, says:

"These frames are usually stationary; but if not, are necessarily bulky, and therefore require considerable time and trouble in handling. The object of my invention is to overcome these and other troublesome features; and it consists of a rack or tray constructed in such a manner that a number of the same can be laid or slid one upon the other to form a stack having spaces between the racks for the accommodation of the printed sheets to be dried."

The single claim reads as follows:

"An interchangeable paper rack or tray for lithographers' or printers' use, consisting, essentially, of a floor piece or pieces having secured thereto on each side a rail, each rail having an inner wall, a shelf, or recess above the inner wall, a guard along the outside of the shelf or recess, and an outside groove below the guard adapted for sliding register with the guard of the rack placed beneath, all arranged in a series, as shown, to form a drying-stack for printed sheets, substantially as described."

The defenses are anticipation, want of patentable novelty, prior public use and sale for more than two years before filing application, and noninfringement. The defendants contend that the claim is limited to a rail or bar secured to each side of the floor pieces, such construction of the claim being precisely descriptive of various kinds of drying trays and racks found in the prior art. A literal inter-

pretation of the language of the claim indicates, perhaps, that the floor pieces were to be provided with four rails instead of two parallel side rails firmly secured to the edges of floor pieces. In this particular, the claim probably is not free from criticism. The word "sides," however, does not always include the marginal parts of a surface, for the Century Dictionary says:

"The word side may be used either of all the bounding surfaces of an object, as with certain prisms, crystals and geometrical figures, or as exclusive of parts that may be called top, bottom, edge, or end, etc."

According to this definition, the defendant's interpretation of the word sides is somewhat narrow and illiberal. It is a statutory rule that a patentee must define precisely what his invention is and his claims must be construed consonant with the plain import of the language employed. White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303. But it frequently happens that resort must be had to the specification for the purpose of finding out all that the claim actually means. Some times features may be included in the claim which are not therein specifically alluded to for the express purpose of showing that the patented device is not inoperative. McCarty v. Lehigh Valley R. R. Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358. And whenever a correct drawing of the specific device is attached to the specification, the claims should in all fairness be construed in connection therewith unless they are free from ambiguity or indefiniteness of expression. Robbins v. Aurora Watch Co. (C. C.) 43 Fed. 521. Reference to the specification and drawings in this case neither enlarges the scope of the claim nor does it describe a drying tray or rack different from that conceived by the patentee. On the contrary, the specification and drawings are helpful in ascertaining what the patentee meant by the use of the words "on each side of a rail." Unquestionably, he meant to be understood as claiming a drying tray or rack with two rails or bars on opposite sides secured to the edges of the floor pieces, and not on four sides thereof. Upon this point the specification says:

"Referring to the drawings it will be seen that each rack or tray consists of the floor-pieces, aa, with open spaces, a, between them, and the side rails or strips, bb, which are secured to the side edges of the floor-pieces, a, upon their top surfaces."

Any other construction of the claim would manifestly defeat the object of the patent. In explanation of the mode of operating the rack the specification says:

"In operation one of these trays or racks is placed upon the delivery table of the printing press, and the sheets, as printed, are automatically placed thereon by the fly of the press. When a sufficient number has accumulated, the tray is taken away to make room for the next, and is placed upon a truck, as at e, Fig. 1. Upon this tray is placed or slid another, as clearly shown in Figs. 1 and 2, and so on until a stack has accumulated, as shown in Fig. 1. The printed sheets are left as just described until dry."

The foregoing quotations read in connection with the claim indicate that the drying apparatus was specifically designed for the purpose of placing thereon printed or lithographed sheets by the fly of the press; that each rack has two rails or bars which are firmly

affixed to opposite ends or to the side edges of the floor pieces, thereby enabling sliding one rack on top of another. This was the essence of the invention. To accomplish the object of the patent, the rails are provided "with a guide groove and guard adapted to co-operate with corresponding grooves and guards of other racks forming a stack." The fact that the specification shows in detail the necessity of parallel rails to carry out the purpose of the invention; i. e., the sliding of one rack upon another to produce an interlocking thereof, distinguishes this case from Roemer v. Neumann (C. C.) 26 Fed. 102, and Windle v. Parks & Woolson Mach. Co., 134 Fed. 381, 67 C. C. A. 363, cited by counsel for defendant as sustentative of the proposition that the claim is being enlarged beyond its scope. Racks for drying lithographic prints were concededly old, though the utility of the device in question is sufficiently established by the proofs. The trade, apparently, was quick to appreciate the interchangeable sliding feature of the patent. This is shown by a letter written to complainant by Mr. Donaldson, a lithographer, and afterward president of the American Lithographing Company (the real defendant, as claimed by complainant). The letter states that the invention in suit was an invaluable adjunct to the lithograph business and that by the use of the device the firm of Donaldson Bros., lithographers, were "enabled to dispense almost entirely with slip sheets to the great improvement of our work; while the loss by offset, fingermarks, dust, etc., has been reduced to a minimum." But it is contended that the prior art discloses the principle of interlocking the trays specifically set forth in the specification. It is true that some of the features of the patent in suit were old and familiar to the art, but in spite of the separate utilization of such elements in other kindred devices the combination in suit is thought to perform a new and useful function. The proofs show that matched surfaces, rabbet joint, grooves, etc., which were used by the patentee in the construction of the tray or rack, and the rails to interlock one tray on another were old. Such elements, however, were not hitherto combined in such a way as to produce a structure which was adapted to slide upon a similar structure to form a stack and to facilitate handling and removing from one place to another. Was it invention to do this? An examination of the patents and devices cited in anticipation shows that the claim of patentability stands on narrow ground. The Hildenbrand and Ottman racks concededly were adapted to receive the printed sheets from the flies of the press, and to stack one rack above another; but in each the significant feature of sliding the racks securely in their places one above another and interlocking them to prevent shifting or tilting was lacking. That such was the fact is supported by the testimony of the expert witnesses examined for the complainant, and by an inspection of the prior racks. The patent declares that in the prior devices the sheets coming from the press were placed in cumbersome frames and boxes to dry. This, evidently, in view of the Hildenbrand and Ottman racks, was not an accurate statement. The side rails in these devices were flat and the boards were nailed between an upper and

lower strip or rail, which were not provided with grooves nor the interlocking feature, certainly, they did not suggest the combination in suit, nor did they make obvious that which is claimed therein.

The patents of Ryder, No. 320,399, of McFarland, No. 210,362, of Strong, No. 361,379, and of Grier, No. 221,056, are relied on to anticipate the patent in suit. The Ryder patent is for a fruit dryer, and has side or end rails, or walls with ribs or grooves attached to floor pieces. The McFarland patent discloses a series of fruit drying trays with rails secured to floor pieces at their side and end; the rails having a guide groove and guard. In the Strong patent is shown trays for drying fruit, which also have a wall or rail on each side to facilitate stacking the trays one above another. The Grier patent described a rectangular frame with side rails and an interlocking arrangement. Although side rails, as stated, and the system of interlocking the trays one above another are shown in the above patents for fruit drying, the combination of the Koerner patent is essentially differentiated from them in that it produces a new result which enables continual sliding and stacking the trays and interlocking them without lifting one on top of the other. This is accomplished by constructing the rack so as to keep the ends free and open, the side bars being secured to the edges of the floor pieces. If the side rails or bars surrounded the tray the sliding feature manifestly would be impracticable. The Lutz jewelers' tray, upon which stress is laid by defendants, is also objectionable, on the ground that it has rails or rims on four sides of the floor pieces, and hence, was incapable of operating to produce the result of the patent in suit. The slight differences pointed out are important, and are shown by the evidence to have resulted in a more useful adaptation to the needs of the trade. This precise method of sliding the racks has not been disclosed by the prior art and the complainant was the first to adopt such form of the tray or rack for the purpose specified in the patent. The argument of nonpatentability is a plausible one, and why the slight alteration herein described did not occur to others engaged in the lithograph art is not explained. However simple the alteration, the fact is that no one perceived the advantages that would result by adapting the changed or altered form to the use designed by the patentee. That the complainant's apparatus is entitled to merit and a limited range of equivalents is shown by Mr. Donaldson's letter, to which attention has been directed, praising the efficiency of the racks. The Hildenbrand and Ottman devices were long and directly known to the lithographic art. The fruit drying racks and the Lutz tray closely approach the device in question. In short, the prior art possessed all the possibilities of the Koerner device, and yet lacking the sliding feature, no one seems to have thought of the advantages that were to be derived from a slight alteration in that which was known and in use. As said in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177:

"But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes;

they may also almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice."

The defendants contend that the patents relating to fruit dryers belong to the art, and in the examination which I have given the subject-matter, I have regarded them as analogous. I am constrained, however, to hold that in principle the first-known patent is materially different from the prior art. The alteration in the frame or rail embodied a substantially different method of operation to produce a new result. As to prior public use. Evidence was given by the defendants to prove that prior to the year 1899, they had manufactured and sold racks containing all the elements of the complainant's rack; such structures being used for drying lithographs after painting or varnishing them. Several witnesses, former employés of the defendants, testified positively that racks were manufactured by the defendants about twenty years ago, and models and sketches were produced on the trial from memory by the witnesses Deuther and Dykstra. No racks or models actually manufactured by defendants were produced; it being explained that a fire had destroyed them. It does not appear that Mr. Deuther ever applied for a patent, and no witnesses were called to controvert the claim of prior public use. In the absence of a rack manufactured and used as claimed by the defendants I am not inclined to find as a fact that the patented structure has been in prior public use. Upon this proposition the burden of proof under the rule is on the defendants, and every reasonable doubt should be resolved against them. Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821. In Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153, the Supreme Court says:

"Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, is such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used."

That the defendants have infringed the Koerner patent in question in view of the scope of the claims as herein indicated is not seriously controverted. The defendants' rack which infringes is provided at the opposite ends of the floor pieces with bars or rails grooved on one side, together with a guard on its opposite side. The groove and guard are arranged so as to enable forming a stack by sliding the racks one on top of the other. In addition to such features, the rails or bars have channels or recesses which serve to retain the slatted floor pieces. Other structural differences relate to the details; in fact, the said rack in form is similar to the complainant's latter adoption. To differentiate their structure the defendants have inverted the essential elements of the rack of the complainant; but by such reversal they have retained the principle which, I think, removes the patent from the domain of the prior art. By equivalent means the defendants have attained the same result, and hence, they cannot escape the charge of infringement. Patent No. 504,985, re-

lating to the same subject as the first, is claimed to be an improvement. Much of what has been said of the first patent could appropriately be said of the latter. The specification states that the object of the patentee was to provide a rail of increased rigidity and strength. The claim allowed by the Patent Office reads:

"An interchangeable rack or tray for lithographers' or printers' use, consisting essentially of a floor piece or pieces, having secured thereto on each side a rail, each rail having an inner wall, a shelf or rest above the inner wall, an outside groove adjacent to the shelf and opposite to the inner wall, a depending guard underneath the outside groove and projecting below the floor pieces adapted for sliding register with the outside groove of the rack placed beneath, and a recess above the depending guard forming a shelf for the reception of the end of the floor piece, all arranged in a series as shown to form a drying stack for printed sheets, substantially as described."

Upon examining the record, it will be observed that the floor pieces are inserted in a groove in the side rail or bars instead of being nailed to the underside thereof; the side walls being inverted. The application was several times rejected by the Patent Office on the grounds that the device consisted in "nothing more than a slatted tray having a ledge on the upper side and retaining flange on the lower side," and that it "consists in merely reversing the end rails and attaching the transverse strip to a different part of the same." Later, however, the application was allowed. Regarding the patentability of the second patent, Mr. Kimball, expert witness for the defendant, says:

"The tray shown, and very minutely described in this patent, is comprised of the same parts as the tray of the former patent, these being simply floor pieces with two matching side rails; the latter being mortised to the edges of the flooring. The disposition of the matching or interlocking elements is one in which the upper rib or guard is on the inside, and the lower rib on the outside; that is to say, the relative positions of rib and groove with respect to the floor are reversed from the positions of these parts in the first Koerner patent."

There is no novelty in channeling or recessing the rails and joining the floor pieces thereto. Peters v. Hanson, 129 U. S. 541, 9 Sup. Ct. 393, 32 L. Ed. 742. The inversion of the bars or rails together with such other alterations as are proven, was simply the application of old elements without creating any new result, and, therefore, the second Koerner patent does not involve invention. Moreover, the principle of sliding one rack on top of another, as we have seen, is covered by the earlier patent. According to the specification of the later, the improvement consists of the compactness of the rail, "which can be more readily secured to the floor pieces." Such improvement, however, is thought to have been perfectly obvious to the ordinary skilled workman and the means to produce the change in form were within his knowledge. Doig v. Morgan Mach. Co., 122 Fed. 460, 59 C. C. A. 616. As herein stated, the Koerner patent, No. 392,735, was infringed by the defendants, but as that patent has expired, only an accounting is decreed.

The improvement patent discloses no invention and as to such patent the complaint is dismissed without costs to either party.

So ordered.

BRISTOL OIL & GAS CO. v. BEACOM et al.

(Circuit Court, N. D. West Virginia. March 18, 1905.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not be granted to restrain infringement of a patent which has not been adjudicated, where the proofs leave the question of its validity in doubt, especially when it appears that defendants are financially responsible.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 474.]

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

Charles B. Johnson and George M. Hoffheimer, for complainant.
Davis & Davis, for defendants.

GOFF, Circuit Judge. The Bristol Oil & Gas Company, claiming to be the assignee in and for the county of Harrison, state of West Virginia, of patent No. 601,389, issued by the United States to Justin I. Williams, for "improvement in automatic lampblack machines," brings this suit against the defendants, alleging infringement by them, and praying an accounting, and a decree for damages. The defendants John W. Brown and Buena W. Brown, in their separate answers, deny infringement and disclaim any interest in the subject-matter of the controversy. The defendant Johnson W. Beacom, in his answer, denies infringement, questions complainant's title, controverts the validity of the patent, and raises certain statutory defenses. Pending the suit, prior to the taking of proof, the complainant submits a motion for a preliminary injunction, and this I am now to dispose of.

Complainant does not claim that the validity of the patent in suit has ever been established by the adjudication of any court, but insists that there has been public acquiescence. The validity of the patent is not now to be determined, but I am to decree whether, in order to protect the rights of the complainant in advance of a decree upon the merits, the preliminary writ of injunction should issue. A large number of ex parte affidavits have been filed by the parties hereto, conflicting in character and unsatisfactory as proof. The parties making them should be examined as witnesses, their testimony should be taken in due and regular manner, and, when cross-examined, their depositions should be submitted to the court. These affidavits disclose a conflict that the court cannot now dispose of, and, pending the existence of the doubt caused thereby, an injunction that may possibly work great damage to the defendants should not issue, especially in this case, in which I think it appears that defendants are financially responsible.

The validity of the patent is not only assailed, but the insistence that prior patents disclose that the patented design was old and known prior to the date of complainant's patent is not without testimony to sustain it, and, so far as the question of asquiescence is concerned, I am of opinion that, as it is now presented, it does not raise the presumption of validity.

Without intimating an opinion concerning the complainant's rights, or the defendants' liability for infringement, the preliminary injunction asked for is refused.

ELECTRIC VEHICLE CO. et al. v. BARNEY.

(Circuit Court, S. D. New York. January 27, 1906.)

COURTS — CONFLICTING JURISDICTION — PATENTS — SUIT FOR INFRINGEMENT — GROUNDS FOR STAY.

The pendency of a suit for infringement of a patent is not ground for staying a second suit in another circuit against a different defendant for infringement by a different machine.

On Motion for Stay.

Niles & Johnson, for the motion.

S. R. Betts and Wm. A. Redding, opposed.

LACOMBE, Circuit Judge. This is a motion to restrain the prosecution of this suit, which is brought for alleged infringement of the Selden patent in the use of a foreign-made machine (a "Mercedes") imported by defendant for his own use. The ground of application is that there is pending in some other circuit a suit for alleged infringement of the Selden patent brought against the manufacturer of the Ford Machine, and this court is asked to suspend the prosecution of this suit until after the Ford suit is determined.

If defendant were using a Ford machine, or if he were asking to have prosecution suspended until the decision of some prior suit against a maker, seller, or a user of a Mercedes machine, the application would probably commend itself to the court; but there seems neither authority nor any sound reason for granting it under existing circumstances.

COURTIN, GOLDEN & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 4, 1906.)

No. 3,898.

1. CUSTOMS DUTIES—FRUIT IN PACKAGES—ALLOWANCE FOR DECAY.

The rule that the duty on fruit should be assessed only on the sound and merchantable portion, allowance being made for such as is rendered worthless, and unsalable through decay, *held* to apply to fruit in packages, even though the decayed portion is not separated, but, after being removed for the purpose of estimating its quantity, is replaced in the package and sold with the good fruit.

2. SAME—MEASUREMENT—ALLOWANCE FOR ROTTEN FRUIT—EVIDENCE.

For the purpose of ascertaining the percentage of decay in importations of fruit, the importers opened at least one package in ten of the consignments from each shipper; and the percentage thus estimated was assumed to prevail throughout the other packages, and was accepted by the bidders at the auction sales held immediately on the dock. *Held*, that this method of averaging constituted a reasonably certain and sufficient mode of proof, and should be accepted by the customs officers as a proper basis for making allowance for the decayed fruit.

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 Stone v. Shallus (C. C. A.) 143 Fed. 486.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The Board affirmed the decision of the collector, who assessed, under Tariff Act July 24, 1897, c. 11, Schedule G. par. 266, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651], a duty of one cent per pound on the entire importation, which consisted of oranges, lemons, and grape fruit. The importers claim to have satisfactorily shown that certain portions of the various consignments covered by the invoice were absolutely decayed and worthless, and were not, therefore, subject to any duty when they reached our shores, invoking the principle of Lawder v. Stone, 187 U. S 281, 23 Sup. Ct. 79, 47 L. Ed. 178. The reasoning of the Board fails to persuade me. It is found in the opinion submitted in Rathbun's Case, G. A. 5,865, T. D. 25,843, which is made the basis of the action taken herein. It undertakes to distinguish that matter from the Lawder v. Stone decision in several ways:

First. Because the portion of the pineapples found undutiable in the Lawder Case were "worthless slush, commercially valueless, condemned under the sanitary regulations of the city of Baltimore, and dumped overboard," while in Rathbun's Case some of the fruit claimed to be undutiable "brought prices equivalent to the market price of sound fruit." However that may have been in Rathbun's Case, the evidence in the matter before me shows clearly that the percentage of reduction claimed is based upon absolutely worthless stuff, and that, although it was sold in the packages with the good fruit, the amount which the packages brought at auction was based upon the actual percentage of thoroughly decayed and commercially valueless matter.

Second. Because in the present case the bad fruit was delivered from the vessel in packages with sound fruit, and after investigation as to the percentage thereof was placed back in the package and sold with the good fruit. I discover no force in this point. Fruit which is so far decayed as to be absolutely unfit for commerce is no more the subject of duty, because it remains in close conjunction with admittedly good fruit, than if it were kept apart and condemned by health authorities.

Third. Because "the importer has failed to show with sufficient certainty and by satisfactory evidence the quantity of merchandise, if any, which was so destroyed as to become valueless," and that under the rule of the Lawder Case "the mere fact that goods were damaged, so as to be merchantable to a less extent than sound fruit, should not * * * constitute a nonimportation." This latter suggestion seems to imply that in Rathbun's Case the individual oranges

were found to have been to some extent injured, but not absolutely worthless. There is no such testimony in this case. In the case before us the importers arrived at the portion of the fruit which was entirely decayed in this way: The importation consisted of various consignments packed on the other side at different times and by different packers. From each consignment at least one package out of ten was opened and examined, and the rotten fruit separated from the good. The percentage of loss in that package was assumed to prevail through all the packages put up at the same time and by the same parties. This was done by the inspectors in charge of the auction sale, which took place at once on the dock, and the percentage of rot so fixed was accepted by the bidder in fixing a price upon the consignment. This plan is good enough for the government in getting at the contents of a number of packages of imported merchandise, and ought not to be unduly criticized by the government when it is invoked by the importer. As to the certainty and sufficiency of proof, it would seem that the importers have arrived at their averages in a reasonable way, and that the method adopted is as good as the one applied in the Lawder v. Stone Case. The citation of Hollender v. Magone, 149 U. S. 586, 13 Sup. Ct. 932, 37 L. Ed. 860, is unpersuasive.

The importers are entitled to have considered as nonimportations the percentages of rotten fruit indicated on the different shipments, and the decision of the Board of General Appraisers is reversed.

In re A. F. HARDIE & CO.

(District Court, W. D. Texas, San Antonio Division. February 7, 1906.)

No. 343.

BILLS AND NOTES—PARTNERSHIP AS JOINT MAKER—NOTICE TO PURCHASER OF DEFENSES.

Promissory notes signed by a corporation first and by a partnership second as a joint maker, impart notice on their face that the transaction was not one in the usual and ordinary course of borrowing money for partnership purposes, and to bind the firm it is incumbent on a purchaser, although for value and before maturity, to prove either that the proceeds were used by the firm, or that all of the partners either assented to the execution of the notes or subsequently ratified the same.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 846.]

In Bankruptcy. On certificate of referee.

Keller & Keller and Terrell, Hopkins & Terrell, for trustee.
Crawford & Crawford, for Union Nat. Bank.

MAXEY, District Judge. The Union National Bank of Kansas City, on May 8, 1905, presented to the referee in bankruptcy for allowance against the bankrupt firm of A. F. Hardie & Co. 12 notes for the sum of $2,500 each. The claims were duly allowed. But afterwards, on motion of the trustee, they were disallowed and expunged

from the list of claims. To the action of the referee the bank excepted and filed its petition for review. The referee certifies to the court the following question:

"Was the Union National Bank an innocent purchaser, without notice, of the 12 notes attached to the claim?"

The 12 notes, except as to the date of maturity, are in the following form:

"$2500.00 Dallas, Texas, February 16, 1905.

"April 10, 1905, after date we promise to pay to the order of Spence and Leonard Hardie, Twenty-five Hundred Dollars, at Dallas, Texas, with interest from date until paid at six per cent per annum. If this note is not paid at maturity and is collected by suit or attorney, we further promise to pay ten per cent additional on principal and interest for attorney's fees. Value received.

"Hardie Rose Co.,
"By A. F. Hardie, Pres.
"A. F. Hardie & Co.,
"A. F. Hardie.

Indorsed:

"Spence Hardie,
"Leonard A. Hardie.
"Pay Union National Bank, Kansas City, Mo., or order Swofford Bros., D. G. Co. By J. J. Swofford, Pres."

It is shown by the testimony that these notes were gotten up by A. F. Hardie and J. M. Hardie, and that either the Hardie-Rose Company, a corporation of Dallas, Tex., or A. F. Hardie, personally, or J. M. Hardie, received the proceeds thereof, and that the firm of A. F. Hardie & Co., a partnership of San Antonio, Tex., and Max Kaliski, who was an active member thereof, and who furnished a large part of the capital of the firm, received no benefit whatever therefrom and did not know of their execution, and never consented to or ratified their execution, and never heard of the existence of the notes until the day that A. F. Hardie & Co. failed, to wit, April 22, 1905, at which time J. M. Hardie told Max Kaliski of the transaction and urged the bookkeeper of the firm to enter the notes in their books, which the bookkeeper refused to do. It was also clearly shown by the proof that the bank was a purchaser for value of the notes before maturity and had no notice of any infirmity in them except what was disclosed on their face.

The question, raised by the petition for review filed by the Union National Bank of Kansas City, has been considered with unusual care; and a large number of authorities, including English and American text-books, encyclopedias, and judicial decisions, have been examined in the effort to reach a satisfactory conclusion. No decision directly in point has been found by the court nor have the researches of counsel produced one. The question, however, must be determined, and, although doubtful of its correctness, the following conclusion is announced. The name of the Hardie-Rose Company, appearing as the first joint maker on the face of the notes, with the partnership name of A. F. Hardie & Co. immediately following, imparted notice to third parties that the transaction was not one in the usual and ordinary

course of business of borrowing money for partnership purposes; and in order to bind the firm of A. F. Hardie & Co., the loan not being intended for its benefit, it was incumbent on the bank, notwithstanding its purchase of the notes for value before maturity, to prove (1) that the money was used by the firm of A. F. Hardie & Co.; or (2) that the protesting partner, Kaliski, either assented to the execution of the notes or subsequently, expressly or by implication, ratified the act. See Bank v. Law et al., 127 Mass. 72; Lemoine v. Bank, Fed. Cas. No. 8,240; Sherwood v. Snow, Foote & Co., 46 Iowa, 481, 26 Am. Rep. 155; Stall v. Catskill Bank, 18 Wend. 467; 1 Dan. Neg. Instruments (3d Ed.) § 365; 22 Am. & Eng. Enc. Law, pp. 144–146; Parsons on Part. (4th Ed.) § 145.

The proof being clear that the money was not borrowed for the benefit of the firm; that Kaliski knew nothing of the existence of the notes at the date of their negotiation; and that he never, subsequently, expressly, or impliedly ratified the act, it follows that they are not binding on the firm.

The order of the referee, of October 26, A. D. 1906, expunging the notes of the bank from the list of claims against the estate of the bankrupts was therefore correct, and it is accordingly affirmed.

PRESTON v. McNEIL LUMBER CO.

(Circuit Court, M. D. Pennsylvania. February 6, 1906.)

No. 40.

REMOVAL OF CAUSES—FOREIGN ATTACHMENT—SUFFICIENCY OF BOND—CONDITION FOR SPECIAL BAIL.

An undertaking to dissolve a foreign attachment, under the law of Pennsylvania, must be an absolute one for the payment of the debt or damages recovered, and constitutes "special bail," within the meaning of the removal act (Act March 3, 1875, c. 137, § 3, 18 Stat. 470 [U. S. Comp. St. 1901, p. 510]), which requires a bond for the removal of a cause to be conditioned for the entering of such bail when originally requisite; but, since a defendant is not required to enter such bail under the law of the state, but may at his option appear and contest the action, leaving the attachment in force, it is not necessary that a removal bond in such case be so conditioned, particularly where an undertaking to that effect has been given in the state court, which necessarily remains in full force and effect in the federal court after the removal.

On Motion to Remand to State Court.

E. H. Owlett and D. W. Baldwin, for the motion.

Vernon Cole, C. La Rue Munson, and Willard, Warren & Knapp, opposed.

ARCHBALD, District Judge. This is a foreign attachment in assumpsit, originally brought in the common pleas of Tioga county, Pa., to recover a balance of $2,800 claimed to be due by the defendants, on a sale of timber; the property attached consisting of certain logs and lumber in the hands of the garnishee, and bail to dissolve being fixed by the plaintiff at $5,000. The action was brought Jan-

uary 19, 1905, and the defendants appeared promptly on January 23d, giving bail in the required amount on March 6th following. Nothing further was done, however, until August 15th, when the plaintiff filed his statement of claim, and on September 2d, before the time for pleading thereto had expired, the defendants, being citizens of New York, and the plaintiff, a citizen of Pennsylvania, filed a petition and bond to remove the case into this court. The bond was in $500 with a sufficient surety, and was conditioned that the defendants should enter and file copies of the record of the case on the first day of the next session and "do such other appropriate acts as by the statutes of the United States are required in that behalf, upon the removal of a suit from a state court into the United States Circuit Court," and also to pay all costs that might be awarded by said court, if it should be held that the suit had been wrongfully or improperly removed. The acts of Congress upon the subject, in addition to what is so provided for in the bond, require that it shall be conditioned for the party's "appearing and entering special bail in such suit if special bail was originally requisite therein." Act March 3, 1875, c. 137, § 3, 18 Stat. 470; 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. 510]. This last provision having been omitted from the bond, a removal was resisted by the plaintiff, and the learned president of the common pleas, being of the opinion that the law had not been complied with, withheld his approval and dismissed the petition. The defendants, however, contending that the steps taken to remove the case were sufficient, filed a copy of the record in this court, and, having obtained a recognition of their standing here, a motion is now made by counsel for the plaintiff to remand the case to the common pleas.

The sufficiency of the removal is not to be disposed of on the idea that bail to dissolve is simply in the nature of a forthcoming or delivery bond. Whatever may be said of it in other jurisdictions, dependent upon local statutes (Ramsey v. Coolbaugh, 13 Iowa, 164), that is not true of it here, in which respect, as it may be observed in passing, it differs from the bond to be given by the defendant in case of a fraudulent attachment (Act March 17, 1869, § 3 [P. L. Pa. 9]; Maitland Driving Park Association v. Fisk, 3 Lack. Leg. N. [Pa.] 210). The object of a foreign attachment is to compel an appearance from a nonresident defendant, who cannot otherwise be reached. According to the statutes upon the subject in Pennsylvania, he may thereupon either appear and make defense to the action, in which case it proceeds as if begun by a summons, except that the attachment continues to bind the property attached (Act June 13, 1836, § 64 [P. L. 584]), or he may put in and perfect bail, which shall be bail absolute, by recognizance with sufficient sureties, in double the amount in controversy, as nearly as may be ascertained, conditioned for the payment of the debt or damages, which may be recovered with interest and costs (Act March 20, 1845, § 2 [P. L. 189]). As the law originally stood, however, this bail was bail to the action, in the sum demanded by the plaintiff or in such sum as the court upon cause of action shown should order, the plaintiff, as stated by Duncan, J.,

in Fitch v. Ross, 4 Serg. & R. (Pa.) 557, being given the highest security known to the law, security by the body; or the defendant might make deposit in the manner provided in the case of an arrest upon a capias ad respondendum; the action in either case proceeding after the dissolution the same as if it had been begun by such writ. Act June 13, 1836, § 62 (P. L. 583). The bail which was so provided for, as it will be noted, was special bail or the customary deposit in lieu of it, and its character in this respect is not changed. Hailman v. Wilson, 1 Clark (Pa.) 189. The security now required is an undertaking by the defendant and his sureties, by recognizance, by which, in consideration of the release of the property attached, they become responsible to the plaintiff for the amount which may be thereafter recovered. Borden v. American Surety Co., 159 Pa. 465, 28 Atl. 301. In form as well as in nature this is bail, and it is special, in that it is given by responsible, and not merely nominal, parties, as in the case of common bail, with which it is contrasted. 3 Am. & Eng. Encycl. Law (2d Ed.) 591.

But this discussion, after all, is somewhat academic. Notwithstanding the conclusion which is so reached, the plaintiff is not entitled to have the case remanded. While the undertaking to dissolve a foreign attachment is such as is stated, the defendant is not bound to enter it. He may simply appear, as we have seen above, if he so desires, and allow the attachment to stand. It is not as though the action were begun by capias, to which the statutes regulating a removal evidently apply, and for which they intend to provide, where bail to respond, unless the defendant is unable to secure it or prefers to go to jail, is absolutely necessary. Even there, however, bail having been once put in, there is no occasion to renew it. And as, upon a removal, the case proceeds in the Circuit Court the same as if it had been begun there, every step previously taken in it being given due effect (Lebensberger v. Scofield [C. C. A.] 139 Fed. 380), where bail to dissolve, as in the present instance, has been put in, in the state court, before the removal, it holds good in the Circuit Court without more. Even, therefore, if it should be held, contrary to the opinion expressed above, that the case is one in which, within the meaning of the statute, special bail is in fact required, it has already been entered by the defendants, in $5,000, the amount demanded, and it does not need to be entered again; nor can the removal bond be held to be deficient, because it fails to so provide. This requirement, if such it be, having been already met, the provision is no longer of any moment, any more than in a case to which it never applied. Burck v. Taylor (C. C.) 39 Fed. 581. In Cooke v. Seligman (C. C.) 7 Fed. 263, it was held that a bond was sufficient, which was conditioned "to do such other appropriate acts as by the statutes of the United States in that behalf, upon the removal of a suit from a state court into the United States Circuit Court, require," even though there was no provision with regard to the entry of special bail; which is the exact condition here. It was also held, in Coburn v. Cedar Valley Land Co. (C. C.) 25 Fed. 791, that the form of the bond was not matter of substance so as to affect the validity of the removal; and, in Harris v. D. L. &

W. R. R. (C. C.) 18 Fed. 833, that a defect in the bond could be cured by substituting a new one. But it is not necessary to go to the length of either of these cases. Having regard to the state of the record at the time of the removal, the bond, which we have here, is good as it stands, whatever view be taken with regard to the act of Congress; and the removal must therefore be sustained. It is true that a different conclusion was reached by the learned president of the common pleas, for whose judgment I have the highest regard; but, for the reasons given, I am unable to coincide therein, and, while this may possibly raise a conflict of jurisdiction, I trust that some way will be found to avoid this result.

The motion to remand is refused.

HARTFORD v. BRIDGEPORT TRUST CO.

(Circuit Court, D. Connecticut. February 12, 1906.)

No. 1,072.

EQUITY—DISMISSAL OF SUIT—SETTLEMENT OF ISSUES.

A bill in equity against an administrator alleged a partnership between complainant and defendant's intestate, and prayed for an accounting as to the partnership business and injunctive relief against interference therewith by defendant. By an answer and a cross-bill defendant denied the partnership and asked affirmative relief. After the case had lain dormant for two or three years defendant filed a supplemental cross-bill alleging a settlement pursuant to which the property in controversy had been transferred to a corporation formed for the purpose. *Held*, that no issues remained for trial, and that the court would not retain the case for the purpose of litigating the right of defendant to enforce an alleged agreement by plaintiff in the settlement to deliver to defendant certain stock of the corporation, against plaintiff's petition to dismiss.

In Equity.

Arthur J. Baldwin, for plaintiff.
George P. Carroll, for defendant.

PLATT, District Judge. In the original bill filed October 24, 1901, plaintiff claimed to have been a partner of the deceased Gilman, whose administrator the defendant is, and asked for an accounting and for injunctive relief against any interference by defendant with the copartnership property which consisted of 140 tea stores scattered through several states, exclusive of 57 stores located in New York, concerning which, separate administration existed.

Defendant, by answer filed January 4, 1902, denied the partnership, which, if a fact, would of course remove the reason for a copartnership accounting. Said answer further sets forth that plaintiff had never been anything more than Gilman's managing agent, and that since Gilman's death, his effort to close the estate as the surviving partner was an intrusion, and that a receiver ought to be appointed by the court to wind matters up. Defendant then, in what it called a "cross-complaint" and by way of "affirmative relief," re-

peated its answer, and set forth that since Hartford had put himself within the court's jurisdiction, and whereas there was no adequate remedy at law for such a condition of things as the answer exhibited, the court ought to order Hartford to stop refusing defendant's demand for the scattered property and that a receiver be appointed to wind up the tangled skein of affairs.

Exceptions to the answer were filed for complainant on February 4, 1902; one for impertinence and scandal, and one for insufficiency. In such situation the cause lay torpid in the files of the court until August 28, 1905, when a paper was filed by defendant, entitled "Supplemental Cross-Complaint" which sets forth, in substance, that since the original answer, to wit, on August 15, 1902 (all other difficulties having been arranged), plaintiff and defendant had entered into an agreement by which defendant agreed to transfer all its rights in the property outside of New York to a New Jersey corporation to be formed, in consideration that plaintiff should transfer $15,000 preferred stock in said corporation to the defendant; that the corporation had been formed and that Hartford had more than $25,000 preferred stock thereof in his possession; that the Connecticut superior court, acting on appeal from the Bridgeport probate court, had authorized the defendant to settle and compromise the claims in dispute with Hartford; that defendant had demanded the transfer of the $25,000 preferred stock, but plaintiff had refused. The prayer for relief which culminates such recital is unique and deserves to be inserted. Here it is:

"Wherefore, inasmuch as your orator is without remedy in the premises, it prays by way of remedy against this plaintiff who is defendant in the cross-complaint, that it may have against him the remedy prayed for in the original cross-complaint, except as modified by the facts herein set forth."

The remedy asked for in the alleged original cross-complaint was practically the same as that suggested in the original answer, and upon the facts recited in this "supplemental cross-complaint," it would seem that if the defendant was not as he said himself "without remedy," the situation had at least become so "modified" that no court would be able to discover what the remedy ought to be. The complications, when analyzed, offer us a compound which can be called neither "fish, flesh, nor good red herring."

Now in a paper styled "Substituted Supplemental Cross-Complaint" presented for filing January 29, 1906, defendant charges the plaintiff with having been Gilman's partner and demands an accounting. If it had taken this position at the beginning, a decree must have gone against the defendant pro confesso. The entire case now revealed to the court shows that a substantial compliance with plaintiff's original demand has been otherwise effected, and therefore nothing remains upon the record to be litigated. All the copartnership property has gone to the New Jersey corporation; plaintiff says that the defendant has consented that it should so go. The defendant does not deny that it consented, but claims that such consent was obtained through a promise made by the plaintiff to transfer to the defendant,

as a consideration for such consent, $25,000 in preferred stock of the New Jersey corporation.

The only open question is about the transfer of the stock. That is clearly a question of law, and I may say in passing, although it does not affect my disposition of the case, that the plaintiff offers to meet the defendant on that issue, in the forum of defendant's own choosing. The defendant might find it a serious matter to settle what disposition could be lawfully made of that preferred stock, if such litigation should turn in its favor, and the new expense should have failed to eat it up in advance. There are no debtors to demand it. Taxes have been taken care of. Present expenses do not enter in. The heirs who might otherwise apply for it, have each and all, accepted an acquittance of whatever claims they once had, by taking over as an equivalent, certain proportionate interests in the New Jersey corporation. It is unimportant whether or not they agreed to do so in the writing which they signed. Actions speak louder than words and the facts on the record show enough to estop any claimant from demanding further indemnity from the plaintiff. This court, however, is not called upon to pass on that controversy. If a real contention exists, it is a matter of independent litigation.

Equity and good conscience demand that the so-called "Supplemental Substitute Cross-Complaint" should not be filed, and that, upon plaintiff's petition filed January 29, 1906, an order should be entered discontinuing this action.

It is so ordered.

PARKER v. BLACK et al.

(District Court, W. D. New York. February 6, 1906.)

1. BANKRUPTCY—VOIDABLE PREFERENCES—SUIT IN EQUITY TO RECOVER.
   A trustee in bankruptcy may at his election maintain a suit in equity to recover a payment made by a bankrupt to a creditor as a voidable preference; such suit being in the nature of a creditors' suit to set aside a fraudulent conveyance.
2. SAME—KNOWLEDGE OF DEBTOR OF CREDITOR'S INTENT.
   A payment made by an insolvent to a creditor within four months prior to the debtor's bankruptcy may be recovered by his trustee as a voidable preference, under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], if the creditor had reasonable cause to believe a preference was intended, irrespective of the debtor's actual intention; and such reasonable cause exists if the creditor had knowledge of the insolvency, or of facts which reasonably charge him with such knowledge.
3. SAME—EVIDENCE.
   Evidence considered, and *held* to establish knowledge on the part of creditors, who obtained payment from an insolvent within four months prior to the bankruptcy, of such facts as to give them reasonable cause to believe that he was insolvent and intended a preference, and to entitle his trustee to recover the payment.

In Equity.

Lewis & Crowley, for plaintiff.

Werner & Harris, for defendants.

HAZEL, District Judge. This suit in equity for an accounting was brought by the complainant, as trustee in bankruptcy, against the defendants, a partnership, who were creditors of John S. Hough, the bankrupt. The sum of $2,929.75 is alleged to have been transferred by the bankrupt, when insolvent, in violation of section 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). The trustee claims to be entitled on behalf of the creditors to the amount mentioned. Although lack of jurisdiction was suggested at the hearing, it is not pressed in the brief submitted for the defendants. That the trustee acted within his right in instituting a plenary action for an accounting, instead of resorting to an action at law, seems to be settled by the federal authorities. Pond, Trustee, v. New York Exchange Bank, 10 Am. Bankr. Rep. 343, 124 Fed. 992; Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408; Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. In Pond v. New York Exchange Bank, supra, Judge Holt, speaking of the right of a trustee in bankruptcy to enforce his remedy to recover a preference, consisting of money paid a creditor by bill of equity, says:

"This suit is analogous to a judgment creditors' suit to set aside a fraudulent conveyance. The original payment, when made, was valid. It would not have been voidable by the bankrupt. It has only become voidable, at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity."

In Loveland on Bankruptcy (2d Ed.) p. 608, the practice is thus stated:

"To recover property conveyed by the bankrupt in fraud of the act, either as a preference or a fraudulent conveyance, is not a proceeding in bankruptcy. It must be a plenary suit at law or in equity, according to the nature of the case. Such suit may be actions at law, in ejectment, trover assumpsit, etc., or suits in equity, as a bill to set aside a fraudulent conveyance."

In Bardes v. Bank, supra, the Supreme Court of the United States, specifically answering the question of jurisdiction certified to them, says:

"The provisions of the second clause of section 23 of the bankrupt act of 1898 [30 Stat. 552; U. S. Comp. St. 1901, p. 3431] control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors."

It will be noted that the language employed in the same sentence includes suits to set aside fraudulent conveyances and suits for the recovery of money paid by the bankrupt to third persons. This would seem to indicate that the Supreme Court regarded the payment of money to a creditor or third person in violation of the bankruptcy act as in the nature of a fraud, misrepresentation, or concealment, and that a remedy in equity would more readily afford adequate relief. Jones v. Bolles, 9 Wall. 364, 19 L. Ed. 734.

The adjudications in the courts of the state are not entirely har-

monious upon the point under consideration. In Houghton v. Stiner, 92 App. Div. 171, 87 N. Y. Supp. 10, the trustee sought to recover the value of a stock of goods transferred to a creditor in violation of the bankruptcy act. The court substantially held that, as the transfer was only voidable by the trustee, his mere election to avoid the same did not destroy the title, ownership, or possession, and that the creditor receiving a preference must be deprived of his right to the property by a court of equity. In Stern v. Mayer, 99 App. Div. 427, 91 N. Y. Supp. 292, and Merritt v. Halliday, 107 App. Div. 596, 95 N. Y. Supp. 331, it is declared that an action to recover money paid by a bankrupt to a creditor within the period limited by section 60 of the bankruptcy act is in form and substance an action at law. Notwithstanding the indicated conflict of authorities in the courts of the state of New York, the trend of the federal adjudications is firmly in the direction of enabling a trustee to proceed in equity to nullify an alleged preference in violation of the national bankruptcy law. It was not necessary for the trustee to invoke his equitable remedy; he was not exclusively confined to seek redress in a court of law. Wetstein v. Franciscus, 13 Am. Bankr. Rep. 326, 133 Fed. 900, 67 C. C. A. 62. Either remedy, apparently, was open to the trustee in this case.

The principle is not controverted that if the defendants, creditors of the bankrupt, had reasonable cause to believe that the bankrupt was insolvent at the time of the payment to them of the pre-existing debt, an unlawful preference was created within the purview of the statute. By section 60, subd. "a," a preference consists of a transfer of property to a creditor by an insolvent before an adjudication in bankruptcy and within four months prior to filing a petition; such creditor having reasonable cause to believe that it was intended to give a preference. Hence it follows that, if the evidence shows that the debtor was insolvent at the time of the payment of the debt and the defendants knew of his financial condition, the transfer of the money to apply on account of the pre-existing indebtedness was a preference, irrespective of whether the bankrupt intended to give a preference or not. His insolvency at the time of payment is undisputed. The payment of the amount which is sought to be recovered resulted in giving the defendants greater benefit than other creditors of the same class have in the distribution of the bankrupt's estate. Accordingly the property transferred may be recovered by the trustee provided the defendants had knowledege of the insolvency of the bankrupt. Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; Benedict v. Deshel, 177 N. Y. 1, 68 N. E. 999; In re Andrews, 14 Am. Bankr. Rep. 247, 135 Fed. 599; Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. Supp. 1101; In re Eggert, 102 Fed. 735, 43 C. C. A. 1.

From an examination of the record, I am of opinion that the circumstances surrounding the transaction of the sale by the bankrupt of the store at Albion and the payment of the debt to the defendants are such that the latter had reasonable cause to believe the bankrupt insolvent at the time of such payment. While it must be admitted

that an action of this character ought not to be decided on mere surmise or suspicion, still the reasonable deductions that are thought to be obvious from the circumstances warrant me in holding that the defendants are chargeable with knowledge of Hough's financial condition at the time of payment of the debt. It is true that the evidence on behalf of the defendants indicates that in a conversation between Mr. Harris, counsel for the defendants, and the bankrupt, it was stated by the latter that he was solvent and that his liabilities were less than his assets; but prior to such interview the defendants, I think, had information respecting the financial affairs of the bankrupt which did not warrant them in relying upon such statements. They had substantial reason to suspect that his assertions were not entirely accurate. The sale of the store to Mr. Sammet, a brother-in-law of one of the defendants, who borrowed from the defendants money necessary to effectuate the purchase, the sale of the stock at 55 per cent. of the cost value, the schedule of the liabilities filed in compliance with the provisions of the law of the state then in force, the visits of the purchaser to the defendant Black, and the subsequent relations with Sammet's counsel, are strongly persuasive that the defendants knew of the insolvency of the bankrupt and that in procuring payment of the debt they had sufficient cause to believe that a preference was intended. The inferences from the facts and circumstances irresistibly indicate a perfect understanding with the purchaser and consequent knowledge of the debtor's financial situation. Although there is no direct evidence upon that point, yet, as said, the surrounding circumstances, though not here fully stated, are such that I am reasonably satisfied that the defendants knew the aggregate amount of the bankrupt's liabilities, which was illuminative of his insolvency. Having such knowledge, they induced him to give an order upon the purchaser of the store in question for the payment of their debt.

The complainant is entitled to a decree, with costs.

ALDRICH v. BRINKER.

(District Court, W. D. New York. January 25, 1906.)

INSURANCE—ASSIGNMENT OF LIFE POLICY—RIGHT OF ASSIGNEE.

Where a wife joined in the assignment of a paid-up policy of insurance on the life of her husband, in which she was beneficiary, to a bank, with the understanding on her part, justified by the conversation at the time between her husband and the officer of the bank that the assignment was made only as security for a loan then made her husband, it can be enforced after the death of her husband only to that extent as against her, notwithstanding a further agreement, made contemporaneously between her husband and the bank, that the assignment should stand as security for other indebtedness.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 492, 1481.]

At Law. Action to recover $4,760 on policy of life insurance. Trial by jury waived.

Hotchkiss & Bush, for plaintiff.
Thomas E. Boyd, for defendant.

HAZEL, District Judge. The question submitted for determination is whether the substituted defendant, Clara S. Brinker, at the time she executed the assignment mentioned in the complaint, which on its face purports to be an absolute transfer of her beneficial interest in a life insurance policy issued to her husband, did so to secure a specific loan of $1,000. The proofs show that on April 4, 1899, the policy under its terms became one for paid-up insurance in the sum of $4,760. The assured died on June 9, 1903. Prior thereto, on April 10, 1899, he assigned the policy of insurance in a separate instrument, which also in terms was absolute on its face, and in addition thereto he executed and delivered a pledge by which the said policy was delivered as a continuing security for the payment of his individual and firm debts and obligations which he then owed the said bank or thereafter might owe. Although the latter instrument was executed and delivered contemporaneously with the assignments, Mrs. Brinker, the beneficiary, had no knowledge of it. As far as she is concerned, the evidence indicates her intention to conditionally surrender her interest in the policy to secure a loan for a stipulated amount. Upon the death of Mr. Brinker, suit was brought by the receiver of the City National Bank of Buffalo, N. Y., against the New York Life Insurance Company to compel payment to him of the entire sum due on the policy, claiming that the bank under the assignments above mentioned was the absolute owner thereof, and that the assured at the time of his death was indebted to the bank individually and as a member of the firm of Brinker & Co.

There is no disagreement in relation to the principle of law which applies to this controversy. Even though the assignment was absolute on its face, the court is bound to inquire into the actual transaction between the parties for the purpose of ascertaining whether the instrument was executed merely as a security for the payment of the loan or subject to other conditions. It is true the testimony of Mrs. Brinker does not conclusively show a personal understanding with the bank that the assignment was to be held as security for the repayment by her husband of the note given to secure the said sum of $1,000; but she testifies that, needing money to pay certain debts, she and her husband went to the bank for the purpose of procuring a loan of $1,000, and her husband said to Mr. Berry, an officer of the bank, that they wanted to put up the policy for $1,000. She then executed the assignment and the money was placed to the credit of her husband, and she received from him that day about the sum of $500. It is clear that as far as the defendant is concerned it was her understanding that the assignment simply secured said loan. That it was the understanding of the bank that the policy stood as collateral for a specific loan finds some corroboration, perhaps, in the entry made at the time in the collateral book. The testimony of Mr. Pitman is also somewhat illuminative of the claim of the defendant. He testifies that the firm of J. M. Brinker & Co., of

which he was a member, did not on April 10, 1899, borrow $1,000 from the bank, and that the interest upon the promissory note given that day by Mr. Brinker was afterwards demanded of him individually. These occurrences tend to negative the claim of the plaintiff that the policy as to the defendant stood as general collateral for the obligations of the firm of J. M. Brinker & Co. and of Mr. Brinker individually.

The written pledge accompanying the assignment, in view of the absence of knowledge on the part of the defendant, does not, in my opinion, alter the original purpose of the transaction. The testimony of Mr. Cornwell, witness for plaintiff and president of the bank, is simply to the effect that Mr. Brinker wanted to secure a loan, and that the bank, not wishing to increase the existing indebtedness without security, accepted his offer of the life insurance policy "and the loan was granted to him." Manifestly he referred to the $1,000 loan, for he adds that nothing was said about the policy being treated as specific collateral to secure the advance. It is not shown that anything was said to Mrs. Brinker to the effect that the assignments would be treated as a continuing collateral for the indebtedness of the firm of J. M. Brinker & Co., or for any purpose other than the loan in question. As the evidence satisfactorily shows that the defendant did not assign and transfer her rights in the policy of insurance in question, except as security for the loan of $1,000 and interest, it follows that judgment may be entered appropriately decreeing the payment by the clerk, out of the fund deposited with him by the original defendant, the amounts of money to which the plaintiff and defendant are each respectively entitled. The ruling which was reserved by the court on motion of the plaintiff at the close of the case to amend the complaint to conform to the evidence is allowed.

Judgment may be entered accordingly.

YARRINGTON v. DELAWARE & HUDSON CO.

(Circuit Court, M. D. Pennsylvania. January 29, 1906.)

No. 31.

1. COURTS—STATE AND FEDERAL COURTS—RULES OF DECISION—STATE STATUTES.

   The construction given by the highest court of a state to the local statute law regulating the liability of railroad carriers is binding upon the federal courts.

   [Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 957.]

2. CARRIERS—NEGLIGENCE—PASSENGERS—MAIL CLERK—ACT PA. APRIL 4, 1868—QUASI EMPLOYÉS.

   By reason of the local Pennsylvania act of April 4, 1868 (P. L. 58), as construed in Railroad v. Price, 96 Pa. 256, although contrary to the great weight of authority elsewhere, a railway mail clerk is not a passenger, and according to the provisions of the statute, in case of personal injury while engaged in the performance of his duties on or about the road, works, depots, or premises of a railroad, or any train or car thereon, can only recover of such company the same as one of its own employés.

   [Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 979.]

3. SAME—JOINT TRACKAGE RIGHTS OF DIFFERENT ROADS.

Where, however, two railroads have joint trackage rights over the same track, and an employé of one of them is injured thereon by the negligence of the other company, the following rules of construction of the statute have been established:

(a) The track, for the application of Act Pa. April 4, 1868 (P. L. 58), must be regarded as the property of each road, while using it, whether the use be by virtue of joint or several ownership, charter rights, lease, license, or traffic agreement.

(b) Where the place of the accident is clearly and for general purposes the road, works, depots, or premises of the railroad company defendant, it is sufficient for the application of the act, if the person injured is engaged or employed in and about such road, works, depots, or premises, and is not a passenger.

(c) Where, however, the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the defendant railroad, the nature of the employment at which the party was engaged at the time of the injury becomes material; and if it was so connected with the railroad that it is ordinarily the duty of railroad employés, then while engaged at it the statute treats the party as a quasi employé and puts his right to recover on that basis. But if the work has no relation to railroad work as such, and is only connected with it by the circumstance of locality, the case is not within the statute at all.

(d) In case of joint trackage rights, therefore, to bring the case within the statute, the person injured must not only be employed in and about the premises of the railroad by whose negligence he is injured, as so defined, but engaged at work which is ordinarily the work of the employés of that company.

4. SAME—RAILWAY MAIL CLERK—WHEN NOT WITHIN ACT OF 1868.

Hence, where the plaintiff, a railway mail clerk, was injured in a collision between a passenger train of the Erie Railway, on which he was engaged in the performance of his duties, and the rear end of a freight train of the defendant company, having joint trackage rights at that point over the tracks of the Erie Railway, whose road it was, which freight train was running on the time of the passenger train and had failed to properly flag it, *held*, that Act April 4, 1868 (P. L. 58), did not apply, and that the defendant company was liable; the place where the accident occurred not being by right the premises of the company at the time, nor the plaintiff engaged in work ordinarily performed by its employés.

(Syllabus by the Court.)

Rule for a New Trial.

W. D. B. Ainey, for plaintiff.

Lewis E. Carr and James H. Torrey, for defendant.

ARCHBALD, District Judge. The plaintiff was injured by the negligence of the defendant while engaged in the performance of his duties as a railroad mail clerk, in the employ of the general government. His run was from Susquehanna to Wilkes-Barre, both in Pennsylvania; the first half of it to Carbondale being on the trains of the Erie Railroad, over the Jefferson branch of that company; and it was while riding on one of its trains, south-bound, that his injuries were received, by a collision with the rear end of a freight train of the Delaware & Hudson Company, defendant, which was pulling into the Carbondale yard. The Delaware & Hudson Company has trackage rights over this branch of the Erie Railroad, its trains being subject, however,

to the direction and orders of the dispatcher of that road, as well as its rules and timetables. The accident was caused by the failure of the crew in charge of the freight train to get out of the road of the Erie passenger on which the plaintiff was riding, which they knew was closely following them and had the right of way, and on whose time they were in fact running; or, not succeeding in this, to properly flag it. The jury found a verdict for the plaintiff of $1,000, and the defendant now asks for a new trial upon the ground that under the statute law of Pennsylvania it was not liable.

As a matter of general law, aside from any local statute, a railway mail clerk, while engaged in the performance of his duties, is unquestionably to be regarded as a passenger, and entitled to the rights and immunities growing out of that relation. This is decided by courts of the highest character, the authority of which is not to be resisted. Nolton v. Western Railroad, 15 N. Y. 444, 69 Am. Dec. 623; Seybolt v. N. Y., L. E. & West. R. R., 95 N. Y. 562, 47 Am. Rep. 75; Collett v. Lond. & N. West. R. R., 16 Q. B. 984; Gleason v. Va. Midland R. R., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; Balt. & Ohio R. R. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Arrowsmith v. Nashville, etc., R. R. (C. C.) 57 Fed. 165; Farley v. Cin., H. & D. R. R., 108 Fed. 14, 47 C. C. A. 156; Ohio & Miss. R. R. v. Voight, 122 Ind. 288, 23 N. E. 774; Clev., Cin., Chic. & St. L. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; Balt. & Ohio R. R. v. State, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454; Norfolk & Western R. R. v. Shott, 92 Va. 34, 22 S. E. 811; Houston & Tex. Cent. R. R. v. Hampton, 64 Tex. 427; Gulf, Col. & Santa Fé R. R. v. Wilson, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; Hammond v. North East R. R., 6 S. C. 130, 24 Am. Rep. 467; Libby v. Maine Cent. R. R., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; Magoffin v. Mo. & Pacific R. R., 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798; Mellor v. Mo. & Pacific R. R., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Louisv. & Nashville R. R. v. Kingman (Ky.) 35 S. W. 264; Weaver v. Railroad Company, 3 App. D. C. 436. As is said by Morris, J., in Ches. & Ohio R. R. v. Patton, 23 App. D. C. 113:

"Except under exceptional circumstances and with due regard to the duties which he is required to perform a postal clerk upon a railroad train is as much a passenger and entitled to all the rights and immunities of passengers, as any person on the train, transported under the ordinary contract of hire."

He is, "in no sense," as it is declared, "an employe of the railroad company. He has no function whatever in the management of the train, or of the railroad. He is to all intents and purposes * * * in the place of a passenger for hire, and, as such, entitled to safe transportation and reasonable guaranty against the negligence of the employes of the railroad company." Similar rulings have been made with regard to express messengers (Blair v. Railroad, 66 N. Y. 313, 23 Am. Rep. 55; Brewer v. Railroad, 124 N. Y. 59, 26 N. E. 324. 11 L. R. A. 483, 21 Am. St. Rep. 647; Pennsylvania Company v. Woodworth, 26 Ohio St. 585; Jenkins v. Railroad, 15 Ont. App. 477), persons riding on a drover's pass (Railroad Company v. Lockwood, 17 Wall.

357, 21 L. Ed. 627), or those privileged to conduct a business on the train, by arrangement with the carrier (Com. v. Vermont, etc., R. R., 108 Mass. 7, 11 Am. Rep. 301, Yeomans v. Contra Costa Nav. Co., 44 Cal. 71).

By act of the General Assembly of the state of Pennsylvania of April 4, 1868, § 1 (P. L. 58), it is provided, however:

"When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein, or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employé; provided, that this section shall not apply to passengers."

Construing this act, it was decided in Pennsylvania Railroad v. Price, 96 Pa. 256, that a railway postal clerk such as the plaintiff, engaged in his duties on a railroad train, was not a passenger within the meaning of the proviso, and being employed in and about the railroad was thus within the terms of the statute, and the company were only liable to him for personal injuries caused by negligence, to the extent that they would be to an employé. "Was the deceased a passenger within the meaning of the act of 1868?" says Paxson, J. "Looking at the mischief which the act was intended to remedy, the answer to this question is not difficult. The deceased was 'lawfully employed upon the road.' He was therefore within the precise language of the act, and must be held to have had the rights only of an employé, unless he comes within the exception. The word 'passenger,' in the proviso, must be understood in its ordinary and popular signification. Had the question been asked of any person, intelligent, or otherwise, upon this train when the accident occurred, whether * * * the deceased was a passenger, * * * the answer would have been in the negative; that he was employed on the train as a mail agent. Why, then, should we give the proviso a forced construction, not warranted by its language, and repugnant to our common sense? It was urged that the deceased was a passenger because under the act of Congress; * * * 'Every railway company carrying the mail shall carry on any train which shall run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same.' This act makes it the duty of the company to carry the mail agent without extra charge, but it no more makes him a passenger than it does the mail matter of which he has the care. The company have no control of him as they have over passengers for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers. He may expose his life in the most reckless manner. The mail car, like the baggage car, is a known place of danger. From its position it is peculiarly exposed to destruction in cases of collision. The effect of the act of Congress is to make his position on the car a lawful one. Being lawfully upon the train, a recovery might possibly have been had for his death upon the duty to carry safely; Collett v. Railway Co., 16 Q. B. 984, and Nolton v. Western Railway Co., 15 N. Y. 444 [69 Am. Dec. 623], go

to this extent. But here the act of 1868 comes in and declares that persons employed upon the road shall have only the rights of employés of the company."

This decision was carried to the Supreme Court of the United States, but gains nothing from that circumstance; the writ of error being dismissed on the ground that no federal question was involved. Price v. Pennsylvania Railroad, 113 U. S. 218, 5 Sup. Ct. 427, 28 L. Ed. 980. It depends for acceptance, therefore, entirely on its own merits, and I have to confess that it does not impress me favorably. Not only, as it seems to me, does it contain several doubtful assumptions involving more than one non sequitur, but it stands absolutely alone, being opposed to the overwhelming weight of authority to the contrary. As the consequence of this, moreover, we have the anomalous result that whenever a railway mail clerk is carried into or through Pennsylvania, on an interstate run, his status changes as he crosses the state line, being accorded the rights of a passenger for one part of his journey, and not the rest of it, unless, perchance, the interstate character of it should be held to interfere. It was followed however in the recent case of Foreman v. Pennsylvania Railroad, 195 Pa. 499, 46 Atl. 109, and must therefore be regarded as the settled law of the state; and notwithstanding what has thus been said of it, to the extent that it is applicable, it is controlling here. It does not simply decide that a railway mail clerk is not a passenger, although that is involved in it. If this were all, that being a question of general law (Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627), I should not feel bound by it. But what it decides is that a railway mail clerk is not a passenger, within the meaning of the act of 1868, whereby the company is relieved from responsibility. In this, it interprets the state statute by which the subject is regulated, and, however much I may be inclined to criticize it, it governs locally and cannot be disregarded. The only question, therefore, is whether it applies to the state of facts which we have here.

If the present action were against the railroad on whose train the plaintiff was riding, he would come within the act of 1868, according to this decision, and the company, under the circumstances, would not be liable. But the case is not so simple as that. The accident was the result of negligence on the part of the employés of another and distinct company, the defendant here, on a railroad over which it simply had trackage privileges, and the question is whether it has the right to invoke the act. It was held not at the trial, and it is the propriety of this ruling that is now in controversy. Except as the act of 1868 applies, the plaintiff having no relation to the defendant, that company would, of course, be liable. Catawissa R. R. v. Armstrong, 49 Pa. 186. But although the track on which its train was running was not owned by it, it had rights of trackage there, and the road for all necessary purposes was thus for the time being its own. Mulherrin v. D. L. & W. R. R., 81 Pa. 366. If, then, the plaintiff is to be regarded as employed in and about it at the time of the accident he is brought within the terms of the act, and so is not entitled to recover, any more than he would be against the company on whose

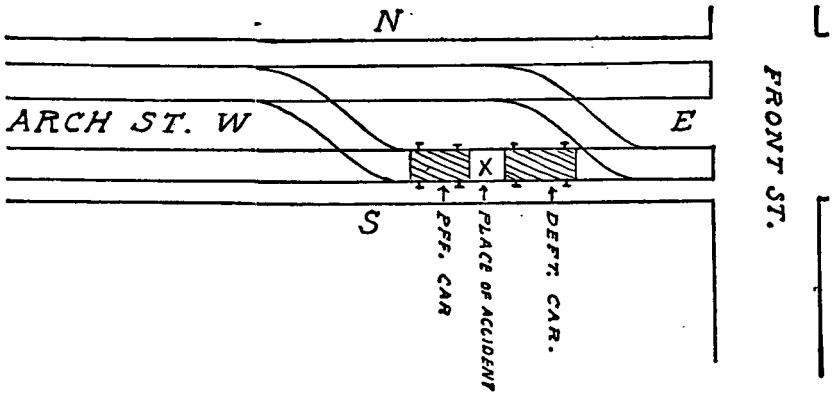
train he was being carried. What, then, is there to relieve him from this result?

All things considered, the most natural and obvious construction to be given to the act of 1868 would seem to be that the employment which is there referred to, by which parties engaged in and about the premises of a railroad are made to acquire the character of quasi employés, should be such as is ordinarily performed by the company's own workmen; and to a certain extent, although not entirely, this view has been adopted by the state courts. In Spisak v. Balt. & Ohio R. R., 152 Pa. 281, 25 Atl. 497, in a most carefully considered opinion, it is pointed out by Mitchell, J., that the cases under the act of 1868 divide themselves into two classes. In the one, when the place of the accident is clearly and for general purposes the "roads, works, depots, or premises," of the railroad company, it is sufficient, if the person injured is "engaged or employed on or about them," and is not a passenger; to which class belong, as it is said, Kirby v. Railroad Company, 76 Pa. 506; Ricard v. Railroad Co., 89 Pa. 193, and Balt. & Ohio R. R. v. Colvin, 118 Pa. 230, 12 Atl. 337. The other class is where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad; in which case, the nature of the employment at which the party was engaged at the time of the injury becomes material. "If it is business connected with the railroad in the sense that it is ordinarily the duty of railroad employes, then, while the party is engaged at it, the statute treats him as a quasi employé and puts his rights upon the same basis. If, however, the work has no relation to the railroad work as such, and is connected with the railroad only by irrelevant and immaterial circumstances of locality, the case is not within the statute at all."

To this second class, according to the opinion, belong Mulherrin v. Railroad, 81 Pa. 366, Cummings v. Railroad, 92 Pa. 82, and Stone v. Railroad, 132 Pa. 206, 19 Atl. 67, in each of which, although the circumstance may not have been alluded to, the party injured was engaged in work ordinarily performed by employés of the railroad, which thus brought the case within the provisions of the act; and, also, Richter v. Railroad, 104 Pa. 511, and Christman v. Railroad, 141 Pa. 604, 21 Atl. 738, in which the party was not so engaged, being employed in the one case, in wheeling ashes from the furnace to the cinder pile of a rolling mill across a siding belonging to the mill, but operated by the railroad, and in the other in carrying into a rolling mill a pile of iron which had been unloaded from the defendant's cars, in view of which it was held in both that the act did not apply. Spisak's Case, in which these observations were made, was declared to belong in the second class. It appeared by the evidence that he was a brakeman on a shifting engine belonging to a steel company which was engaged in moving cars from point to point in its yard. The track on which he was injured was on the land of the steel company and was its property, but the defendant railroad had the right to use it in its business with the steel company. There were two spur tracks or sidings, a receiving track to which the railroad brought cars, and a delivering track from which it took them. Between the receipt and the delivery

of the cars, they were under the exclusive control of the steel company, and were shifted about, unloaded, and reloaded, entirely at its will and by its employés. The work was considerable in amount, and the steel company had supplied itself with a locomotive in order to dispose of it, on which the plaintiff was brakeman. A car had been unloaded while on the receiving track, and the yard boss directed the plaintiff to take the shifting engine there, and move the car to the scales in order to take its light weight; and while doing this he was injured. It was held that the nature of his occupation at the time of the injury was the test of the applicability of the statute, and that the case was not within it. "The railroad company had delivered the car," says Judge Mitchell. "Its duty in that respect was ended, and its further duty of taking it out had not begun. The intermediate unloading, shifting, and weighing the car, was the work of the steel company, done for it, on its own land by its own employés. The connection of the railroad company with the place of the accident, by reason of its joint use of the tracks for other purposes, was an immaterial circumstance that did not affect the relations of plaintiff to it, or to the work he was engaged in. He was neither an employé in fact, nor doing work which made him a quasi employé under the statute."

This case was followed, and its principle applied, in Keck v. Philadelphia & Reading R. R., 206 Pa. 501, 56 Atl. 47, in an opinion by the same learned judge; a case which in its controlling facts approaches very closely to the one in hand. Before considering it, however, the intermediate case of Kelly v. Union Traction Co., 199 Pa. 322, 49 Atl. 70, requires notice.[1] In that case, two street railways, having equal charter rights on Arch street, Philadelphia, made use of the same tracks, of which there were two; the south track for cars east bound, and the north track for those going west.



At the eastern terminus on Front street, the south track was connected with the north track by two switches about 70 feet apart, extending northwestwardly for the cars to cross over. When two cars

[1] See, also, Vannatta v. Central R. R., 154 Pa. 262, 26 Atl. 384, 35 Am. St. Rep. 823.

reached the terminus at or about the same time, it was the duty of the motorman on the most easterly to stop his car east of the easternmost switch, while the following car was stopped at a point intermediate between the two switches, and each, after reversing the trolley pole and changing the fender, crossed over by its own switch to the west-bound track. On the day of the accident two cars came to this point in this way; the head or most easterly one belonging to the defendant, and the one following it, on which the plaintiff was employed as conductor, to the other company. Each car was run to its appropriate place, and stopped preparatory to reversing its course, and going over onto the west-bound track. But the motorman of the defendant's car, having started back without turning the easternmost switch by which he should cross over, ran into and injured the plaintiff as he was standing at the east end of his car, between the two switches in the act of transferring his fender. Under these circumstances it was held that the act of 1868 did not apply, and that the defendant company was liable. "The south track on Arch street," says Mestrezat, J., "and especially that part of it at the place of the accident, being in the use of the Hestonville [that is the plaintiff's] company, was the road of that company within the terms of the act, and was not the road of the defendant company. The south track was essentially the road of the company whose cars were running east. Neither company used that track for west-bound cars, and when used for east-bound traffic it became the road of the company so using it. When, therefore, the plaintiff was injured he was lawfully engaged in the service of his employer, the Hestonville Company, on or about its road, and not on or about the road of the defendant company. The track at that point was in the use of the Hestonville Company, and therefore had, by agreement of the parties, become for the time being, the road of that company. Its employés in the operation of its cars had a right to be there, and they could enforce their right to protection against the negligence of every one save the co-employés of that company."

This brings us to Keck v. Phila. & Reading R. R., 206 Pa. 501, 56 Atl. 47, already noted, where the applicability of the act of 1868, in the case of joint rights by different railroads over the same roadbed is further considered. The plaintiff's husband there was a locomotive engineer in the employ of the Central Railroad of New Jersey, which, by arrangement with the defendant company, had certain trackage rights for its trains on the defendant's railroad, using its own engines and crews to move them. At the point of the accident there were two tracks, on one of which the Central Railroad train, on which the plaintiff's husband was the engineer, was running, and just as it came along a rear-end collision occurred between two of the defendant's trains on the adjoining track, by which the caboose of the one was thrown over onto the engine of the Central train, and the plaintiff's husband was killed. It was held that this did not present a case within the act, the plaintiff's husband, while engaged in railroad work as a locomotive engineer, not being in the employ of the defendant, nor upon premises which were to be treated as the defendant's at the time.

Summing up the result of the preceding cases, the following rules are deduced by the court therefrom. "First, where the same track is used by two railroad companies, it must be considered for the application of the act of 1868 as the property of each while using it. Secondly, whether the use be by virtue of joint or several ownership, charter right, lease, license, or traffic agreement, is immaterial. Thirdly, to bring the case within the second class distinguished in Spisak v. B. & O. R. R. Co., 152 Pa. 281, 25 Atl. 497, namely, those where the employment is ordinarily the duty of railroad employés, the plaintiff must not only be engaged in such work, but also be so engaged for or upon the property of the railroad by whose negligence he is injured. * * * Fourthly, in such cases the employés of each road accept the risks of their employment in regard to their own road but not those incident to the operation of the other road, unless at the time engaged in some work for the other or for both roads jointly." It is conceded that the distinctions which are thus made were not directly developed by the facts in the earlier cases; but it is claimed that the language of the opinions indicates the trend of thought on the subject, no case having been decided, as it is asserted, which upon its facts is out of harmony with the rules so laid down. Even the Mulherrin Case is said to be in accordance with them when carefully examined, it being significantly pointed out that the plaintiff there might have recovered had he been injured while the track on which he was walking was the track of his own company, and while he was engaged in the performance of his duty on it; the fact being, however, that it had become the track of the other company, his own train having left him and passed on.

There can be no question, as it seems to me, with regard to the conclusion to which these cases lead, as applied to the case in hand. The Erie passenger train, on which the plaintiff was riding when he was injured, had the right of way over the defendant's freight train with which it collided and the road by right was its road and not that of the defendant, entitling it to a clear passage thereon. It is true, that the defendant's freight train was occupying and using the track where it was, but it was doing so of wrong, so far as it intruded upon the time of and except as it took proper precaution to guard against the passenger train which it knew was following. Even on the basis of use and occupancy (which at the best was shifting and temporary) such part of the road as the freight train had passed over and off of, no longer belonged to it, so as to stand as the premises of the defendant, but became at once the road of the Erie, which both owned and had the right of way over it for its approaching train. As then the Erie train advanced, the track under it became its track, by right as as well as by occupancy, and ceased per force to be the track of the defendant company; and the plaintiff riding over it could not in any sense be said to be upon or employed about the defendant's premises when he was injured any more than the conductor in the Kelly Case, or the engineer in Keck v. Railroad.

Assuming, however, that this might not be so, according to the distinction made in Spisak v. Balt. & Ohio R. R. Co., 152 Pa. 281, 25 Atl.

497, the cases, in which joint traffic rights are enjoyed by different companies over the same road, fall into the second class there made; that is to say, in the words of the court, "where the accident occurs in a place which is not exclusively and for general purposes, but only within a limited and statutory sense, the premises of the railroad company." In proof of which it is sufficient to note that Mulherrin v. Railroad, where that was the fact, is assigned to that class. But, as declared in the Spisak Case, in this class the nature of the employment at which the party is engaged at the time of the injury becomes material; and it is only where this is of a kind that is ordinarily performed by employés of the railroad, that the act of 1868 applies and puts him on the basis of a quasi employé. Where that is not its character, however, and it has no relation to railroad work as such, it does not. Applying this in the Keck Case, it was held not to be within the act, the plaintiff's husband, although actually engaged in railroad work as a locomotive engineer, not being at work for the defendant company nor upon premises which were to be treated as belonging to it at the time. And as further illustrating this principle, according to what is said in the same case of Mulherrin v. Railroad, the plaintiff there by the same consideration, would have had his action, provided only he had been injured while in the performance of his duties as brakeman, on what was to be regarded as his own road.

In the present instance, then, not only was not the plaintiff on premises which could be claimed to be those of the defendant company, within the meaning of the act, but his duties as mail clerk had not the remotest relation to railroad work as such, and could not have been performed by employés of either company, being specially committed to him as agent and representative of the Post Office Department of the general government, which the fact that they were to be performed while being transported on a railroad train does not affect or change. To such a case, in whatever way we look at it, the act of 1868 does not apply, and cannot, therefore, be invoked to relieve the defendant of responsibility.

The rule for a new trial is discharged.

MAYS v. NEWLIN.

(Circuit Court, W. D. Virginia. January 25, 1906.)

1. REMOVAL OF CAUSES—TIME OF TRANSFER OF JURISDICTION.

The jurisdiction of a state court over a cause is not terminated merely by the filing of a sufficient petition and bond for its removal with the clerk, nor until they are presented to the court or judge for acceptance.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 204.]

2. SAME—PRESENTATION OF PETITION AND BOND TO COURT.

An oral motion in a state court for the removal of a cause is a sufficient presentation to the court of the petition and bond for removal, where they are on file with the clerk.

3. SAME—EFFECT OF WITHDRAWAL OF PRESENTATION.

Where a motion for the removal of a cause on a petition and bond on file was overruled by the state court, on the ground that the cause was still at rules and not on the court docket, and defendant acquiesced in such decision by taking no further action for removal until the next term and then again presenting the motion, such action had the effect of a temporary withdrawal of the motion, and the state court retained jurisdiction until it was again presented.

4. ATTACHMENT—VALIDITY OF WRIT—RETURN DAY.

Where the first Monday in a month, which was made by statute the first day of a term of court, fell on the fifth, but the term was not actually opened until the seventh, as permitted by statute, an attachment issued and served on the sixth and returned on the seventh is not invalid because it was in terms made returnable on the "first day" of the term, when no prejudice resulted to defendant.

At Law. On motion to quash attachment.

Caskie & Coleman and Whitehead & Whitehead, for plaintiff.
Beasley & Moon and W. K. Allen, for defendant.

McDOWELL, District Judge. This is an action at law commenced in the corporation court of the city of Lynchburg, and removed to this court, on the ground of the nonresidence of the defendant. Process was issued on April 5, 1905, returnable to the May rules. The defendant, conceded to be a citizen and resident of Pennsylvania, was found and served with process in due time in this state. At the May rules (held April 24, 1905) the declaration was filed, and the defendant filed in the office of the clerk of the corporation court a petition for removal and a bond, subsequently adjudged to be in good form and accepted. The order of the state court, made on June 10, 1905, reads, in so far as is now material, as follows:

"And now at this day, to wit, at a corporation court for the city of Lynchburg, continued and held at the courthouse thereof on Saturday the 10th day of June, A. D. 1905, being the day and year first herein mentioned. On the first day of the May term, 1905, of this court, the defendant, by counsel, submitted a motion, ore tenus, in open court, for the removal of this cause to the Circuit Court of the United States for the Western District of Virginia, which motion was denied by this court, on the ground that the cause was still at rules and so not matured, therefore not before the court. And no record was made of said motion. On the 7th day of June, 1905 (being the first day of the sitting of this court at its June term, 1905), the defendant, by counsel, submitted the same motion in open court, ore tenus, which motion, not being objected to by counsel for plaintiff, who was then present at the bar of the court, was granted by this court, but later, on the same day and before such order of removal was entered by the clerk, counsel for defendant asked leave to withdraw their said motion for the time being, and such leave was accordingly granted. And thereupon, at a later day of the same term, to wit, on the 9th day of June, 1905, the defendant, by counsel, filed herein his motion in writing for the removal of this cause to the Circuit Court of the United States for the Western District of Virginia. * * * Now therefore, this court doth now hereby accept and approve said bond and accept said petition, and doth order that this cause be removed for trial to the next term of the Circuit Court of the United States for the Western District of Virginia at Lynchburg, pursuant to the statute of the United States, and the clerk of this court is hereby ordered forthwith to transcribe and certify a transcript of the proceedings herein to said court, including the attachment proceedings herein; and it is further ordered that all other proceedings of this court herein be stayed."

The copy of the record was made June 15, 1905, and was filed in this court September 12, 1905. On June 6, 1905, an attachment was sued out by the plaintiff from the office of the clerk of the corporation court, and it was on that date levied on certain real estate belonging to the defendant. The return of the sergeant was also made on June 6, 1905. The June term, 1905, of the corporation court, had the judge been present, would have commenced on Monday, June 5th. It appears from the above quoted order of June 10th that that term of the court was actually commenced on June 7th. Section 3122, Code 1904, reads:

"Though a court be not held on the first day of a term, it may nevertheless be opened on any subsequent day, if, in the case of a circuit or corporation court, the same is done before four o'clock in the afternoon of the third day."

The order of attachment, issued on June 6th, concludes as follows:

"Therefore we command you that you attach the estate of the said H. H. Newlin for the amount of the said $5,000.00; and that you secure such estate so attached in your hands, or so provide that the same may be forthcoming and liable to further proceedings thereupon to be had before our said court on the first day of the June term, 1905, thereof; and that you make return hereof at that time how you have executed the same. And have then there this writ."

After the removal of the cause to this court the defendant moved that the attachment be quashed. This motion was resisted, and the questions involved must now be considered.

It is contended in behalf of the defendant that the attachment is void (1) because issued after the petition for removal and bond had been filed and (2) because the attachment is returnable to a day that had passed prior to the issue of the attachment.

Judicial complaints of the confusion of thought, the inconsistencies, and the wholly unnecessary want of clearness in the "Judiciary Act" (Act March 3, 1875, c. 137, § 1, 18 Stat. 470, 1 U. S. Comp. St. 1901, p. 508; 4 Fed. St. Ann. 265 et seq.) have been unceasing and unavailing. But, until Congress sees fit to act, the courts must continue their efforts to construe this perplexing statute as best they may. Whether or not, in a proper case for removal, the jurisdiction of the state court ceases on the filing in the clerk's office of the state court of a petition for removal and a proper bond, is a question which, so far as I am advised, has never been expressly decided by the Supreme Court, and is one on which there is among the subordinate federal courts much conflict of opinion. There are undoubtedly expressions in the opinions of the Supreme Court indicating that mere filing of the petition and bond, in a proper case for removal, eo instanti, terminates the jurisdiction of the state court. But these expressions are dicta, and in other opinions are found dicta indicating that the petition and bond must be presented to the state court, or a judge thereof (Remington v. Railroad Co., 198 U. S. 95, 99, 25 Sup. Ct. 577, 49 L. Ed. 959), in order to terminate the jurisdiction of such court. See Traction Co. v. Mining Co., 196 U. S. 239, 244, 25 Sup. Ct. 251, 49 L. Ed. 462, and cases there cited. Many of

the irreconcilable decisions of the federal trial courts are cited in 18 Ency. Pl. & Pr. 320, 321. Among those holding that presentation of the petition and bond to the state court, or the judge thereof, is essential may be mentioned: Shedd v. Fuller (C. C.) 36 Fed. 609; Roberts v. Railroad Co. (C. C.) 45 Fed. 433; Hall v. Chattanooga Agricultural Works (C. C.) 48 Fed. 599; Kinne v. Lant (C. C.) 68 Fed. 436, 438; La Page v. Day (C. C.) 74 Fed. 977; Fox v. Railroad Co. (C. C.) 80 Fed. 945. See, also, 4 Fed. St. Ann. 351. In support of the opposite view the following cases are in point: Miller v. Tobin (C. C.) 18 Fed. 609, 613; Brown v. Murray, Nelson & Co. (C. C.) 43 Fed. 614; Noble v. Ass'n (C. C.) 48 Fed. 337; Wills v. Railroad Co. (C. C.) 65 Fed. 532. I have found no decision of the question before us by the Circuit Court of Appeals of the Fourth Circuit. The question is at large and must be determined as may seem most in accord with the intent of the removal statute. The language of the statute clearly imports that the petition and bond shall be presented to the state court. It is not expressly stated that the jurisdiction of that court ceases upon the mere filing of these papers, and, on the other hand, the time when the state court shall "proceed no further in such suit" is after that court has been afforded opportunity to "accept" the petition and bond. Since the rulings (Noble v. Ass'n [C. C.] 48 Fed. 337; Loop v. Winter's Estate [C. C.] 115 Fed. 362; Remington v. Railroad Co., 198 U. S. 95, 99, 25 Sup. Ct. 577, 49 L. Ed. 959; Groton Co. v. American Co. [C. C.] 137 Fed. 284, 289; Johnson v. Computing Co. [C. C.] 139 Fed. 339, 343) to the effect that the petition and bond may be presented to a judge of the state court in vacation, the strongest argument in support of the view that the mere filing of these papers ends the jurisdiction of the state court has lost much of its force. The most satisfactory conclusion that I can reach is that the jurisdiction of the corporation court was not terminated on April 24, 1905, by the mere filing of the petition and bond in the office of the clerk of that court.

The oral motion made by defendant on the first day of the May term of the corporation court was I think a sufficient presentation of the petition and bond to that court. While the order does not recite that these papers were then actually and with formality presented to the court for action, it is a matter of course that the motion to remove was based on these papers, and that they were called to the attention of the court. Such is a sufficient presentation of the removal papers. The reason the corporation court did not then accept the petition and bond is expressly stated to be the fact that the cause was at rules and not on the court docket. If my views are sound, the learned corporation court should have considered the removal papers, and, as the right of removal was shown to exist on the face of these papers, it was the duty of that court to then accept them. Upon the refusal of that court to accept the petition and bond, counsel for defendant had the right to have the record transcribed and forthwith filed in this court. The failure so to do seems to me necessarily an acceptance of the action of the corpora-

tion court. It was an election to leave undisturbed the jurisdiction of that court until the cause should be placed on the docket and again called to the attention of the court at the June term. Such action was a temporary withdrawal of the motion to remove. Being temporary, it was not an abandonment of the right of removal, but it was a waiver of the right to then bring to an end the jurisdiction of the corporation court. During the interval between the first Monday in May and the sitting of the court in June, the defendant was in position to treat the cause as still pending in the corporation court. If the record had been brought to this court at any time after the ruling of the corporation court at the May term, and before the issue of the attachment, a different question would be presented. But the failure to file the record here was an acquiescence in the view taken by the corporation court, and a temporary withdrawal of the motion to remove.

It is incongruous and anomalous that a statute, which is based on the theory that certain defendants cannot secure justice in the state courts, should require that the removal papers be presented to and accepted by the state court. And it is deplorable that a defendant who seeks a removal should be held to have lost any right because of an exhibition of respect for the state court. But such seems to be the inevitable result. During the interval between May 1st and June 7th the plaintiff had a right to secure a valid attachment. If it be held that the defendant had a right by subsequent action to destroy the jurisdiction of the corporation court as of May 1st, or to leave the case in that court, the only course open to the plaintiff was to sue out an attachment from the state court and to also himself bring the record here and sue out another attachment from this court. If the plaintiff had so acted, he would have subjected himself to the necessity of paying, in the first instance, both sets of costs and the probability of ultimately having to pay either the costs of the attachment from the corporation court or costs of the transcript and the costs of the attachment from this court; and he would also have subjected himself to the possibility of an action for damages because of the levy of an attachment from a court having no jurisdiction. Assuredly the law does not authorize the defendant to thus embarrass and wrong the plaintiff.

The failure of the defendant to file the transcript here prior to the attachment must be treated as a temporary withdrawal of the removal papers from the consideration of the corporation court and an election to leave the jurisdiction of that court undisturbed, until at least the renewal of the motion at the June term.

The motion to remove made on June 7th must therefore be considered, in this case, as the first presentation of the petition and bond. Under the circumstances here the jurisdiction of the corporation court did not come to an end at least until June 7th, after the issue, levy, and return of the attachment. It is of course, unnecessary to express an opinion as to the effect of the withdrawal of the motion to remove on June 7th. It is immaterial whether the jurisdiction of the corporation court ceased on June 7th or June 9th.

The remaining contention may be more briefly disposed of. For some purposes, the "first day" of the June term, 1905, of the corporation court was Monday, June 5th. The attachment was issued on June 6th and was returnable to the first day of the June term. But the judge of that court, exercising the right given by section 3122, Code 1904, did not commence the term until June 7th. Consequently, in another sense, the first day of the term was June 7th. That the expression was thus used by the clerk in issuing the attachment, and thus understood by the sergeant in executing it, cannot be gainsaid. The objection to the validity of the process is therefore based on the fact that there is some ambiguity as to the return day. I understand that it is conceded that the attachment would be unobjectionable had the return day been in terms June 7th. If a defendant or a garnishee were liable to lose some right for failure to take action on the return day of an attachment, there would be some merit in the contention of the defendant. But I am not advised of any statute or rule of practice which requires motions to abate, or other objections to, attachments to be made on the return day. I am consequently unable to perceive any merit in the objection. The latent ambiguity as to the return day is made to appear only by reference to the statute directing that the terms of the corporation court be held monthly, beginning on the first Monday of each month. But when it further appears that the June term in fact did not commence until the second day after the first Monday of that month, there remains almost no ground for a serious contention that the writ is void. This conclusion finds some support in Skipwith's Ex'r v. Cunningham, 8 Leigh (Va.) 271, 279, 31 Am. Dec. 642, and Brown v. Hume, 16 Grat. (Va.) 456, and does not seem to me to be weakened by the ruling in Tench v. Gray, 102 Va. 215, 46 S. E. 287.

The motion to quash the attachment must be overruled.

In re IMPERIAL BREWING CO.

(District Court, W. D. Missouri, W. D. January 11, 1906.)

BANKRUPTCY—PROVABLE DEBTS—DAMAGES FOR ANTICIPATORY BREACH OF CONTRACT.

An adjudication of bankruptcy in an involuntary proceeding against a corporation is not of itself a repudiation by the bankrupt of an executory contract by which it agreed to take and pay for a certain quantity of a product to be grown and delivered by the seller in each of a number of future years, nor is it the equivalent of a permanent disenablement to perform the contract, so as to give the seller a present claim for damages for breach, which may be liquidated and proved as a debt of the estate, where the time for performance had not arrived and there had not in fact been any tender of performance on the one part nor refusal nor repudiation on the other.

In Bankruptcy. On application by the E. Clements Horst Company for an order directing the manner in which its claims for unliquidated damages against the bankrupt may be liquidated.

Warner, Dean, McLeod, Holden & Timmonds, for claimant.
Karnes, New & Krauthoff, for general creditors.
I. J. Ringolsky, for trustees.

PHILIPS, District Judge. On the 21st day of October, 1905, the Imperial Brewing Company, a corporation of the state of Missouri, was adjudged an involuntary bankrupt on petition of certain of its creditors and its answer admitting its inability to pay its debts and its willingness to be adjudged a bankrupt on that account. The E. Clements Horst Company, a corporation having its residence and general place of business in the city of San Francisco, Cal., has presented its petition, setting out in substance that on the 26th day of June, 1905, it entered into a contract with the said Imperial Brewing Company whereby the petitioner obligated itself to sell and deliver to said Imperial Brewing Company 80 bales of hops, each, of the crops of the years 1905 to 1910, inclusive, for which the said vendee company obligated itself to pay to the petitioner on each bale of such hops at the rate of 15 cents per pound (tare 5 pounds) net cash, plus the freight from the Pacific Coast. The time of delivery fixed by the contract was during the months of September to February, following the harvest of each year's crop. Said hops were to be used by said brewing company in the manufacture of beer. The petition alleges, in effect, that the contract was breached by said adjudication in bankruptcy, whereby the petitioner was damaged in the sum of $5,675, and it prays that the same may be liquidated and proved against the estate of the bankrupt, and for an order directing the manner in which said liquidation shall be had. The petition further alleges that the trustees in bankruptcy have elected not to keep said contract alive.

The question to be decided is, did the adjudication in bankruptcy against the Imperial Brewing Company in and of itself constitute such a breach of the contract as to mature the whole executory contract, entitling the claimant to prove up and have allowed against the estate in bankruptcy the damages claimed? While the statement of the petition is a little indefinite respecting the proceedings leading to the adjudication, the court will take cognizance of its own records, which show that it was an involuntary proceeding in bankruptcy—necessarily so because the corporation could not on its own voluntary petition be adjudged a bankrupt. While the petition herein states that the Imperial Brewing Company was permanently disabled from performing said contract and repudiated the same in all its parts, and that it retired permanently from business and was hopelessly insolvent, etc., these results are alleged to follow "by reason of said bankruptcy proceedings." At the time of the adjudication in bankruptcy there was no debt owing by the bankrupt to the claimant. There had been no delivery or tender of delivery prior thereto, and none since. It may be conceded as the law of this jurisdiction that where a party is bound from time to time, as expressed in the contract, to deliver articles to be manufactured or products to be grown, each parcel as delivered to be paid for at a certain time and in a cer-

tain way, a refusal by the vendee to be further bound by the terms of the contract or to accept further deliveries constitutes a breach of the contract as a whole, and gives the vendor a right of action to recover the damages he may sustain by reason of such refusal. In such case the positive refusal of the vendee to perform when tender is made, or notice by him to the vendor before maturity of the time for delivery that he will not carry out the contract, will release the vendor from making any tender, and entitle him to an action in advance of the fixed period for delivery on his part to recover damages as for breach of the whole contract. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

The sole reliance of the claimant to bring it within this rule for such breach is predicated of the adjudication in an involuntary proceeding in bankruptcy against the vendee. I am unable to consent to the proposition that such an adjudication in bankruptcy, ex vi termini, is in law tantamount to a refusal of the bankrupt to perform, or that it thereby permanently disabled itself from performance, to bring the claim asserted by petitioner within the operation of the rule laid down in Roehm v. Horst, supra. As said by Judge Sanborn, in Watson v. Merrill, 136 Fed. 363, 69 C. C. A. 719:

"An adjudication in bankruptcy does not dissolve or terminate contractual relations of the bankrupt. * * * Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and, since his obligation to pay rents which are to accrue after the filing of the petition in bankruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication."

Why should a rule be applied to a corporation—a legal entity—different in this respect from a natural person? Section 1, cl. 19, of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) declares that "persons" shall include corporations, except where otherwise specified. An adjudication in bankruptcy of a corporation does not work a dissolution of the corporation or a forfeiture or loss of its franchise. The very policy of the bankrupt law is that by the adjudication and the surrender to the trustee of all the assets of the bankrupt then owned he may thereby be manumitted from the burden of existing debts, and by his unimpeded energies and industry the better be enabled to prosecute his

business and earn a livelihood and a competency. Why should any different rule be applied to a corporation coerced into bankruptcy, which but represents the aggregate co-operation and capital of a number of individual stockholders? Its stockholders may decide to infuse new life into it by assessments or otherwise, and its directors resume business, go ahead, and perform any executory contract. And if they had an advantageous contract with the vendor for providing it with hops in its business, why should it not be left in position to avail itself of the yet unexecuted contract?

In Lovell v. St. Louis Life Insurance Company, 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, the court held that where an insurance company had terminated its business and transferred its assets and policies to another company, whereby it totally abandoned the performance of its contracts by transferring all of its assets and obligations to the new company, it thereby authorized the insured to treat the contract as at an end and to sue to recover back the premiums already paid, although the time for performance of the obligation, to wit, the death of the insured, had not arrived. For, as said by Mr. Justice Bradley, referring to a life insurance company which had gone into liquidation, in Carr v. Hamilton, 129 U. S. 252, 256, 9 Sup. Ct. 295, 32 L. Ed. 669:

"By that act the company becomes civiliter mortuus, its business is brought to an absolute end, and the policy holders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets."

In Re Swift, 112 Fed. 315, 50 C. C. A. 264, a broker had made a contract to deliver certain stock to a customer. It was held that he made it impossible to fulfill his agreement to deliver the stock by his adjudication in bankruptcy, for the reason that it took the stock from him and vested it, with all his property, in his trustee. But that is clearly not this case.

As to In re Pettingill & Co. (D. C.) 137 Fed. 143, relied upon by the petitioner, I may say that I can concur in the syllabus of that case that under the bankrupt act the provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy. If not then a provable debt, as defined in the act, it cannot be proved, although it may thereafter come within such definition. "If a bankrupt, at the time of bankruptcy, by disenabling himself from performing a particular contract, and by repudiating its obligation, could give the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such party may prove as a creditor in bankruptcy, on the ground that bankruptcy is equivalent of disablement and repudiation."

If, however, it was intended to hold that, as applied to an executory contract for the sale of annual crops to be raised in successive years, where no breach had occurred at the time of an involuntary adjudication in bankruptcy, the mere act of such declared statutory insolvency constituted such a breach of the contract as to enable the vendor to prove up against the estate the contingent damages, as on a repudiation of the contract by the vendee, I cannot consent thereto.

There was no renunciation by the vendee company of the contract after the commencement of performance or renunciation before the time for performance had arrived. Nor has the vendee deliberately incapacitated itself or rendered performance of the contract impossible within the rule laid down in Roehm v. Horst, 178 U. S. 18, 20 Sup. Ct. 787, 44 L. Ed. 953. As a discharge in bankruptcy under section 1, cl. 12 means no more than "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by the act," and the claim for damages for a possible future breach of a contract is not a debt provable against the estate, in the absence of any refusal on the part of the bankrupt to recognize the contract, and he has not voluntarily or positively disabled himself from performing it, where its performance does not become obligatory until after the adjudication in bankruptcy, my conclusion is that the claim in question is not one provable in bankruptcy.

It is a noteworthy fact that under the bankrupt acts of 1841 and 1867 the right was given to prove "uncertain and contingent demands" against the estate. This provision was omitted from the present bankrupt act of 1898. In my judgment this omission is significant.

It results that the application for an order directing the manner of the liquidation of the claim in question is denied.

WHITTAKER v. ATLANTA, B. & A. R. CO.

(Circuit Court, N. D. Georgia. January 3, 1906.)

No. 64.

RAILROADS—CONSTRUCTION ON STREET—INJUNCTION.

Under Civ. Code Ga. § 2167, which authorizes any railroad company to lay its track along any street or highway with the written consent of the municipal or county authorities, a lot owner cannot enjoin the construction of a railroad along a street on which his lot abuts, with the consent of the city council, on the ground that the contemplated change of grade, also approved by the council, will result in incidental damages to his lot which have not been ascertained or paid; and the rule is the same whether the fee of the street is in the public or in the abutting lot owners, it being the settled law of the state that damages arising from the grading of a street by the municipality are recoverable only by an action at law.

In Equity.

A. H. Thompson and Spencer R. Atkinson, for complainant.
Rosser & Brandon, for defendant.

NEWMAN, District Judge. This is a bill filed by the complainant against the Atlanta, Birmingham & Atlantic Railroad Company, seeking to enjoin the defendant company from laying its track and constructing its railroad line along Morgan street, in the city of La Grange, Ga., upon which complainant's property abuts, and also to enjoin it from going upon one of the lots on Morgan street owned by the complainant. The defendant company is incorporated under

the general law of Georgia providing for the incorporation of railroad companies. One of the powers granted by the act of the Legislature, now embodied in section 2167, par. 5, of the Civil Code of Georgia, is:

"To construct its road across, along or upon, or to use any stream of water, watercourse, street, highway or canal which the route of its road shall intersect or touch: Provided, no railroad shall be constructed along and upon any street or highway without the written consent of the municipal or county authorities, and whenever the track of any such road shall touch, intersect or cross any road, highway or street, it may be carried over or under, or cross at a grade level or otherwise, as may be found most expedient for the public good."

The municipal authorities of the city of La Grange have authorized the railroad company to construct its road upon and along Morgan street at the point in question. They have also approved the profile made by the engineer of the railroad company, which somewhat alters the grade of the street along complainant's property. Complainant expressly avers in his bill that it is the purpose of the railroad company to actually go upon his property. The defendant in its answer explicitly denies that it is its intention to actually enter upon any of the property of complainant with its work of construction until the value of the property to be taken shall have been ascertained according to law and compensation paid therefor. That part of the case, therefore, which involves the actual taking of any of complainant's property, can be readily disposed of by proper order. The important question for determination in the case is whether the railroad company has a right to proceed to lay its track along Morgan street, as proposed, without first ascertaining whether there would be damages to complainant's property, and, if so, paying for the same before the construction begins.

Counsel for complainant contend that there is a difference between the rights of abutting owners on streets as to matters of this sort where the title to the land embraced in the street is in the public, and where it is in the abutting owners to the center of the street. By an act of the Legislature of Georgia approved December 24, 1827, the justices of the inferior court of the county of Troup, as well as other counties mentioned in the act, were authorized "to purchase a lot of land for the county town." Laws 1827, p. 65. The justices of the inferior court of Troup county did purchase on March 5, 1828, lot of land No. 109 in that county. This they subsequently laid off into town lots, and the lots now in question were sold by the justices of the inferior court, and came down by proper conveyances to the complainant's intestate. By an act of the Legislature of Georgia approved December 16, 1828, county commissioners were appointed for the town of La Grange, and provision made for their successors. By this act it was also provided that:

"Said commissioners and their successors in office shall have corporate jurisdiction over the lot of land on which the said town is situated, and all other public lots that may hereafter be laid out in said town; and shall have exclusive government of and control of all patrols and persons liable to work on the roads within the same." Laws 1828, p. 152.

Unquestionably by this last act the government and control over the land embraced within the town of La Grange, which is a part of the original land lot No. 109, was vested in the commissioners of the town of La Grange and their successors in office, now the mayor and council.

It is urged that where land is platted and sold by the justices of the inferior court abutting streets, as was done in this instance, the fee to the center of the street passes to the purchaser of the lots, just as it would if an individual had platted the land and sold it off in lots. It is then argued that in consequence of this Whittaker's intestate owned the land to the center of Morgan street in front of his property, subject only to the public use as a street, and that an additional burden cannot be put upon it without compensation being first paid for its use. It is true that some authorities draw a distinction as to the right to put an additional burden upon the street, other than that of the ordinary public use as a highway, when the title to the street is in the abutters, and when it is in the state or in the city. I do not know that any such distinction should exist in Georgia. The Legislature certainly made none in the act authorizing railroads to use streets longitudinally, as quoted above; and the ground upon which the cases rest, authorizing the construction of street railroads and steam commercial railroads entering a city from other cities along public streets, is that it is a proper use to which a public highway may be put, in the legislative discretion. In Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224, in the opinion of the court by Mr. Justice Bradley (pages 340–342, of 94 U. S. [24 L. Ed. 224]) the question is discussed in this way:

"On the general question as to the rights of the public in a city street, we cannot see any material difference in principle with regard to the extent of those rights, whether the fee is in the public, or in the adjacent landowner, or in some third person. In either case the street is legally open and free for the public passage, and for such other public uses as are necessary in a city and do not prevent its use as a thoroughfare, such as the laying of water-pipes, gas pipes, and the like; and according to the laws of Iowa (which must be taken to govern the case) it may be occupied by those improved iron ways for public passage which modern skill has devised, and which the advance of general improvement requires. It cannot be denied that horse railroads have contributed immensely to the public convenience in furnishing a rapid, cheap, and convenient means of communication between different parts of large towns, and have greatly promoted their increase and growth in wealth and population. By the accommodation which they afford, the citizen can reside miles from his shop or place of business. Though attended with some inconveniences, they have greatly added to the efficiency of the public thoroughfares, and have more than doubled their capacity for travel and transportation. So other railways coming to cities add greatly to their population and wealth, and furnish greatly increased facilities of communication with other portions of the country. In Iowa, by the act called the 'Right of Way Act,' found in the Code of 1851 [section 735], it is declared that 'the county court may also grant licenses for the construction of any canal or railroad, or any macadamized or plank road, or any other improvement of a similar character, or any telegraph line, to keep the same up for a period of not exceeding fifty years, and to use for this purpose any portion of the public highway or other property, public or private, if necessary: Provided, such use shall not obstruct the highway.' Revision 1860, Iowa, p. 206. By the construction given to this act by the Supreme Court of the state,

railroads, especially when located and constructed under municipal regulation and control, are not regarded as obstructions to a highway in the legal sense, nor as creating, when laid thereon, any injury to the proprietors of the adjacent lands, for which they are entitled to compensation. The cases referred to by the Circuit Court (which are given below) abundantly demonstrate this conclusion, and no elaborate discussion of the subject is required from us. See Milburn v. Cedar Rapids, 12 Iowa, 249–260; Clinton v. Cedar Rapids & Mo. Railroad Co., 24 Iowa, 455; Tomlin v. Dubuque Railroad Co., 32 Iowa, 106, 7 Am. Rep. 176; Chicago, Newton & S. W. Railroad Co. v. Mayor, etc., of Town of Newton, 36 Iowa, 299; Cook v. City of Burlington, 36 Iowa, 357; Clinton v. Clinton & Lyons Railroad Co., 37 Iowa, 61; Ingram et al. v. Chicago, Dubuque & Minn. Railroad Co., 38 Iowa, 669. The cases cited, it is true, are generally those in which the fee of the streets was in the cities respectively, as is commonly the case in Iowa. But in Haight's Case, in 4 Iowa, 199, the very street now in question was under consideration, and the plaintiff has the same title as that of the plaintiff in the present case; and the principles laid down in all the later cases apply as well where the title of the soil is in the adjacent proprietor as where it is in the city or a third party. And, as before remarked, we can perceive no well-founded difference in principle between the one and the other as to the rights of the public."

As the law of Iowa seems to have been quite similar to the law of Georgia, this discussion of the question is particularly applicable. I should not be disposed to hold that Whittaker's intestate had the title to the soil to the center of Morgan street in front of his property; but, if he had, I am inclined to think that it would not make any difference as to the merits of the question now presented.

It is thoroughly settled in Georgia, as I understand it, that a city may grade a street, although consequential damages may result, without first paying compensation therefor. Injunction will not issue to prevent the public from grading a highway, but the abutting property owner, claiming to be injured, will be left to his action at law for damages. Moore v. City of Atlanta, 70 Ga. 611. There seems to be no difference in principle between a city doing the grading itself and allowing it to be done by a railway company. In the present case the city authorities have approved a profile showing the changes in grade to be made, and it must be assumed that they considered the changes which are to be made by cutting down somewhat along the complainant's lots to be proper changes for public purpose and in the public interest. Consequently the same rule would apply as if the city was itself having the work done. In Atlantic & Birmingham R. R. Co. v. Mayor and Council of Montezuma, 122 Ga. 1, 49 S. E. 738, the Supreme Court of the state recognizes the right of this same railroad company to construct its track lawfully in a street, although in that case it appears to have been considered that the use to which it was desired to put the street was not the ordinary longitudinal use for its tracks, because it obstructed and practically closed up the street. It is said in that case that:

"Civ. Code, § 2167, par. 5, permitting the longitudinal use of a street, must be considered to authorize only a lawful use, and not the creation and maintenance of a nuisance thereon."

If there can be a lawful use of a street for a railroad track, such lawful use must embrace what is proposed in this case; that is, the

construction of one track longitudinally along the street. The railroad company could not do less than this, and, if it is allowed to use the street at all, it certainly must be allowed to use it for the purpose contemplated here. It seems to have been the intention of the Legislature to allow the city and county authorities to control the matter of permitting railroads to be constructed along public streets in cities and towns and roads in the country, respectively. It must be assumed that the municipal authorities of the city of La Grange would not have granted the right to construct a railroad along Morgan street unless it was for the public interest. A discretion is vested by law in the city council, and the courts will not interfere unless there is a manifest abuse of this discretion, or unless some constitutional right of property owners is violated. Neither of these is satisfactorily shown here.

The injunction prayed, so far as it seeks to prevent the use of the street in front and along the side of complainant's property for the laying of track, must be denied, and the restraining order heretofore granted to that extent dissolved. As the railroad company denies any purpose or intent of actually going upon the land in question without having the damages ascertained and paid, the injunction seeking to prevent that should also be denied, and the restraining order dissolved, but, as to this, with the right of complainant to move at any time for a renewal of the restraining order, should the defendant company take any further steps to go upon any of the property in question without first complying with the law with reference to the ascertainment and payment of proper compensation.

KNICKERBOCKER TRUST CO. v. DAVIS.

(Circuit Court, D. New Jersey. February 17, 1906.)

CORPORATIONS—SUBSCRIPTIONS FOR BONDS—CONSTRUCTION OF SYNDICATE AGREEMENT.

A syndicate agreement recited that a corporation had authorized an issue of $200,000 of bonds, and each subscriber signed and delivered to the syndicate managers a certificate by which for himself alone he agreed to take and pay for by a date fixed a certain number of such bonds at a stated price, for which he was also to receive a certain amount of the stock of the corporation; such certificates being payable to the managers or their order. The agreement also authorized the managers to obtain a loan from plaintiff trust company and to pledge the underwriting certificates and the bonds and stock called for therein as security therefor, and each subscriber guarantied payment of a part of the loan equal to the face value of his certificate, such payment to be a fulfillment of his subscription and to entitle him to the bonds and stock subscribed for. *Held*, that the subscriptions were several, and that plaintiff, having made a loan as contemplated, was entitled to enforce the guaranty against a subscriber, without reference to whether or not the entire authorized issue of bonds had been sold; there being no such requirement in the agreement.

On Rule to Show Cause Why a New Trial Should Not be Granted.

On January 6, 1903, a written agreement was entered into by the Consolidated Industries Company, designated in the agreement as "syndicate

managers," and the several individuals signing the agreement, designated as "underwriters." The agreement, in its preamble, contained a number of recitals setting forth that the Consolidated Gas & Electric Company would rebuild its gas and electric plant, extend its mains for gas and electric supply, and erect coke ovens, by the purchase of real estate and the making of other improvements specified in the recitals; that it was estimated that the earnings of the Consolidated Gas & Electric Company for the year ending May, 1904, would be over $100,000; that on the basis of 65 per cent. of the earnings for operating expenses there would remain 35 per cent., as a net revenue, which would be sufficient to provide for the payment of the annual fixed charges of the company and also of a dividend of 6 per cent. on its capital stock; that the total capital was 2,000 full-paid shares, of a par value of $100 each; that an issue of $300,000 of 5 per cent. consolidated refunding sinking fund gold bonds had been authorized, which would fall due in 35 years from their date; that $100,000 of the bonds and currency in excess of $21,700 were reserved for redemption purposes; that the bonds were deposited with the New York Security & Trust Company, trustee, and the currency with the Rochester Trust Company, trustee; that the Consolidated Industries Company, "in order to obtain funds for the purpose set forth herein, has undertaken to and has organized an underwriting syndicate, and has agreed and hereby does agree to act as the managers of the said consolidated Gas & Electric Company's underwriting syndicate"; and that "each underwriter, each for himself, but not for the others, for the purpose of better aiding in obtaining the funds sought for, has duly executed and signed and delivered to the syndicate managers of said underwriting syndicate certain underwriting certificates in the denomination of $825 each, to the aggregate amount set opposite his signature hereto, said certificates being substantially in the following form:

"Underwriting Certificate.

"————, 190—.

"On January 10th, 1904 (or at any time on or before four months from date hereof, at my option), I promise to pay the Consolidated Industries Company, or to their order, by indorsement hereof, the sum of eight hundred and twenty-five dollars, in consideration of which, it is agreed by all parties hereto, I shall receive from the payee one thousand dollars par value in the consolidated refunding sinking fund 5 per cent. 35-year gold bonds of the Consolidated Gas & Electric Company, of Batavia, New York, of an authorized issue of three hundred thousand dollars, and three hundred dollars par value of the capital stock of the said Consolidated Gas & Electric Company, of Batavia, New York, of an authorized issue of two hundred thousand dollars, the payment of said sum by me and delivery of said certificates to me to be made at the office of ——— on (or on or before four months from the date hereof, at my option) January 10th, 1904.

"————.

"No. ————."

After the above-mentioned recitals the agreement sets forth that in consideration of the premises the Consolidated Industries Company, for themselves and as managers of the syndicate, and for each and every member of the syndicate, agreed to carry out faithfully and to their utmost ability the following provisions:

(1) That during the period ending January 10, 1904, the syndicate managers would endeavor to market the bonds held under the agreement for the pro rata benefit of all the underwriters at a net price to them of $925 per bond, without deduction for expenses or commissions, the excess received by the syndicate managers to go to them as their compensation for effecting the sales.

(2) That each member of the syndicate should be liable only for his pro rata share of the bonds, if any, which remained unsold on January 10, 1904.

(3) That no underwriter should be liable to the syndicate managers for any sum of money unless he should receive in exchange, for each certificate

for $825 signed by him, $1,000 in said mortgage bonds of the Consolidated Gas & Electric Company and $100 in cash on his pro rata share of the bonds previously sold, and the full amount of stock bonus to which he was entitled on the total amount of his subscription.

(4) That each member should have the privilege, within four months from the date of the agreement, of withdrawing his bonds and stock loans, or any unsold portion thereof, to which he might be entitled, from the syndicate for investment, at the underwriting price of 82½ cents on the dollar, upon agreeing not to offer or sell any of such securities for a period of one year from the date of the withdrawal.

(5) That the syndicate should be dissolved within 10 days after the maturity and payment of the last obligation outstanding for the account of the syndicate.

(6) "The several underwriters hereby agree that the syndicate managers may borrow from the Knickerbocker Trust Company, New York, or any other party, up to the aggregate amount of all of said underwriting certificates, and may pledge to said trust company or such other party the said certificates and bonds and shares of stock therein mentioned, and each underwriter, in consideration of the making of said loan, hereby guaranties to the said trust company, or such other party, the repayment of said loan to the extent only of the par of the underwriting certificates signed by him and so pledged. All payments made on account of such guaranties shall to that extent cancel such underwriter's obligation upon the said underwriting certificates. This agreement shall be filed with the said trust company or such other party to evidence such guaranties."

(7) "This instrument may be executed in any number of counterparts to the same effect as if all the signatures were upon one original."

The defendant signed one of the counterparts of the above-mentioned agreement for the sum of $4,125, and five underwriting certificates of the form above set forth, each for $825, amounting also, it will be observed, to the sum of $4,125. The plaintiff brought suit against the defendant on his guaranty set forth in the sixth paragraph of the agreement, and at the trial proved the execution of the agreement by the Consolidated Industries Company and the defendant, the five underwriting certificates signed by the defendant, the loan by the Knickerbocker Trust Company to the Consolidated Industries Company of the sum of $51,975, and the deposit by the Consolidated Industries Company with the Knickerbocker Trust Company, as collateral to secure $4,125 of the above-mentioned loan, the five underwriting certificates signed by the defendant, and five of the mortgage bonds and certificates, for the proportion of the capital stock to which, upon the payment of the five underwriting certificates, the defendant would be entitled. The plaintiff's proofs further showed that the total subscription by underwriters for the mortgage bonds amounted to $63,000 only, and that the total amount loaned by the Knickerbocker Trust Company was 82½ per cent. of the total subscription, being the above-mentioned sum of $51,975. The defendant offered no evidence. The court thereupon instructed the jury to render a verdict for the plaintiff, and, in order that the question of law raised at the trial might be more deliberately considered than was then possible, granted, upon the application of the defendant, a rule to show cause why a new trial should not be allowed. The present argument is on that rule.

McCarter, Williamson & McCarter and Julien T. Davies, Jr., for plaintiff.

William H. Speer and Charles Snow Kellogg, for defendant.

LANNING, District Judge (after stating the facts). The question presented in this case calls for a construction of the syndicate agreement set forth in the preceding statement. The defendant insists that no subscriber for bonds could become liable under the agreement, or upon any of the underwriting certificates, unless and until

200 of the bonds should be subscribed for. The plaintiff, on the other hand, insists that each of the subscribers for the 63 bonds who did not at maturity pay the underwriting certificates signed by him became liable thereupon in an action at law. No other question is presented.

It will be observed that in the underwriting certificate the promise is to pay on January 10, 1904 (or, at the signer's option, at any time before that date), to the Consolidated Industries Company, or to their order, $825 upon the receipt of one of the mortgage bonds for $1,000 and of capital stock of the par value of $300 issued by the Consolidated Gas & Electric Company. The five certificates signed by the defendant were indorsed over to the Knickerbocker Trust Company, on which, with other securities, the Knickerbocker Trust Company made its loan of $51,975. By one of the recitals to the agreement the defendant had expressly declared to the Knickerbocker Trust Company, with whom the agreement was deposited pursuant to the provisions of the last clause in its sixth paragraph, that the Consolidated Industries Company had already organized an underwriting syndicate, and that for the purpose of better aiding in obtaining the funds sought for he had duly executed and signed and delivered to the syndicate managers certain underwriting certificates, in the denomination of $825 each, to the aggregate amount set opposite his signature. In the sixth paragraph of the agreement, he had individually authorized the syndicate managers (for the agreement is a several one) to borrow from the Knickerbocker Trust Company "up to the aggregate amount of all of said underwriting certificates," and to pledge with the trust company the certificates and the bonds and shares of stock therein mentioned, and that he thereby guarantied to the trust company the repayment of the loan it should make under the terms of the agreement to the extent of the par value of the underwriting certificates signed by him and so pledged. There is nothing in the agreement that justifies the restricted construction for which the defendant contends. The Knickerbocker Trust Company was not a party to the syndicate agreement. That agreement, in counterparts, showing subscriptions to the amount of $63,000, was deposited with the Knickerbocker Trust Company. It showed that $63,000 of the bonds were subscribed for by different individuals. These individuals constituted the syndicate referred to in the agreement, and each of them by the terms of the agreement became an underwriter for the amount of each of the underwriting certificates signed by him.

The case of Bray v. Farwell, 81 N. Y. 600, which is the only case cited by the counsel for the defendant on the argument or in their brief, is not at all applicable to the facts of the case before me. There the Court of Appeals of New York held that a subscriber to shares of a joint-stock association having a capital fixed at $3,000,000, divided into 30,000 shares, whose articles of association contained no provision for the commencement of its business before the whole of the capital stock was subscribed, could not enforce an assessment upon a holder of its shares when it appeared that all the shares had not been taken and that that holder had not attended any meetings of the shareholders

or assented to the commencement of business by the association. When the present case was before this court on a motion to strike out pleas, it was held by Judge Cross (see 139 Fed. 792) that the contract of guaranty was unconditional. I agree with the view thus expressed by my associate. The contract contains no condition that the underwriting certificates shall be unenforceable unless the subscriptions to the bonds should amount in the aggregate to the sum of $200,000.

The rule to show cause must be discharged.

THE FULTON.

(District Court, N. D. California. February 15. 1906.)

No. 13,480.

1. MASTER AND SERVANT—INJURY OF SERVANT—LIABILITY OF MASTER.

The cause of the breaking of a rope sling used in hoisting lumber from the hold of a vessel, resulting in the injury of a seaman, *held*, under the evidence, not due to the unsound condition of the rope, which might have rendered the vessel liable for the injury, but to the unusual strain put upon it by the catching of the load upon the hatch coaming, for which the vessel was not liable.

2. SAME—UNSAFE APPLIANCES—DEFECTS DUE TO WEAR.

While it is the duty of a master to furnish reasonably safe appliances for the use of his servants, it is not his duty to repair defects arising in the daily use of an appliance not permanent in its character, such as a rope sling used in loading and discharging a vessel, which is liable to become worn and unsafe at any time, and if the owner supplies the workmen with new and sound rope which they may use in repairing or renewing the slings, when required, the vessel is not liable for the injury of a seaman through a failure to use such material, even though it is due to the negligence of an officer, who in such case is not the agent of the owner, but a fellow servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 252, 253.]

In Admiralty. Suit in rem by seaman to recover for personal injuries.

F. R. Wall, for libelant.

C. H. Wilson, for defendant.

DE HAVEN, District Judge. The libelant was a seaman on the schooner Fulton, and while engaged as such was seriously injured by the parting of a rope sling, used at the time in discharging a cargo of lumber from the hold of the vessel. This is an action in rem to recover the damages resulting to the libelant from the injury so sustained by him.

The libel alleges that the rope from which the sling was made was unsound and defective, that the owners of the vessel were guilty of negligence in furnishing such unsound sling, and that the place where libelant worked was rendered unsafe by its use. It appears from the evidence that for two or three days prior to the accident, the vessel's cargo, consisting of lumber, was being discharged, and that in hoisting the lumber from the hold six or eight slings were

used; that on the day prior to the accident members of the crew, including the libelant, complained to the first officer that the slings were unsafe; and thereupon two or three new slings were made and put in use, but the sling which broke was one of the old ones. This sling when it parted, was carrying a load of boards, weighing from 1,200 to 1,500 pounds. The load caught in the hatch coaming while being hoisted from the hold by a steam winch. The winch was immediately stopped and the libelant was trying to free the lumber so that it could be hoisted through the hatchway when the sling broke; the lumber which it carried falling upon him.

I think the accident was due to the excessive strain which was put upon the sling when the lumber caught in the hatch coaming. The fact that the strain was almost immediately released by the stopping of the winch is not opposed to this supposition. The rope was doubtless weakened by the unusual tension to which it was subjected before the winch was stopped, and stopping the winch would not restore its strength. The sling was made of 3½ inch Manila rope, and the evidence shows that it was able to carry under usual conditions, the load which it had on at the time of the accident. From an inspection of the part which was received in evidence, and from the testimony of the experts who were examined as witnesses, I am satisfied that the sling was not unsound, or unfit for discharging lumber from the vessel. It was not new, but it was not so much worn that a man of ordinary prudence would have considered it unsafe to use in discharging cargo. This fact is shown, not only by the testimony of the master and mate of the vessel, and by the witnesses Sellers and Rice, who may be regarded as experts upon the subject of the strength and quality of ropes, but also by the evidence of Carlson, the seaman who put the sling around the lumber. The fact that a prudent man would not have considered the sling unsafe is sufficient to defeat the present action, for the master is not an absolute insurer of the safety of the servant. He is only required to use ordinary care for the protection of the servant. "The master is not bound to provide the very best materials, implements, or accommodations which can be procured, nor those which are absolutely the most convenient or most safe. His duty is sufficiently discharged by providing those which are reasonably safe and fit." Shearman & Redfield on Negligence, § 195; Sappenfield v. Main St. R. R. Co., 91 Cal. 48, 27 Pac. 590; The Chico (D. C.) 140 Fed. 568.

2. But I am of the opinion that the action cannot be maintained, even if it should be assumed that the sling was unsound, and that the mate was guilty of negligence in permitting it to be used. It is undoubtedly the general rule that it is the duty of the master to furnish his servant with appliances which are reasonably safe and fit for use in the prosecution of the servant's work, but the rule itself is not applicable to those appliances which are not of a permanent character, requiring renewal and repairs from time to time because of daily wear and tear, and which repairs and renewals are to be made by the servant as a part of his work. In such a case the master has discharged his duty by supplying proper and suitable

materials with which to replace or repair the appliance when it has become unfit for further use. An application of this principle will be found in the case of Johnson v. Boston Towboat Co., 135 Mass. 209, 46 Am. Rep. 458. In that case the servant sued to recover damages for an injury which resulted to him from the negligence of a fellow servant in using an unsound rope, instead of a new one, which had been supplied by the master. In holding that the master was not liable for the injury, the court said:

"The defendant was under obligation to its servants to use reasonable diligence to maintain in suitable condition the appliances furnished for their use. If the defendant exercised that diligence, and provided suitable means for keeping its apparatus in proper condition, and employed competent servants to see that the means were properly used, it had fulfilled its duty. It was incidental to the use of the apparatus—a part of its contemplated use—that the rope should be occasionally renewed; and when the defendant had furnished the means for that renewal, and employed Moore to make the renewal whenever needed, it employed him as a servant, and not as agent or deputy."

In Cregan v. Marston et al., 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854, the question of the master's liability to respond in damages for the death of one of his employés killed by the breaking of a "fall," attached to a derrick, and used at the time of the accident in hoisting buckets of coal from the hold of the vessel was presented for decision. The court in its statement of the case said:

"The lengths of rope used in the derrick were called 'falls.' * * * Everybody connected with the business knew the consequences of excessive use and the necessity of frequent changes of falls, but at varying and uncertain periods of time. The fall which was sound and safe in the beginning of a morning's work might become frayed and dangerous before night, and, if it did, would become so before the eyes of all the workmen dependent upon it for its use. And that is true because the proof given by the plaintiff shows clearly that the rope which is sound originally becomes pulpy internally only when use has affected it externally."

Then, after referring to the fact that the defendant kept on hand an adequate supply of "falls," which would have been supplied if called for, the court held that the servant was not entitled to recover for his injuries, saying:

"It is undoubtedly true, as we have often said, that it is the duty of the master to keep a machine or appliance in order, and that he cannot delegate the duty so as to escape responsibility. But that is a general rule and has its qualifications. One of those is that it is not the master's duty to repair defects arising in the daily use of the appliance, for which proper and suitable materials are supplied, and which may be easily remedied by the workmen, and are not of a permanent character, or require the help of skilled mechanics."

The same rule was recognized in Burns v. Sennett & Miller, 99 Cal. 363, 33 Pac. 916, and Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450, 42 Am. St. Rep. 421, in which latter case it was held that the owners of the ship were not liable for an injury to a seaman caused by the negligence of the mate in constructing the triangle in which the seaman was seated when engaged in scraping a mast.

The reason underlying the rule established by the cases above referred to is that, in the nature of things, the master is not expected

to look after mere matters of detail in the prosecution of the general work which is committed to the employé. It is well known that appliances such as ropes, used in taking on and in discharging cargo, become worn and unsafe from use, that it is necessary such appliances should be changed from time to time as occasion requires; that the necessity for substituting new for old may arise in the absence of the owner, but is always open to the observation of those who use them, and the matter of substitution is therefore left to the discretion and judgment of the servant employed in the general work of taking on or discharging cargo, and is regarded as a part of the details of that work, in relation to which the owner owes no positive and personal duty to the crew beyond supplying the vessel with suitable materials from which to repair or renew unsafe appliances, and the exercise of proper care in selecting competent officers, whose duty it is to see that such renewals are made when necessary. The evidence in this case shows that the owners had supplied the vessel with a sufficient quantity of new rope from which necessary slings could have been made, and if it should be conceded that the mate was guilty of negligence in not discarding all of the old slings when complaint was made to him, and at once supplying their places with others spliced from the new rope on hand, still such negligence is not that of the owner of the vessel, but is to be deemed the negligence of a fellow servant, for the consequences of which the owner is not responsible.

The libel is dismissed.

In re RODGERS & HITE, Inc.

(District Court, E. D. Pennsylvania. February 21, 1906.)

No. 2,002.

FIXTURES—MACHINERY INSTALLED BY CONTRACT PURCHASER OF REALTY—INTENTION OF PARTIES.

Machinery placed upon land by a purchaser under an executory contract does not become a part of the realty as between the vendor and purchaser, where there is a clearly expressed agreement between them that it shall remain the personal property of the purchaser, nor can the vendor, after the purchaser's bankruptcy, enforce a provision of the contract limiting the time within which such machinery might be removed by the purchaser in case of his default in making payment for the property, where such default was due to the fault of the vendor in failing to perfect the title until after the time for performance had expired and after the purchaser had become unable to perform, and where no claim of the right to enforce such forfeiture was made until after the bankruptcy.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, § 47.]

In Bankruptcy. On question certified by the referee.

Henry C. Boyer, for trustee.

Montgomery Evans, for claimant.

HOLLAND, District Judge. The question certified to the court by the referee in this case is whether the machinery in the mill at

Conshohocken became a part of the freehold or belonged to the bankrupt's estate. The facts found by the referee, in the opinion accompanying the record, are in the main sustained by the evidence, an examination of which, however, shows that there are other facts and circumstances important in the determination of the question certified, and I shall, therefore, state the facts which appear to me relevant and which seem to be clearly established by the oral and written evidence taken before the referee: It appears that on the 17th day of January, 1903, J. Lesley Rodgers entered into an agreement with the executors of the Powers estate for the purchase of certain real estate in the borough of Conshohocken. This agreement of purchase, it is conceded, subsequently became the agreement of this bankrupt corporation, and all negotiations between the parties before and after the agreement had been executed, on the part of the owner, was through the owner's real estate agent. The agreement, or so much of it as is important here, is as follows:

"Whereas the party of the second part is about to enter into certain contracts for the purchase of boilers, electrical dynamos, tanks, and other machinery necessary for the operation of the plant to be established therein, which property will be purchased partially upon credit. Now it is hereby agreed that in event of the failure of the said party of the second part to carry out the provisions of this contract, that the parties of the first part shall have no lien upon said boilers, dynamos, machinery, etc., but the party of the second part or those from whom the same have been purchased, shall have the right to remove the same from said premises, provided that he or they leave the said real estate in the same condition as prior to this agreement, and satisfactory to the grantors, on the condition, however, that said boilers, dynamos, machinery, tanks, etc., shall be removed from said premises on or before the first day of May, A. D. 1903. In the event of the party of the second part failing to comply with the provisions of this agreement in respect of payment of said balance of the purchase money on or before the first day of May, A. D. 1903, it is expressly stipulated and agreed that the time for carrying out the provisions of this agreement shall be extended for the further period of one month, upon the payment by the said party of the second part of a rent rental of one hundred dollars, said payment to be made on May first, 1903. All personal property belonging to others than the grantors upon said premises to be subject to a lien for this rental until paid."

As between contract vendors and contract vendee, the presumption of law is (except as to trade fixtures, Smith v. Moore, 26 Ill. 392) that one who enters on land under an agreement to purchase it and annexes fixtures is permitted to do so with the intention to make them permanent and part of the realty. 19 Cyc. 1061. But not so if the contract vendor has given his consent to removal, or if he is himself in default in performing the contract to convey. 19 Cyc. 1061. Again, the policy of law is to favor trade, and chattels affixed to the realty for this purpose are allowed to remain a chattel. There are two cases decided by the Supreme Court of Pennsylvania, within a year of each other, which illustrate how completely the fact that a fixture has been annexed by a tenant, for the purpose of his trade, will change the nature of the act. In Morgan v. Arthurs, 3 Watts, 140, decided in September, 1834, the question was about a steam engine set up by the owner of the land to drive his sawmill, and it was held to be part of the realty. And in Lemar v. Miles, 4 Watts, 330,

decided in September, 1835, the court held that a steam engine set up by a tenant for the purpose of his trade, which was the manufacture of salt, was a chattel, and had not become part of the inheritance. See, also, Oves v. Ogelsby, 7 Watts, 106.

The test or criterion is, what was the intention of the party? And this question is one of fact. What, then, was the intention of the parties in the case at bar? The negotiations between the parties, prior to the execution of the contract, cannot alter its terms finally adopted, but we can look to the letters which passed between them to aid us in arriving at a proper understanding of the rights of the parties arising out of the agreement. The bankrupt, who was the contract vendee, on November 19, 1902, received a letter from the present claimants of this machinery, who were the contract vendors, wherein they state that they would give the bankrupt an option upon the property for 90 days, "provided it is clearly understood that, if the settlement should fall through, the $500.00 is to be forfeited, and also the machinery which you may place in the property in the meantime." This proposition as to the forfeiture of the machinery was first assented to, but subsequently, on the 29th of December, 1902, a counter proposition was submitted by the contract vendee, in which it was entirely rejected, and for the reason, as stated in a letter of that date, that it would be necessary to "purchase this machinery upon credit of from three to six months," and in order to enable them to secure it upon these terms they suggested that:

"It be expressly stipulated in the agreement of sale that in the event of their failure to carry out the conditions of the contract of sale, that the present owners shall have no lien upon the said machinery, but that said purchasers, or those from whom they have purchased the same, shall have the right to remove the same from the premises, leaving the property in as good order and repair as it now is."

To this counter proposition, the contract vendors replied on December 30, 1902, in which they stated:

"Your letter, I think, is satisfactory to us, with, however, this additional condition, viz., that in the event of failure to carry out the agreement of sale, the boilers, electric dynamos, machinery, tanks, etc., which are reserved to the use of the purchaser, shall be removed on or before May 1st, 1903, or in the event of failure to remove them at that time, a specified rental should be paid for the period within which they should definitely and positively be removed, not exceeding, say, one additional month."

Then followed the execution of the agreement in question, wherein the bankrupt reserved the right to remove the machinery, provided it shall be removed on or before the 1st day of May, 1903, which is the last day under the agreement for it to pay the purchase price of the real estate, and in language embodying in substance the suggestions contained in the letters of December 29th and 30th, but so altered in terms as to permit the vendee, upon the payment of $100, to obtain a month's extension of time for the payment of the purchase price, as well as for the removal of the machinery.

It is very plain that the intention of the parties was that the machinery should continue the property of the contract vendee, with

the right of removal within a certain time, subject to no claim on the part of the owners except a "lien for rental" on the property. This right was extended to July 31, 1903, by subsequent agreements. Was there any act or agreement on the part of the vendee, after the latter date down to the time of the institution of the bankruptcy proceedings, to forfeit this right of property in the machinery? It is true that the vendee was not prompt in examining the title and preparing the deed prior to the 1st day of May, 1903, but during that time they had secured a promise from the Norristown Trust Company to loan them a sum sufficient to pay the purchase price of the real estate. Counsel for the vendee shortly prior to May 1, 1903, discovered that there were some liens and incumbrances on the title that necessitated a postponement of settlement until they could be removed, and the time of performance of all the provisions of the contract was by written agreement extended to July 31, 1903, and rent was paid at the rate of $100 per month. The vendors had agreed to convey, "free and clear of all liens and incumbrances." It was their duty, therefore, to remove this objection to the title, and until this was done they were in default and in no position to claim the machinery, because of a failure to remove the same before the stipulated time. 19 Cyc. 1061. After the 31st day of July, 1903, the vendee refused to pay rent, upon advice of their counsel, for the reason that there was a defect in the title, and no subsequent payments were made.

It is also a fact of importance, in the determination of this case, that this machinery in dispute, which it is claimed by the vendors was to be removed on or before May 1st, or be forfeited to them, was not placed in the building until long after that date, and, in fact, the vendee did not finish the installment of it until October, 1903. These facts were known to the vendors, as a letter from them, dated September 30, 1903, shows, wherein they state that they received a letter from the vendee of September 29th stating that the "machinery had all been installed in the Albion Print Works"; and stating in the same letter that "it would be proper for us [vendors] to render a bill for the rent to September 25th." No rent, however, was paid, because the vendors up to that time had failed to clear the incumbrances upon the title, but subsequently, on the 17th of November, 1903, the vendors informed the vendee that the title was clear of incumbrances and they were ready to convey, and in the early part of December, 1903, tendered a deed to the vendee. At this time, however, the vendee was unable to perform by reason of the fact that the long delay had resulted in causing the trust company to refuse to make the loan because of a lack of funds.

The default of the vendors prevented them from asserting their right to claim the machinery down to the time when they were able to tender a deed for the premises, clear of incumbrances, and it remains to inquire what the understanding of the parties was from the date of the tender to the presentation of the petition in bankruptcy. The loan originally secured from the trust company, for the purpose of carrying out the contract, by reason of the long delay in removing the objections to the title, could not be had by the vendee when the

deed was tendered, and it was then unable to secure the money elsewhere. Of this fact the vendors were informed, and treated the provisions of the agreement as to the real estate and machinery as of no binding force upon them, and, with regard to the machinery, they continued to regard that as the property of the vendee or bankrupt. On December 24, 1903, the vendors, in a letter, urged the vendee "to execute an agreement which might be mutually satisfactory, under the terms of which they would pay interest upon the purchase price, in consideration of which the date of settlement was to be extended for a limited period, and as additional security vendee to execute a bill of sale for the machinery, etc., on the premises." It is very plain that at this time, notwithstanding the facts that this machinery had not been removed from the premises and no rent had been paid from July, the vendors conceded the ownership of the machinery to be in the vendee, and subsequent to the filing of the petition, when the vendors' representative called upon counsel for the bankrupt and requested him to vacate the premises and to remove the personal property therefrom, the language used, according to the vendee's counsel, who was a witness in the case, was such as to indicate a disclaimer of any ownership in the machinery. The only anxiety manifested on the part of the vendors was to have the vendee remove the same from the premises.

There is nothing in this whole case to indicate that at any time during the occupancy of these premises by the bankrupt it was the intention of either of the parties to the agreement to hold the fixtures forfeited to the vendors. The vendee paid the rental of $100 a month for three months for an extension of time, which it could have claimed because of vendors' default, and, having placed the vendee in a position where it was unable to perform, it would have been inequitable in them to have taken advantage of their own wrong to forfeit the ownership of the machinery which was placed on the premises by the bankrupt. This machinery was, then, as a matter of fact, the property of the alleged bankrupt at the time the petition in bankruptcy was filed in this court, and the title thereto, upon the institution of bankruptcy proceedings, passed into the hands of the receiver for distribution among the bankrupt's creditors.

The conclusion, therefore, is that the machinery placed in the mill did not become a part of the freehold, but belongs to the bankrupt's estate; and, as it had been sold by agreement of all parties, the fund should be paid over to the receiver.

In re BERKOWITZ.

(District Court, E. D. Pennsylvania. February 21, 1906.)

No. 2,173.

1. BANKRUPTCY—POWERS OF REFEREE—INJUNCTION TO STAY PROCEEDINGS OF STATE COURT OR OFFICER.

In Bankr. Act July 1, 1898, 30 Stat. 555, § 38a, cl. 4 [U. S. Comp. St. 1901, p. 3435], which, with stated exceptions, authorizes referees to perform such part of the duties conferred on courts of bankruptcy as

shall be prescribed by their rules or orders, "except as herein otherwise provided," the word "herein" refers to the entire act, including the general orders prescribed by authority of section 30, and the provision must be construed in connection with General Order 12, § 3 (89 Fed. vii; 18 Sup. Ct. vi), which denies to a referee jurisdiction to grant an injunction to stay proceedings of a court or officer of the United States or of a state.

2. SAME.

A referee, who has previously determined on a hearing before him that certain property does not belong to a bankrupt estate, but to a third person, has no further jurisdiction over such property, and cannot enjoin its seizure by a sheriff under a writ of replevin issued from a state court, in an action brought therein by the trustee against such third person, even if otherwise vested with such power.

In Bankruptcy. On certificate of referee.

Bernard Harris, for trustee.
Julius C. Levi, for bankrupt.

J. B. McPHERSON, District Judge. The following excerpt from the report of the learned referee sets forth the facts upon which the question for decision arises:

"On the 7th day of February, 1905, Morris Berkowitz was duly adjudicated a bankrupt. The said Morris Berkowitz kept a store where he sold shoes in retail, and on the date he was adjudicated bankrupt he filed in the District Court of the United States for the Eastern District of Pennsylvania, a schedule of all his property, alleging that he had shoes in stock only to the amount of $464.

"On the 13th of May, 1905, the trustee of the bankrupt estate presented a petition to the referee setting forth, in substance: That he took possession of said assets of said estate, and had an appraisement made. In accordance with the request of the bankrupt he set aside property of the estate appraised by the appraisers to be of the value of about $290 and included in the property so set aside for the exemption 660 pairs of shoes and rubbers.

"Upon his information and belief, the petitioner averred that a large quantity of the shoes at present situated at 2207 Ridge avenue consist of shoes sold to the said Morris Berkowitz by creditors prior to his adjudication in bankruptcy, and that said creditors have not sold him any goods since his adjudication in bankruptcy. That the amount of goods now in the possession and control of the said Morris Berkowitz is at least 2,500 pairs of shoes, of the approximate value of $2,000, which shoes were and still are a part of the bankrupt estate, and should have been turned over to the trustee, which the bankrupt has failed and refuses to do.

"The petition prayed for an order upon Morris Berkowitz to show cause why he should not deliver to the trustee the said 2,500 pairs of shoes as set forth in said petition.

"An order was made by the referee authorizing the trustee meanwhile to take possession of the shoes at 2207 Ridge avenue and to hold the same until further ordered by the referee.

"The answer to the petition sets forth that the shoes in question were not shoes which had been fraudulently concealed as set forth in the petition, but that they were purchased on the 11th day of April, 1905, subsequent to the adjudication in bankruptcy, from N. Auerbach at 339 Monroe street, by J. Berkowitz, the wife of the said bankrupt, with her own money, which she did not receive from nor through the said bankrupt, her husband.

"A good deal of testimony was taken before the referee, which, however, was not sufficient to establish fraud on the part of the bankrupt as alleged in the petition of Samuel J. Gottesfeld, the trustee who claimed the goods in

question; but, on the contrary, the evidence showed, and the referee so found, that the goods were the property of Jennie Berkowitz, the wife of the said bankrupt, and that they did not belong to the bankrupt's estate. Accordingly the referee dismissed the trustee's petition and made an order upon him to deliver the property in question to the said Jennie Berkowitz, wife of the said bankrupt, which was done.

"Subsequent to this the said trustee filed his account and resigned. Whereupon Harvey P. Gallagher was substituted as trustee.

"That the said substituted trustee on the 29th day of September, 1905, entered an action of replevin in the court of common pleas No. 3 as of September term, 1905, No. 1,317, and in pursuance of said writ of replevin the sheriff took possession of said goods. Whereupon the said Jennie Berkowitz, to whom the goods were awarded by the referee as her property, presented a petition to the referee asking for a restraining order upon the said substituted trustee, restraining him from further proceeding under the writ of replevin issued by him, and that the sheriff of Philadelphia county stay further proceedings under the said writ.

"The order prayed for was granted, and the proceedings were stayed. The substituted trustee then presented his petition to vacate said order, which was refused by the referee. Hence this petition for review."

The error assigned is the referee's refusal to vacate the restraining order that was entered on October 2, 1905, and I am of opinion that the assignment must be sustained. There are two reasons for this conclusion, neither of which seems to have been brought to the attention of the referee. His authority, in general, to issue a restraining order against the sheriff of Philadelphia county, is denied by section 3 of general order 12 (89 Fed. vii; 18 Sup. Ct. vi) which provides that:

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

Unless, therefore, in spite of the general order, the referee's authority can be found in the special grant of power made by clause 3 of section 38a (Bankr. Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]), which permits the referee to "exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt, in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act," or in clause 4, which empowers the referee to "perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided," the restraining order was without the necessary statutory warrant. No such certificate as is contemplated by clause 3 was issued by the clerk, and none could have been lawfully issued, for at least one of the district judges was in Philadelphia, and able to act, when the restraining order in question was made. Unless clause 4 sustains the order, therefore, it cannot be upheld. Upon this point, the text-book writers do not agree. The learned editor of Collier on Bankruptcy (4th Ed., p. 549) questions the validity of General Order 12, § 3,

(89 Fed. vii; 18 Sup. Ct. vi) as a limitation of the power of the referee to grant stays, "especially where the district judge has conferred such power on the referee by section 38a (4)." And, on page 25 of the same treatise, the author says:

"Since Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it would seem that the referee, being vested with all the functions of a court of bankruptcy save a few, not inclusive of the power to enjoin, may grant permanent injunction orders having all the force of like orders issuing from the judge, and also direct the clerk to issue the writ under the seal of the court."

Loveland (2d Ed.) is of the contrary opinion, holding that the referee can only exercise the power referred to in general order 12 (89 Fed. vii; 18 Sup. Ct. vi) when the judge is absent, sick, or unable to act. Section 22, p. 19; section 29, p. 110; section 90, p. 235. Brandenburg (3d Ed.) § 683, agrees with Collier, but most of the citations he gives are not in point.

As already stated, section 38a (4) of the bankruptcy act gives the referee jurisdiction to "perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided." If "herein" means the whole act, the power thus conferred upon the referee seems to be qualified by the authority given by section 30 (30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]) to the Supreme Court to prescribe "all necessary rules, forms and orders as to procedure, and for carrying this act into force and effect," which authority has been exercised, inter alia, by section 3 of general order 12 (89 Fed. vii; 18 Sup. Ct. vi). But if "herein" refers to section 38 only, then sections 4 and 5 must be construed together, according to the well-known rule of construction that requires all parts of a statute to be enforced if possible; the result being that the referee can only exercise the powers of the judge "for the taking possession and releasing of the property of the bankrupt" in the event specified in clause 3, by which it is "otherwise provided" than by the general language of clause 4. My own inclination is to think that "herein" refers to the whole statute, including general order 12 (89 Fed. vii; 18 Sup. Ct. vi) by force of the authority given by section 30, and therefore that clauses 3 and 4 of section 4, and section 3 of the general order, should be construed together. This construction authorizes the referee to exercise the power of the judge except in certain specified cases; one of the exceptions being that he may not restrain a court or officer of the United States or of a state, unless there be a pressing necessity to act, to which a certificate of the clerk is the essential prerequisite. The reason for section 3 of general order 12 (89 Fed. vii; 18 Sup. Ct. vi) seems to me to be obvious. The Supreme Court had in mind the dignity of other courts, federal and state, and of other officers, and provided that they might only be interfered with by a tribunal of equal rank, and not by a subordinate official, unless for definitely described reasons action by the

latter should be unavoidable. Judge Lowell discussed the subject to some extent in Re Steuer, 5 Am. Bankr. Rep. 214, 104 Fed. 980, but declined to decide the point. He says there, however, that, by the general order referred to, "it is strongly implied that the referee has some jurisdiction to issue injunctions to any party not an officer of the United States or of a state, unless the injunction stays the proceedings of the court," and in this expression of opinion I fully concur.

But there is another reason equally fatal to the validity of the restraining order. The goods in question had previously been decided by the referee to belong, not to the bankrupt estate, but to the bankrupt's wife, and, if this finding was correct, he had no further power over them. A court of bankruptcy cannot administer the property of a third person, neither can it protect such property from the claims of others. This must be left to the appropriate court of law, or of equity, for the sufficient reason that no jurisdiction over such a subject has been committed to the bankrupt court. Whether, at the trial of the action of replevin, the substituted trustee will be bound by the referee's finding, in the controversy between the first trustee and Julia Berkowitz, that the title to the goods is in her, must be left to the common pleas of Philadelphia county to decide. It would be indecorous for me to express an opinion upon the subject, as the District Court has nothing whatever to do with the litigation in the common pleas between the present trustee and the prima facie owner of the goods in dispute.

The referee's refusal to vacate the restraining order was erroneous, and, accordingly, the restraining order must be set aside.

In re WATKINSON et al.

(District Court, E. D. Pennsylvania. February 21, 1906.)

No. 1,184.

1. BANKRUPTCY—PROVABLE DEBTS—RIGHT OF STOCKHOLDERS TO PROVE DEBT TO CORPORATION.

   A claim against the estate of a bankrupt, based on the alleged payment, by the claimant and others represented by him, of an indebtedness of the bankrupt, disallowed where it appeared that the indebtedness was that of a corporation in which claimants and the bankrupt were stockholders; that it was not paid by claimants individually, but by a second corporation, in which they were stockholders, which charged it to the first, and afterwards became itself insolvent; and that the only liability of the bankrupt was to the first corporation on his stock subscription.

2. LIMITATION OF ACTIONS—PART PAYMENT.

   Payments made by a debtor of a corporation to an officer of the corporation, but not expressly stated at the time to be intended to apply on such indebtedness, and not accounted for to the corporation by the payee, do not suspend the running of the statute of limitations against the debt.

3. BANKRUPTCY—PROVABLE DEBTS.

   A purchaser at receiver's sale of the accounts of an insolvent corporation, which include an account against another corporation also insol-

vent, is not vested with the right to prove against the estate in bankruptcy of a stockholder in the debtor corporation a claim for an indebtedness on his stock subscription.

In Bankruptcy. On review of referee's report on the claim of Frank M. Fargo against the individual estate of George Watkinson. The following is the opinion of Theodore M. Etting, referee:

The ground upon which this claim is based is payment of the debts of the Mutual Rubber Company, by the claimant and others in whose behalf he claims, under an understanding and agreement with George Watkinson, one of the above-named bankrupts, to pay back to the claimant, for his benefit and that of his associates, one-half of the amount which they advanced and paid; the debts in question being due by the company on winding up its business. The claimant, his associates, and Watkinson were subscribers to the entire capital stock of the company, upon which nothing had been paid, and were liable pro rata. The amount of Watkinson's liability was $99,000. The amount due by the claimant and his associates was $100,100; each of them being liable for one-fifth of that amount. In computing the amount claimed to be due, Watkinson is charged with one-half of the amount advanced. The date of payment as given is January 1, 1889, and the amount paid as $52,000. Watkinson is credited with certain sums as payments on account, which diminish the amount of his debt, and which, if they should be regarded as payments on account, toll the statute of limitations. The claim is filed by the claimant as trustee for himself and his associates. In the course of testimony taken on a petition for re-examination of the claim it appeared that the true date of payment was January 1, 1893, and the claim has been accordingly reduced. The amount now claimed is $18,873.75, with interest from December 26, 1901, to date of payment.

The claim is against the individual estate of George Watkinson. The only question, however, passed upon by the referee is whether or not the claim as presented is a lawful claim, entitled to be proved. If this question should upon appeal be answered in favor of the claimant, it can be determined hereafter whether or not he is entitled to be paid in full out of the proceeds of sale of the real estate. Allowance of the claim is opposed by the trustee on the ground (1) that Watkinson is not indebted to Frank M. Fargo, the claimant, or to C. H. Fargo & Co.; (2) that, if any indebtedness exists, it is an indebtedness to the rubber company; (3) that the debt is barred by the statute of limitations. No objection to the allowance of the claim as presented was made by any creditor or by the trustee. The objections above referred to followed the allowance of the claim. The trustee also filed a petition for re-examination of the claim and for the examination of the claimant upon the allowance of which the claimant, as well as George Watkinson, Samuel N. Fargo, and E. A. Fargo were examined. The claim now comes before me for re-examination with such light as may be afforded by the testimony. Whilst no claim has been filed by the Mutual Rubber Company, and whilst the only claim filed, growing out of the payment of Watkinson's share of the debts of the rubber company, is the claim now under consideration, a decision of the claimant's rights cannot be arrived at without a knowledge of the history of the rubber company, and an understanding of the circumstances surrounding the payments of its debts.

The company was, I find, chartered in 1887 under the laws of Illinois. The subscribers to its capital stock were George Watkinson, C. H. Fargo, C. E. Fargo, S. N. Fargo, and Frank M. Fargo. The authorized capital stock was $200,000, divided into 2,000 shares of $100 each. Watkinson subscribed to 999 shares. The remaining 1,001 shares were subscribed for by the persons above named, each of whom, with the exception of Frank M. Fargo, who subscribed to 201 shares, subscribed to 200 shares. Under the terms of their subscription the subscribers severally agreed to pay the company $100 for each share of stock. The company began business January 1, 1888. The business in which it engaged was that of selling a certain line of rubber goods for Watkinson, who was then in business in New Haven, and for the firm of C. H.

Fargo & Co., then in business in Chicago. Frank M. Fargo, the claimant, was the secretary and treasurer of the company. Its financial management was in the hands of C. H. Fargo and George Watkinson. Watkinson was also general manager of the company. The company began business without any capital and on a loan effected by the sale or discount of its paper indorsed by the firm of C. H. Fargo & Co. After the company had been in business for about six months the enterprise was abandoned and its assets were taken over by the firm of C. H. Fargo & Co. in liquidation, before any subscriber to the capital stock had paid anything on account of his subscription. The winding up of the company remained in the hands of the firm of C. H. Fargo & Co. from July of 1888 until January 1, 1890, on and after which date the firm of C. H. Fargo & Co. was succeeded by C. H. Fargo & Co., a corporation organized for the express purpose of taking over the business of the firm of C. H. Fargo & Co., and the shares of which were, when originally issued, divided between the persons theretofore carrying on business as a firm in the proportion of their respective interests in the firm. The corporation of C. H. Fargo & Co., upon coming into existence, acquired as a purchaser the book accounts of the firm of C. H. Fargo & Co., and whilst there was no express assignment of this or of any particular debt there is no evidence which indicates that the debt in question was excepted or intended to be excepted. The corporation of C. H. Fargo & Co. took over the assets of the firm. It had no other capital, and amongst the assets thus taken over was the liability of the Mutual Rubber Company to the firm for money advanced in excess of receipts, the amount of which as of January 1, 1890, I am unable to state definitely, because neither the books of the rubber company, of the firm of C. H. Fargo & Co., or of the corporation of C. H. Fargo & Co. are in existence, and no evidence which supplies the want arising from the absence of the books has been produced.

No evidence has been presented showing that the assets were taken over under any agreement or understanding with Watkinson, or that there was then any agreement with him as to the repayment of money advanced or paid out, nor is there any evidence that a call was made on the subscribing stockholders for the payment of anything on account of their subscriptions, or that a meeting of the stockholders of the rubber company was held for that purpose between July of 1888 and January, 1890. There is evidence, however, that on January 1, 1893, the corporation of C. H. Fargo & Co. had arrived at an ascertainment of the amount required for the payment of the creditors whose debts had not theretofore been paid, and that some time thereafter Watkinson received notice of a meeting of the rubber company. The purpose of this meeting is not disclosed in the correspondence or in the testimony, but it does appear that Watkinson in writing to Frank M. Fargo on April 21, 1893, said in substance that he regretted that he would be unable to attend the Mutual Rubber Company's meeting, asked what his share of the loss was, said he would accept Fargo's estimate, and pay before long. In a letter to Fargo, under date of February 1, 1894, Watkinson further says: "I received your previous letter in due time. My idea in regard to the Mutual loss is to pay my share of it—that is, one-half—as soon as I can." These two letters contain the only evidence of any agreement between Watkinson and Fargo with respect to the repayment of the money advanced. I am unable to see how this correspondence can be regarded as evidence of an agreement or understanding with Watkinson to repay to Frank M. Fargo for his benefit and for the benefit of his associates the money which they had advanced. In the first place, they had not as individuals advanced any money. Whatever money had been advanced by the firm of C. H. Fargo & Co. had ceased to be a debt due the firm and was at the date in question a debt due C. H. Fargo & Co., the corporation, and was carried on the books of that corporation, not as the debt of Watkinson, but as the debt of the rubber company. Fargo was treasurer of both companies. The only Mutual Rubber Company asset not yet exhausted was the liability of its shareholders to the company under the terms of their subscription agreement, the amount of which, if collectible, was sufficient to pay outstanding debts, whether due to strangers or to the corporation of C. H. Fargo & Co. A meeting of the

rubber company was held, of which Watkinson was apprised, presumably by Fargo, and the correspondence must, I think, be read and considered with these thoughts in mind. To whom the money was to be paid is not stated in the correspondence. To whom was it due, and, when part payment was made pursuant to the above purpose, to whom was the money paid? By the terms of his subscription Watkinson was liable to the rubber company. When part payment was made pursuant to the above promise, it was made by checks drawn to the order of the rubber company which were indorsed over by that company to the Fargo corporation and applied by the Fargo corporation, not by giving Watkinson credit, but by diminishing in each case as the checks were received the amount of the rubber company's indebtedness to C. H. Fargo & Co., the corporation. The debts of the rubber company remaining unpaid as of January 1, 1893, including an indebtedness of $9,297.58 due the firm of C. H. Fargo & Co., were paid by C. H. Fargo & Co., the corporation, before the close of 1893. The debts of the rubber company, over and above the amounts received in liquidation, were $52,768.67. This indebtedness, with the exception of a debt of $1,886.79 due Watkinson by the company, was assumed and paid by C. H. Fargo & Co., the corporation. The amount due by Watkinson and others as subscribers to the capital stock of the company was an asset applicable to the payment of the creditors' debts, and Watkinson was obligated to pay to the corporation one-half of the amount due as of January 1, 1893. The only portion of this payment made by him is $12,000. There has, therefore, been a loss to the corporation of C. H. Fargo & Co. by reason of Watkinson's failure to pay his indebtedness in full. Apart from the payment of $12,000 by Watkinson, the entire loss has fallen on the corporation of C. H. Fargo & Co. By 1893 Frank M. Fargo and his brothers had become the owners of the entire capital stock of the Fargo corporation, but, even though this be true, a debt due to the corporation would not be due to its stockholders, nor would they have any right to recover in their own behalf, on a corporate cause of action. Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131.

If the partnership is entitled to be paid, the claim should have been filed on behalf of the firm, and Samuel N. Fargo should be included in the distribution. If the corporation of C. H. Fargo & Co. is entitled to be paid, then the claim should have been filed by the receiver of that corporation, and distribution made amongst its creditors. But, apart from the reason before stated, there can be no recovery as against the bankrupt estate, because the debt, to whomsoever due, is barred by the statute of limitations. In the claim filed Watkinson is credited with certain payments which have not been previously referred to, and which, if properly allowable as payments on account, would toll the statute. The first is a note sent to Frank M. Fargo by Watkinson for $898 in February of 1899. Fargo, who was Watkinson's son-in-law, after the failure of the Fargo corporation moved to New York and went into business there on his own account. The evidence is that the note in question was sent to Fargo by Watkinson for the purpose of enabling him to pay one of his own creditors, and that it was used by him for that purpose. The second credit allowed Watkinson in the claim is for $4,000 given him in cash by Irving Watkinson, his brother-in-law, by directions of George Watkinson, his father-in-law, a week before the filing of the petition in bankruptcy.

The evidence as to what was said and done on the latter occasion as given by Fargo is that on December 22d, or thereabouts (he being at the time in the employ of the bankrupt firm), was told by Irving Watkinson that "there was about to be trouble, which he understood to mean business trouble, and that Mr. Watkinson would see that he had some cash." A few days thereafter Irving Watkinson give him $4,000 in cash. The money thus given was, according to Fargo's testimony, used by him for living expenses. The bankrupt was called as a witness for the claimant. He does not testify that anything was said by him, at the time, to designate upon what account the note was sent or the money given to Fargo, but he does say in positive terms, in answer to the following question put to him by counsel for claimant: "Upon what account was the note and the $4,000 paid?"—that

both were paid on account of his indebtedness to the rubber company, and it also is true that Fargo in the course of his evidence says that this note was "simply an amount to apply on that claim." But Fargo's testimony on this point is not, I think, material, and Watkinson's testimony was not given until after the expiration of the statutory period, and he does not pretend to say that there was any identification of the debt made by him at the time. Becker v. Oliver, 111 Fed. 672, 49 C. C. A. 533; Rosencrance v. Johnson, 191 Pa. 520, 43 Atl. 360. It further appears from the testimony of the claimant that the last payment made by Fargo to the Mutual Rubber Company was made prior to the insolvency of the Fargo corporation, and that no endeavor was made after the failure of that corporation to collect the amount due by Watkinson, notwithstanding the fact that the collection of Watkinson's indebtedness had been placed in his hands. No credit was given to Watkinson, or to the Mutual Rubber Company, for the payments referred to or either of them, and the testimony of E. A. Fargo, the claimant's brother, shows that he never knew of the payments and that they were not accounted for by Frank M. Fargo.

The rule with respect to part payments is that, in order to give the act the effect of a new promise, the payment must be on account of the debt in suit. The debt must be identified by the debtor at the time of payment, and payment must be made to the creditor or his known agent under circumstances which would warrant a finding as a question of fact that the debtor intended to thereby and then recognize the debt as existing and was willing to pay it. Rosencrance v. Johnson, 191 Pa. 520, 43 Atl. 360; Becker v. Oliver, 111 Fed. 672, 49 C. C. A. 533; Kunkel v. Kolb, 6 Wkly. Notes Cas. (Pa.) 48; Lowrey v. Robinson, 141 Pa. 189, 21 Atl. 513; Coleman v. Forbes, 22 Pa. 156, 60 Am. Dec. 75. The date of the last payment made to the Mutual Rubber Company was May 31, 1895, and, as six years and over had elapsed when the petition in bankruptcy was filed, the debt, to whomsoever it was due, is barred. I should, perhaps, add that it appears from the testimony that the books of the Fargo corporation were purchased from the receiver of that company at public sale by the claimant and his brother. Whilst this circumstance has been referred to in the argument, I do not understand it to be contended that the claim should be allowed on this ground. The admitted facts are that Watkinson's name does not appear on the books of the Fargo corporation. That corporation apparently never considered that it had any claim against him apart from its books. In each instance of payment made by Watkinson the checks, though sent under cover to Frank M. Fargo, were drawn to the order of the rubber company, receipts for the amounts paid were sent him by Frank M. Fargo as treasurer of the rubber company, not as treasurer of the Fargo corporation, and the money paid was when and as received entered to the credit of the rubber company in account with the Fargo corporation, and not to the credit of Watkinson. The claimant, if entitled to recover at all, must recover on his pleadings. He could not in any event recover on evidence showing a different cause of action. The claim has not been amended, nor would an amendment of this nature be allowed after the expiration of a year subsequent to the bankruptcy. In re Lansaw, 9 Am. Bankr. Rep. 167, 118 Fed. 365; In re Moebius, 8 Am. Bankr. Rep. 590, 116 Fed. 47.

For the reasons above stated, the exceptions are sustained, and the claim disallowed.

Greenwald & Mayer, for trustee.
E. O. Michener, for claimant.

HOLLAND, District Judge. The evidence, in our opinion, amply sustains the referee in his findings of facts, upon which he was warranted in dismissing the claim. For the reasons given in his opinion, sent up with the papers on the re-view, his action in the matter is affirmed.

In re A. F. HARDIE & CO.

(District Court, W. D. Texas, San Antonio Division. February 23, 1906.)

No. 345.

BANKRUPTCY—RIGHT TO DISCHARGE—FALSE STATEMENT BY PARTNER.

A materially false statement in writing made by a partner in the ordinary course of business of the partnership in buying merchandise, for the purpose of obtaining goods on credit and upon which they were obtained by the firm, effects all the partners and debars another partner from the right to a discharge in bankruptcy 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], although he had no knowledge of the fraud.

In Bankruptcy. On application for discharge.

On May 15, 1905, the firm of A. F. Hardie & Co. and the individual members thereof, to wit, Alva Finley Hardie, his son, James Mallory Hardie, and Max Kaliski, were, upon the petition of creditors, adjudged bankrupt. An application for discharge was filed by the members of the firm on the 27th of October following. Opposition to the discharge having been filed by the Swofford Bros. Dry Goods Company, two of the partners, A. F. Hardie and Kaliski withdrew their prayer for discharge, leaving the application to stand in behalf of J. M. Hardie alone. The principal ground of opposition urged by the Swofford Bros. Dry Goods Company was the following: "That on, to wit, the 13th day of February, 1905, the said firm made and delivered to the said Swofford Bros. Dry Goods Company, a statement in writing materially false respecting the condition of the business of the said firm. By the said statement it appears that the said firm had assets of the value of $155,116 and liabilities of $65,500. Said statement further shows that the said A. F. Hardie had in real estate and real estate notes, $60,000. The said Swofford Bros. Dry Goods Company shows that the said statement was absolutely false in this: That the said A. F. Hardie did not have real estate or real estate notes of the value of $60,000, or anything approximating that amount. That the value of the assets of the said firm did not exceed $60,000 and that the liabilities of the said firm were approximately $100,000. That while the said statement shows the said firm to be worth, over and above all liabilities, the sum of $90,000, still in truth and in fact the said firm was then insolvent. The said statement was made by the said firm to the Swofford Bros. Dry Goods Company for the purpose of inducing the said Swofford Bros. to sell to the said A. F. Hardie & Co. goods, wares, and merchandise on credit, and that they relied upon the truth of the said statement and did sell to the said A. F. Hardie & Co. goods, wares, and merchandise aggregating the sum of $1,500 and upward, which said goods, wares, and merchandise have never been paid for." After taking proofs the referee found the facts, substantially, as set forth in the specification of opposition referred to, and made this additional finding: "I find that said statement was made by Alva Finley Hardie, and without the knowledge of said James Mallory Hardie, but at that time James Mallory Hardie was a member of the aforesaid partnership and bound by its statements issued as aforesaid." It is clearly shown by the record that, after A. F. Hardie made the statement, the Swofford Bros. Dry Goods Company shipped merchandise to the firm of A. F. Hardie & Co. at San Antonio, amounting in value to about $1,300, and that the merchandise was received by the firm and commingled with the stock on hand.

Gordon Bullitt and Mason Williams, for James Mallory Hardie, bankrupt.

Crawford & Crawford, for opposing creditors.

MAXEY, District Judge (after stating the facts). Upon the subject of the discharge of a bankrupt it is provided, among other things, by the fourteenth section of the bankruptcy act (Act July 1, 1898. c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended by the act of Congress approved February 5, 1903 (32 Stat. 797, c. 487 [U. S. Comp. St. Supp. 1905, p. 684]), as follows:

"The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has * * * (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

That the false statement, made by A. F. Hardie to the Swofford Bros. Dry Goods Company, was material and had the effect of deceiving the latter, are conclusions readily deducible from the proof, and that the deceit thus practiced operated as a fraud upon the dry goods company will scarcely be controverted. The only question of law to be determined is whether the fraud, thus committed by A. F. Hardie, may be interposed as a bar to the discharge of J. M. Hardie, who, it is conceded, did not participate in the wrongful act and had no knowledge of its perpetration. It is said by Mr. Parsons, in his work on Partnership, that:

"Partners are liable in solido for the tort of one, if that tort were committed by him as a partner, and in the course of the business of the partnership. This principle is frequently illustrated by cases in which a partnership is held liable for injury caused to third persons by their having acted upon the false and deceitful representations made to them by one partner." Parsons, Part. (3d Ed.) p. 163.

In Castle v. Bullard, 23 How. 188, 189, 16 L. Ed. 424, the following language was used by the Supreme Court:

"Judge Story says, in his valuable work on Partnerships, that torts may arise in the course of the business of the partnership for which all the members of the firm will be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. Story on Part. § 166; Collier on Part. (Am. Ed. 1848) §§ 445, 457; Nicoll v. Glennie, 1 Maule & Selw. 568. In precise accordance with this view of the law, it was said, and well said, by the court, in Olmsted v. Hotailing, 1 Hill (N. Y.) 318, that it does not lie with one to claim property through the fraudulent act of another, whether partner or agent, without being affected by that act the same as if it were his own; and we think the same principle must apply in a case like the present, where a firm doing business as commission merchants have received the fruits of the fraud in the commissions earned for transacting the business."

The principle was stated as follows by Mr. Justice Harlan, speaking for the Supreme Court in Strang v. Bradner, 114 U. S. 561, 562, 5 Sup. Ct. 1038, 1041, 29 L. Ed. 248:

"Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership. And if, in the conduct

of partnership business, and with reference thereto, one partner makes false or fraudulent misrepresentations of fact to the injury of innocent persons who deal with him as representing the firm, and without notice of any limitations upon his general authority, his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge. This is especially so when, as in the case before us, the partners, who were not themselves guilty of wrong, received and appropriated the fruits of the fraudulent conduct of their associate in business. Stockwell v. United States, 13 Wall. 531, 547, 548, 20 L. Ed. 491; Story on Partnership, §§ 1, 102, 103, 107, 108, 166, 168; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528; Blight's Heirs v. Tobin, 7 T. B. Mon. (Ky.) 612, 18 Am. Dec. 219; Durant v. Rogers, 87 Ill. 508; Collyer on Partnership (Wood's Ed.) §§ 446, 449, 450; Lindley on Partnership (Ewell's Ed.) § 302."

In Strang v. Bradner, the principle was applied in holding a discharge insufficient to protect innocent partners from a debt fraudulently incurred by their copartners. See Coll. Bankr. (5th Ed.) 210, 211.

While the cases cited do not decide the very question involved in the present controversy, they nevertheless distinctly hold that a fraud committed by one partner in the course of the partnership business renders the firm pecuniarily liable to the aggrieved party for the wrongful act of the offending member. In the case before the court it is shown by the record that A. F. Hardie was the financial agent of the firm and one of its buyers; that the false statement was made by him in the course of the partnership business and for the benefit of the firm, and that the firm actually received and appropriated the fruits of the fraudulent transaction. If, under the facts stated, the law would impute the fraud of the delinquent partner to innocent members of the partnership to the extent of imposing upon the firm a pecuniary liability, no sound reason is perceived why the principle should not be applied to the present proceeding by refusing a discharge to a member not assenting to the fraud. The court is of the opinion that the principle is applicable to both cases, and hence that the prayer of J. M. Hardie for a discharge should be denied. The attorneys of the applicant insist that a discharge should be granted upon the authority of In re Hyman (D. C.) 97 Fed. 195, In re Schultz (D. C.) 109 Fed. 264, and In re Blalock (D. C.) 118 Fed. 679. The case last cited scarcely seems to the court to be pertinent. Judge Brown, of the Southern district of New York, decided the two cases of In re Schultz, supra, and In re Meyers (D. C.) 105 Fed. 353. And in expressing a doubt as to the correctness of the ruling of In re Hyman, supra, he employed the following language in the case of In re Meyers:

"As respects the destruction or concealment of books of account, 'with fraudulent intent to conceal the true financial condition and in contemplation of bankruptcy,' under subdivision 'b' (2) of section 14, if the question were before me de novo, I should be inclined to consider, as no 'offense' or penal element exists in the requirements of this subdivision, that the principal is responsible, as respects a discharge in bankruptcy, for the fraudulent conduct of the agent to whom the whole business has been committed, as in civil cases generally, where the fraud has been committed for the principal's benefit. But as that point seems to have been involved in the case last

cited, and a contrary decision was then made by Judge Thomas sitting in this district, it will be followed unless otherwise ruled upon appeal." 105 Fed. 354.

In the Schultz Case he further said:

"If in any case fraud can be similarly imputed to an innocent partner on account of the fraud of his copartner or other agent, as respects the false or improper keeping of books of account (see In re Meyers (D. C.) 105 Fed. 353, 354), it can only be in cases where the fraudulent entries or omissions have reference to partnership transactions so as to fall within the general scope of the partner's or agent's authority. The frauds in the bookkeeping in this case related to transactions of a wholly different character, in which the partner was defrauding his copartner, as well as his creditors, in reference to transactions wholly outside of the partnership authority." 109 Fed. 265.

The distinction between the Case of Schultz and the one before the court is obvious, since here, as has been already shown, the false statement made by A. F. Hardie, upon the faith of which credit was extended by the dry goods company, was an act committed, for the benefit of the firm, by one partner in the regular course of the partnership business.

The prayer of the applicant, J. M. Hardie, for a discharge, will be denied.

THE ROBERT R. KIRKLAND.

(District Court, D. New Jersey. February 17, 1906.)

1. SHIPPING—OWNERSHIP OF VESSEL—EVIDENCE CONSIDERED.
   Evidence considered, and *held* not to sustain the claim of a respondent to the ownership of a vessel in controversy.

2. MARITIME LIEN—REPAIRS—RIGHT TO CONTRACT FOR.
   One of the respondents and another person were appointed agents to represent a number of parties who had joined in the purchase of the plant and vessels of a dredging company to be paid for in installments, with power to make the payments and receive and manage the property. The other respondent was a firm of which the first respondent was a member, and which was also one of the purchasers of the dredging property. *Held*, that the individual respondent had no power, as agent, to create a maritime lien for repairs in favor of the firm on one of the vessels purchased, and which had been delivered for the purchasers without the concurrence of his coagent, nor to create a lien for repairs thereon made at his own instance, under an unfounded claim of ownership in himself.

3. SHIPPING—SUIT TO RECOVER VESSEL—TITLE TO SUPPORT.
   The directors of a dredge owners' association, whose members had joined in the purchase of a dredging plant, appointed a committee, subject to the approval of the individual purchasers, to take title to the property purchased and manage and dispose of the same. Their action was ratified by the constituent members, and a bill of sale of the property, including the tug in controversy, was made to the committee and duly recorded. *Held*, that the committee thus vested with the legal title was authorized to maintain a suit in their own names to recover possession of the tug from one of the constituent owners which withheld possession of it without right.

In Admiralty. Suit for possession of a vessel.

Albert A. Wray, for libelants.

R. D. Benedict, for respondents Ralph G. Packard and Josiah S. Packard.

LANNING, District Judge. By the libel filed in this case Henry H. Petze, Charles H. Souther, and Charles W. Pusey allege that they are the true and legal owners of the steam tug Robert R. Kirkland, and that it is wrongfully withheld from them by Ralph G. Packard and Josiah S. Packard, upon an alleged claim of ownership thereof, or of some interest therein by reason of repairs of the tug alleged to have been made by them. The prayer of the libel is for a decree adjudging that the tug be delivered by the Packards to the libelants, and for general relief.

Ralph G. Packard has answered the libel, denying the ownership of the libelants, or that the tug is wrongfully withheld from the libelants, admitting possession by the firm of R. G. & J. S. Packard (composed of himself and his brother, Josiah S. Packard), and declaring that said firm held possession at the time of the filing of the libel by reason of a lien for repairs made by the firm to the tug. The answer further sets forth that he is the owner of the tug and claims title to it by reason of the following facts: That on October 12, 1892, a written agreement was made between the National Dredging Company of Wilmington, Del., party of the first part, and certain other parties in the agreement named, as parties of the second part, whereby the National Dredging Company agreed to sell the tug, with other property, to the parties of the second part; that by that agreement the respondent Ralph G. Packard and Louis Y. Schermerhorn were appointed agents and representatives of the parties of the second part, with power to make payments and to receive the property so agreed to be sold and bills of sale thereof; that, in accordance with that agreement, the tug was delivered to Ralph G. Packard and Louis Y. Schermerhorn; that thereafter, by a later agreement, the libelants were substituted as such agents in the place of Ralph G. Packard and Louis Y. Schermerhorn; that the libelants wrongfully secured from the National Dredging Company a bill of sale for the tug made out to them absolutely, and not as agents of the parties of the second part; that the bill of sale was not recorded in the New York custom house until July 19, 1898; that the libelants never had possession of the tug or exercised any ownership thereof, either in their own right or as agents of the parties of the second part, and never paid anything individually for the tug; that in the bill of sale procured by them it was wrongfully stated that the tug was transferred to them for a valuable consideration paid by them; that in the month of February, 1898, the tug was sold by the real owners thereof to the respondent Ralph G. Packard for the sum of $1,600; that thereafter Ralph G. Packard had possession of the tug, exercised ownership over her, and made improvements upon her; and that, since such sale, he has been the true and lawful owner thereof, and that the libelants have had no interest whatever therein. Another answer was filed by the firm of R. G. & J. S. Packard, in which they say that they are partners in business, and were in pos-

session of the tug at the time of the filing of the libel by virtue of a lien for repairs and work done by them upon her. They deny that the libelants were, at the time of filing the libel, the true and legal owners of the tug, or that she has been wrongfully withheld from the libelants by the respondents.

It will be observed that the pleadings present three questions for consideration: First, is the respondent Ralph G. Packard the true owner of the tug? Second, if not, has the firm of R. G. & J. S. Packard a right to hold her under a lien for repairs? And, third, if the respondent Ralph G. Packard has failed to establish his ownership of the tug, and if R. G. & J. S. Packard have failed to establish their right to the possession of the tug under a lien for repairs, have the libelants shown a title which gives them the right to take her out of the possession of the firm of R. G. & J. S. Packard?

By the proofs in the case it appears that on October 12, 1892, a written agreement was entered into between the National Dredging Company, of the first part, and 24 corporations, firms, and individuals described, as parties of the second part, by which the party of the first part agreed to sell to the parties of the second part, with good and sufficient bills of sale, its dredging plant on the Atlantic Coast, consisting of "all the dredges, tug, scows and water-scows named in the schedule hereto annexed, marked 'A,' and all dredging machinery, power, tools, duplicate parts and appliances, located or designed for use in and about the vessels and craft aforesaid, and all like property of every name and description belonging to said party of the first part and used or designed for use by it in connection with any of its plant on said Atlantic Coast," for the sum of $125,000, payable in installments as follows: $25,000 on execution of the agreement; $25,000 on January 2, 1893; $18,750 on July 2, 1893; $18,750 on January 2, 1894; $18,750 on July 2, 1894; and $18,750 on January 2, 1895. Provision was also made in the agreement for extending the last four payments of $18,750 each to January 2, 1896, and that after the second installment of $25,000 should be paid the party of the first part would deliver any of the dredges, tugs, scows, or water scows to the parties of the second part, or their assigns, "upon the payment of an amount equal to the schedule price thereof." It was further provided:

"That at any time after the execution of this agreement the party of the first part may tender the care and custody of any of said vessels to the agents or representatives of the parties of the second part, and that thereupon said parties of the second part shall take the care and custody thereof and maintain and protect the same at their own expense and risk and in condition for delivery, until the same are delivered to them pursuant to the terms of this agreement, and the purchase price of such of the plant as is so tendered shall bear interest from date of tender to time of payment therefor."

It was also provided:

"That title to and possession of all of said dredges, tug, scows and water-scows, and appurtenances, are to remain in said party of the first part until the last of said payments, except that said parties of the second part or their assigns may be given possession of any of said vessels as herein provided."

It was also provided:

"That Ralph G. Packard of New York and Louis Y. Schermerhorn of Philadelphia shall be the agents and representatives of the parties of the second part herein, with power to change or modify the terms or times of payment and to make payments and receive and accept tenders or deliveries of said plant and of bills of sale therefor, and all notices, demands, or other communications for said party of the first part to said parties of the second part in reference to the premises may be given, made, and addressed to Messrs. Packard and Schermerhorn at 31 Pine Street, New York."

Annexed to the agreement was a schedule, in which it appears that there was but one tug, the Robert R. Kirkland, and that she was valued at $10,000. About April, 1893, the tug was delivered to Packard and Schermerhorn. I think the delivery was made about this time because Ralph G. Packard testifies that it was delivered to him and Schermerhorn some six months after October 12, 1892, and Mr. Schermerhorn says that after the delivery to Messrs. Packard and Schermerhorn she was used by them for a season at Philadelphia under the direction of the American Dredging Company. It appears, as will presently be seen, that she was sent from Philadelphia to New York in January, 1894. I think, therefore, the delivery to Packard and Schermerhorn must have been made in the spring, and probably in April, of the year 1893. Nor do I think the delivery to them was made for the mere purpose of care and custody in accordance with the provision of the contract of October 12, 1892, concerning delivery to the agents of the parties of the second part for care and custody. Mr. Packard himself testifies that he, as trustee, asked Mr. George D. Barker, president of the National Dredging Company, for the delivery of the tug and several scows and one of the dredges to the purchasers for their use and benefit in any way that the purchasers might desire, or for the purpose of selling when they should find a purchaser. And the fact that after the delivery she was used, as he says, for a whole season or more in towing at Philadelphia, not for the business of the National Dredging Company, but under the direction of the American Dredging Company for the benefit of the parties of the second part, makes it reasonably clear that the delivery in April, 1893, was not for care and custody, but that it was a delivery to the parties of the second part under the agreement of sale, with title reserved in the party of the first part until payment should be made. Finding no further use for the tug at Philadelphia after the close of the season of 1893, and desiring to sell her for the benefit of the parties of the second part, Schermerhorn, on January 6, 1894, wrote from Philadelphia to Ralph G. Packard, who was in New York, that the tug would be ready to send to New York (where they thought they could more readily find a purchaser) as soon as a broken wheel could be replaced and the safety valve repaired. She reached New York before January 17, 1894, and on that day William J. Bradley, general superintendent and chief engineer of the American Dredging Company, wrote a letter from Philadelphia to Ralph G. Packard, in New York, stating that the vessel had a good bottom and was all right under water; that her valves were in fair order, but that the joint on her low-pressure cylinder, her circulating pump, and her

house, should be repaired; and that she ought to be painted, but that he did not think anything else needed to be done. When the vessel arrived at New York she was sent to the shipyard of R. G. & J. S. Packard, where repairs were made upon her by that firm. In April, 1895, a bill for repairs amounting to $1,204.39 was forwarded by R. G. & J. S. Packard to Mr. Schermerhorn. After deducting therefrom $42.87, at the request of Mr. Schermerhorn, for the reason that Mr. Schermerhorn thought the Packards should not make any profit out of the work, the balance, being $1,161.52, was paid by Mr. Schermerhorn, who seems to have acted as treasurer for the two agents. This payment was made May 6, 1895. The Packards continued their repairs upon the vessel from April 17, 1895, down to October 26th of that year, at an additional expense of $680.36. After these repairs had been made, probably immediately after, for Mr. Packard says he thinks it was in October, 1895, the tug was taken out to sea for towing purposes. On her return, within a day or two, her crew refused to go again with her because, as they said, "she was too low in the water and did not pull strong enough for that kind of work."

On December 4, 1895, it appears that the board of directors of the Atlantic & Gulf Coast Dredge Owners' Association, of which association the 24 members of the parties of the second part to the agreement of October 12, 1892, were members, and who seem to have had conferred upon them the authority, to some extent, of managing the business of the members of the association, adopted a vote that Charles H. Souther of Boston, and Henry H. Petze of New York, and Charles W. Pusey of Wilmington, should be constituted a committee of the board to settle and dispose of the contract between the members of the association and the National Dredging Company, dated October 12, 1892, and all matters growing out of the contract. That:

"Said committee shall have power to accept delivery of, and recover and take the legal title to, and possession of, all and singular the plants and property acquired or to be acquired by or in behalf of said members of this association under said contract, and shall sell and dispose of the same as fast as they can do so reasonably and without too great sacrifice, and in the meantime to care for, protect, and preserve said property or any part thereof by leasing, repairing, and insuring the same or otherwise, all in accordance with their best judgment and discretion, and to collect and receive all proceeds and income arising therefrom, and, after deducting the payments and expenditures herein authorized, to distribute the same to and among the members of the parties of the second part to the contract above referred to, pro rata, in proportion to their respective payments or contributions under said contract."

The vote further was to the effect that the committee might require from the members of the parties of the second part to the contract of October 12, 1892, who should concur in the vote of the board of directors, assignments of their respective rights, title, and interests under said contract, with powers of attorney, for which the committee were directed to issue to the assignors, respectively, proper certificates as evidence of their interest in the trust. The vote also provided that:

"All unexhausted powers and duties heretofore conferred upon Ralph G. Packard and Louis Y. Schermerhorn, under the contract aforesaid, are hereby, with their consent, terminated, and the same are hereby conferred upon and vested in said committee and its successors, all in so far as such termination and substitution may be made by consent of parties in interest thereto, and without prejudice to such rights and interests, if any, as cannot be enforced otherwise than through or in the names of said Packard and Schermerhorn; subject to which reservations only said committee, to wit, said Souther, Petze and Pusey, and their successors in said trust hereby created, are hereby constituted and appointed, by every power this board of directors thereunto enabling, the attorneys irrevocable of this association in so far as interested and the members thereof parties to the contract aforesaid, to do all acts and things in, toward or about the accomplishment of the objects herein committed to them and to that end to employ counsel," etc.

The vote also provided that:

"This vote shall be submitted to the members of said party of the second part to the contract aforesaid, for their ratification, adoption and confirmation, and, except in behalf of such members so approving, shall not be construed as any assumption of power, authority or interest by this association, or the board of directors thereof, to represent others in the premises."

The above vote of the board of directors was ratified unconditionally by 14 of the 24 parties of the second part to the contract of October 12, 1892. The firm of R. G. & J. S. Packard, one of the 24 parties of the second part, signed the ratification conditionally, as follows:

"We concur in foregoing agreement, and agree to payment of any beyond our account against the National Dredging Company. [Signed] R. G. & J. S. Packard."

In the spring of 1896 the above-mentioned bill for repairs, made by R. G. & J. S. Packard between April 17, and October 26, 1895, and amounting to $680.36, was presented to Schermerhorn for payment and returned by him with the statement that he had no funds out of which to make payment. Schermerhorn says that he had no knowledge of these repairs having been made prior to the time when the bill was presented to him, and that he had no funds on hand with which to pay the bill, because in the fall of 1895 (we have learned that it was on December 4, 1895) new trustees (the libelants in this case) had been appointed in the place of Messrs. Packard and Schermerhorn, and that Messrs. Packard and Schermerhorn had, before the bill was presented, turned over to the new trustees all the funds they had on hand. On July 6, 1896, the proofs show that the last installment of the consideration money of $125,000 was paid by the parties of the second part to the National Dredging Company, and on July 13, 1896, the National Dredging Company executed and delivered to the libelants a bill of sale for the tug for an expressed consideration of $10,000. The bill of sale was to Charles H. Souther, Henry H. Petze, and Charles W. Pusey in their individual names. It was recorded in the custom house at New York on July 19, 1898. In the early part of 1898, and probably in the month of February, nearly two years after the bill of sale had been executed and delivered to the libelants, there was a meeting of some of the members of the board of directors of the dredge owners' association, which, as I understand the proofs, was held in Baltimore. Mr. Petze, one of the libelants,

acting as a member of the committee under the authority of the agreement of December 4, 1895, says that he had found a purchaser for the tug and had called together several of the interested parties near at hand for advice as to whether the sale should be made. Packard says that Mr. Petze reported at this meeting that he had an offer of $800 for the tug, and asked directions as to what should be done about the offer. Packard says that he advised against accepting it, and stated that he himself was willing to give $1,600 for the tug, and he declares "that the board at once passed a resolution selling the boat to me at $1,600," and that he agreed to the sale. Some time after the Baltimore meeting (Mr. Packard says in April or May of 1898) it appears that a meeting was held at 31 Pine street, New York, at which were present Mr. R. G. Packard, Mr. Petze, Mr. Loomis, and Mr. P. S. Ross, and that Mr. Petze reported at this meeting that he had an offer of $3,500 for the tug, and that he and the others desired to know whether Packard would return the tug to the association and let them take charge of the sale and get the profits resulting from such sale. Packard says he consented, on condition that they would pay his firm the money they had expended on the boat. He says that Mr. Petze expressed regret that the Packards had spent so much money on her, and then raised the question of title to the vessel, when he (Packard) declared that he would guaranty the title to the prospective purchaser, if Mr. Petze desired it. Packard says he did not have the bills for repairs with him at that time, but that he promised to send them to Mr. Petze later. Notwithstanding Mr. Packard's alleged waiver of his right to the tug made at the meeting in April or May, 1898, and his promise to send Mr. Petze the bills of the firm of R. G. & J. S. Packard for repairs, which at that time only amounted to $680.36, that firm, according to their proofs, continued to make other repairs which between May 14 and June 30, 1898, amounted to $717.46, and sent no bills to Mr. Petze until June 29 or 30, 1898, when the two bills, one for $680.36 and the other for $717.46, were sent. Indeed, all the items in the later bill, except the first three, amounting to $18, are for improvements alleged to have been made between June 17 and 30, 1898. On receipt of the bills by Mr. Petze a dispute arose concerning the delivery of the tug; Packard refusing to deliver it, and Petze insisting upon the right of the libelants to possession. No agreement being reached, the libelants had their bill of sale recorded in the custom house at New York, on July 19, 1898, the firm of R. G. & J. S. Packard continued to put other improvements on the tug between July 1st and August 6th to the amount of $150.46, and on August 5, 1898, the libel in this case was filed.

The above rather extended statement of the facts in the case shows clearly, I think, that the answer of Ralph G. Packard setting up his ownership of the tug is not supported by the proofs. At the time of the alleged sale to him, namely, in February, 1898, the alleged debt due to his firm was only $680.36. He says the sale to him was for $1,600, but he does not claim that he made any payment whatever. He never secured or applied for a bill of sale. He does not produce

any copy of the resolution of the board of directors of the dredge owners' association, by which he says the sale was made. Nor is there any proof that that board had authority to sell the tug. The legal title to the tug had been vested, by the bill of sale, in Petze, Souther, and Pusey, although the beneficial ownership was in the parties for whom they were agents or trustees. By the vote of the board on December 4, 1895, ratified by the firm of R. G. & J. S. Packard, Petze, Souther, and Pusey, and not that board, were empowered to make sales of the property purchased under the contract of October 12, 1892. Even if the board did at its meeting in February, 1898, adopt a resolution to sell the tug to Packard for $1,600, it was a nugatory act. Besides, by his letter of June 30, 1898, to Mr. Petze, Packard said that, "without some distinct understanding as to payment of bills on 'Kirkland,' I shall hold the boat or libel her." His position as a libelant against the boat, on account of bills incurred in repairing her, is inconsistent with the idea of ownership. The conclusion reached is that he has failed to establish the claim set up in his answer.

The second question relates to the claim of the firm of R. G. & J. S. Packard. That claim is that they are entitled to retain possession of the vessel because of a lien for repairs. It will be observed that the bill of $680.36 for repairs made by the firm between April 17 and October 26, 1895, was within the period that Ralph G. Packard and Louis Y. Schermerhorn were the agents or representatives of the parties of the second part mentioned in the contract of October 12, 1892. Ralph G. Packard does not claim that he ever consulted Mr. Schermerhorn concerning the need for these repairs, and Schermerhorn denies that any such consultation was ever had, or that he had any knowledge of the making of the repairs until the bill for $680.36 was sent to him in the spring of 1896. In view of the fact that after the vessel had arrived at New York the Messrs. Packard were paid the sum of $1,161.52 for repairs, it is my opinion that they should not have continued to make the other repairs between April 17 and October 26, 1895, without the consent of Schermerhorn as well as of R. G. Packard. The firm of R. G. & J. S. Packard were one of the parties of the second part who executed the agreement of October 12, 1892. They knew what powers had been given to R. G. Packard and Schermerhorn. They were therefore bound to secure from Schermerhorn, as well as from R. G. Packard, authority for the repairs. They could not have a lien upon the vessel for repairs that had not been authorized by the two agents of the parties of the second part. R. G. Packard himself admits that the delivery of the vessel to him and Schermerhorn in April, 1893, was for the use of the parties of the second part mentioned in the agreement of October 12, 1892. He therefore knew, or was bound to know, that he could not, without the consent of his co-trustee, authorize his firm to repair the tug in any such manner as to give to that firm a maritime lien upon her.

So, too, concerning the other bills for repairs amounting to $717.46 and $150.46. Ralph G. Packard does not pretend that these re-

pairs were made with the consent of Mr. Petze, Mr. Souther, or Mr. Pusey, the new agents or representatives of the parties of the second part, or even of Mr. Schermerhorn. On the contrary, he claims that these repairs were made by the firm of R. G. & J. S. Packard after he (R. G. Packard) had purchased the vessel in February, 1898. It is clear therefore that the circumstances under which the repairs from May 14 to August 6, 1898, were made could give no rise to a lien against the vessel. They were not made on the credit of the vessel. They were made on the authority of R. G. Packard, who was neither the owner of the vessel nor the agent of the owner. Nor was the vessel in such a condition as to justify such repairs without the consent of the owners or their agents. It follows that the claim to the right of possession, set up in the answer of the firm of R. G. & J. S. Packard, likewise fails for want of proper proof.

The last question is whether the libelants have shown their right to the possession of the vessel. As already stated, a bill of sale was executed to them by the National Dredging Company on July 13, 1896, within one week after the last payment to the National Dredging Company on account of the purchase price of $125,000 for its Atlantic Coast plant. Petze, Pusey, and Souther were all officers of companies who had signed the agreement of October 12, 1892, and the ratification of the vote of the board of directors of the Atlantic & Gulf Coast Dredge Owners' Association dated December 4, 1895. Petze admits that he and his associates, Souther and Pusey, acted as agents and representatives of the parties of the second part mentioned in the agreement of October 12, 1892. The title taken by them under the bill of sale was without doubt a mere legal title; beneficial ownership being in the parties of the second part mentioned in the agreement of October 12, 1892. Neither R. G. Packard nor the firm of R. G. & J. S. Packard were in a position to dispute the title of the libelants, for that firm, as already stated, signed the agreement of December 4, 1895, by which they ratified the vote of the board of directors of the dredge owners' association to the effect that:

"The said committee [that is, the libelants in this case] shall have power to accept delivery of and recover and take the legal title to and possession of all and singular the plants and property, acquired or to be acquired, by or in behalf of said members of this association under said contract."

The condition annexed to their signature did not affect the provision above quoted. The libelants therefore were expressly authorized by the contract of December 4, 1895, to take the legal title to the Kirkland, and they may assert that title as against any claim set up either by Ralph G. Packard or by R. G. & J. S. Packard.

The prayer of the libel will be granted, and a decree will be entered directing the steam tug Robert R. Kirkland to be delivered to the libelants, and that the respondents Ralph G. Packard and R. G. & J. S. Packard be required to pay costs.

BLAKELY v. FIDELITY MUT. LIFE INS. CO.

(Circuit Court, E. D. Pennsylvania. February 21, 1906.)

No. 65.

1. INSURANCE—ANTICIPATORY BREACH OF LIFE INSURANCE CONTRACT—ELECTION.
   In case an assessment life insurance company commits an anticipatory breach of its contract with a policy holder by making a higher assessment against his policy than is authorized by the contract, and by announcing its intention to continue to do so, the insured has his election to accept such action as a rescission of the contract and sue for the breach, or to refuse to rescind, and continue to treat the contract as in force; but such election, when once made, is final, and where he elects to keep the contract in force by tendering payment of the amount lawfully due thereon, he is concluded thereby, and cannot thereafter rescind on account of such breach.
2. SAME—ACTS CONSTITUTING BREACH—RIGHT OF RESCISSION.
   The fact of a difference of opinion between a policy holder in an assessment life insurance company and the officers of the company with respect to the construction of the contract, and that the officers were making assessments at a higher rate than warranted, but in accordance with the contract as they understood it, did not constitute an anticipatory breach by the company which entitled the policy holder to rescind.
3. SAME—RECOVERY OF ASSESSMENTS—INTEREST.
   An assessment life insurance company, which merely collects assessments from its policy holders, and disburses the same in payment of matured death claims, is not liable for interest on assessments paid in by a policy holder and recovered by him on a rescission of the contract.

At Law. On motion by defendant for judgment upon reserved point notwithstanding the verdict.

W. C. Blakely, G. H. Stein, and W. B. Linn, for plaintiff.
Ira J. Williams and Simpson & Brown, for defendant.

J. B. McPHERSON, District Judge. After the taking of evidence in this case had been finished, it was agreed by counsel that there were no disputed facts for the jury; whereupon a verdict was directed to be entered in favor of the plaintiff, with leave to the court to reduce the amount thereof as might thereafter seem proper, subject also to the customary reservation, whether there was any evidence to go to the jury in support of the plaintiff's claim. Under this convenient practice in the Pennsylvania courts, any question of law can now be considered and decided that affects the plaintiff's right to recover, either in whole or in part.

Some of the uncontroverted facts appear in the following extract from a brief that was prepared by the defendant's counsel for use upon an earlier motion made by the plaintiff for judgment for want of a sufficient affidavit of defense:

"The defendant was incorporated on December 2, 1878, under the act of assembly of the state of Pennsylvania, approved May 1, 1876, P. L. 53. Section 37 of that act provide as follows:

"'Section 37. Companies insuring lives on the plan of assessments upon surviving members may be organized in the same manner as provided in this act for the organization of mutual fire insurance companies, and the provisions of the act to which this is a supplement shall not apply to said

companies, and companies heretofore organized, if their business is transacted in accordance with the provisions of their respective charters, whether with or without capital stock, guarantee capital or accumulated reserve in lieu of capital stock: Provided, however, that each of said companies shall be required to exhibit an annual statement to the Insurance Department, which shall be published in the annual report of the Insurance Commissioner, of the amount, if any, of its capital stock, guarantee capital or accumulated reserve in lieu of capital stock, and also of all assets, assessments and liabilities, and to answer such interrogatories as the Insurance Commissioner may require in order to ascertain its character and condition. For this purpose the said Commissioner may at any time institute an examination of the affairs of any such company, as is provided in the case of mutual fire insurance companies by the act to which this is a supplement: Provided, also, that no part of such assessment upon surviving members shall be applied to any other purpose than the payment of death losses unless the amount intended for other purposes is specially stated in the notice of such assessment, and the object, or objects, for which it is intended. Provided, further, that all policies or certificates issued by said companies, shall state that the company issuing the same is not required by law to maintain the reserve which other life insurance companies are required by the act to which this is a supplement.'

"Defendant's charter * * * states the purpose of the defendant corporation to be as follows:

" 'Second. The class of insurance for the transaction of which it is constituted is to insure lives by assessment on the surviving members of the association.'

" 'Third. The plan or principle upon which the business is to be conducted is on the mutual or co-operative principle.'

"On or about December 11, 1879, application was made for a policy upon the plaintiff's life in defendant company. The application for membership contains the following:

" '* * * We do hereby jointly and severally agree with the association for the benefit of its members to pay the Guarantee Trust & Safe Deposit Company [its successors or legal representatives], trustee for Philadelphia county, state of Pennsylvania, our pro rata proportion according to the age of the insured and the amount of insurance, of all the death losses that occur among the members of the association [during the life of the applicant], provided always, that such pro rata mortality assessment shall not exceed the yearly per cent., named in section 2, article 9 of the association's by-laws, of the amount of insurance above mentioned.'

"On December 13, 1879, a certificate of membership was issued by defendant, reciting among other things that applicant has agreed to pay his annual premiums or dues * * * 'during his lifetime together with his proportion of mortality assessments as agreed and provided in his application,' and providing that the by-laws shall constitute, together with the application of the insured, a part of this contract in the same manner and to the same extent as if they were printed in the body of the policy; and that the association is not required by law to maintain any reserve.

"Article 9 of defendant's by-laws in force at that time, provides as follows:

" 'Sec. 1. For death claims, each member shall pay according to age and amount insured, his or her pro rata share of the mortality assessments.

" 'Sec. 2. The mortality assessments shall not exceed the yearly average of * * * 1½ per cent. between the ages of 45 and 50 years, to be known as class C * * * 2¼ per cent. at the age of 60 years, and until death, to be known as class F, on the amount of insurance held by each member. * * * If the membership commences at the ages and per cent. specified in * * * class C, ¼ to 2¼ per cent. shall be added.' "

Other relevant facts that were proved at the trial are these: the plaintiff was in his 48th year when the policy was issued upon his life, and therefore became a member of class C. He paid assessments

that were levied upon his policy for the payment of death losses from 1879 to 1902, inclusive, aggregating the sum of $2,141.25, the amount paid each year varying from $29.15 to $219; the latter sum having been paid in 1901. During the same period he paid $350 toward the expense account of the company—this sum, however, has no bearing upon the present controversy—and $375.38 toward the contingent fund. The sum paid into the contingent fund could have been used for the purchase of paid-up insurance, but in February 1891, the plaintiff, by a written agreement, waived his right to such a policy, and asked to have the accumulations of his portion of the fund applied to the reducing of his payments on account of the mortality assessments. This was done, and from 1891 to 1902, inclusive, the sum of $420.90 was thus applied.

The defendant's custom was to assess its policies for the payment of death losses three times a year; once for each period of four months. The amount of the assessment was obtained by taking the actuaries', or combined experience, table, which is recognized in Pennsylvania as the standard table (Act May 9, 1889, P. L. 150), calculating the amount with which each policy would be chargeable if the expected number of deaths had occurred according to the table, but assessing against the policy only such proportion of this amount as would meet the actually experienced, instead of the expected, mortality. The method of calculation varied in details during the life of the plaintiff's policy, but the earlier method seems to have been in his favor, and there was no variation to his hurt in the application of the rule just stated. In December, 1902, the plaintiff paid an assessment of $86.15, which was the last call for the year, and on March 2, 1903, he received a notice that the first mortality assessment for the new year was for $99.75, and would be due on April 1st. The plaintiff construed his contract to mean, that he could never be obliged to pay more than $212.50 in any one year; and that, after he had paid whatever smaller sum might be levied upon the policy during a given year, he could never be asked to pay any further sum upon account of his liability for that year. Upon the receipt of the notice in March, he assumed that the total assessments for the year would be at least three times as great as $99.75, and would therefore exceed the maximum amount for which he believed himself to be liable. An interview with the president of the defendant company followed, in which the plaintiff learned, apparently for the first time, that the defendant's construction of the contract differed materially from his own; the president's contention being that the plaintiff's liability was cumulative—meaning by this word, that, as he had agreed to pay his pro rata share of the mortality assessments according to his age and the amount of his policy, and as this share was not to exceed a specified "yearly average," such average could only be calculated by taking the life of the policy as the period during which the average was to be ascertained, and could not be properly calculated by restricting the computation to a single year. In the Company's view, a "yearly average" required of necessity, ex vi termini, that more years than one must be taken into account. Whatever

balance, therefore, of the "yearly average," calculated according to the company's construction of the contract had not been used in any preceding year was regarded by the company as an accumulated liability, which the plaintiff had expressly agreed to pay, and was therefore bound to pay whenever it should be needed and should be called in. The president, therefore, stated to the plaintiff, who was then 72 years old, that his liability would increase year by year as he grew older, because the risk of carrying his policy was growing; and that his assessments would probably go on increasing, the rate of increase being governed by the Pennsylvania mortality tables. The president recommended the plaintiff to substitute a policy on the ordinary, or "old line," plan, but the recommendation was not accepted. On April 1, 1903, the plaintiff, by the hands of an agent, tendered $86.15 to the defendant in payment of the assessment of $99.75, but the tender was refused. No further payment or offer of payment was ever made by the plaintiff, and the policy was accordingly forfeited for nonpayment of assessments. This suit was brought shortly after the plaintiff was notified of the forfeiture and proceeds upon the theory that the declarations of the president constituted a complete anticipatory breach of the contract, and justified the plaintiff in suing to recover the money that he had paid upon the policy. To use the language of the statement of claim, the breach complained of, upon which the plaintiff relies "absolutely and only," as the brief of his counsel informs us, is as follows:

"Whereupon, having received said notice of March 2, 1903, and shortly after receiving it, plaintiff called upon the defendant company, represented by its president, L. G. Fouse, in regard to the increase of said assessment. The defendant, speaking by said Fouse, informed the plaintiff, and the witness who accompanied him, that, according to the system and principles of insurance which the company had adopted, said assessment was correct and proper; and not only that the assessment was correct and proper, but that succeeding annual assessments which the defendant company would make upon the plaintiff would constantly increase, and that each assessment as made would be greater than the assessment immediately preceding it. Defendant, speaking by its president, Fouse, further informed plaintiff that in the course of ten years the assessment upon plaintiff according to the plan of assessment then being followed, would amount to a sum in the neighborhood of $1,000 per year, and would increase annually, and that it was the purpose and intention of the defendant to make such assessments so increasing in amount from year to year. Plaintiff protests that said course so outlined by the defendant is in violation of and in absolute disregard of his rights under his contract of membership, and grossly and iniquitously fraudulent and illegal."

These averments are somewhat stronger than the proof, but for present purposes they are substantially correct. The rules that determine the rights of a person insured, after the company has denounced or improperly forfeited his policy before it becomes due, have been so recently under consideration by this court, and by the Court of Appeals for the Third Circuit, in several cases, that little further discussion is necessary. Assuming for the moment, that the statements of the president amounted to a breach of the contract by anticipation, it seems to me that the dispute is ruled against the plaintiff by Supreme Council v. Lippincott, 134 Fed. 824, 67 C. C. A. 650,

69 L. R. A. 803. In that case, the court of appeals declared some of the principles that govern the subject to be as follows:

"Where one party to a contract to be performed in the future, before the time for performance arrives, refuses to perform, or declares his intention not to perform, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such renunciation, however, in and of itself does not work a rescission, for one party to a contract cannot by himself rescind it. But by making the wrongful renunciation he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect to such wrongful rescission. L. R. 16 Q. B. Div. 467. A declaration by the promisor, before the time for performance has arrived, of his intention not to perform, is not in itself, and unless acted on by the promisee, a breach of the contract. Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Id., 473. In Johnstone v. Milling, L. R. 16 Q. B. Div. 460, 467, Lord Esher, Master of the Rolls, said:

" 'The other party may adopt such renunciation of the contract by so acting upon it as, in effect, to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise. He must elect which course he will pursue.' "

Under these principles, if the president's declarations amounted to a breach by anticipation, the plaintiff was put to his election. He was at liberty to do either of two things, but he was bound to choose one of them. He might either assent to the breach and sue for the money already paid in, or he might refuse assent and keep the contract alive in order that his beneficiary might profit by its terms in the event of his death. He chose the latter alternative, and tendered so much of the premium as he believed to be due on April 1, 1903, thereby continuing the existence of the policy, at least until another assessment should fall due. If his tender was good, as he intended it to be, and if he had died before the next assessment fell due, his beneficiary would have had an unquestionable right to recover the full amount secured by the policy. And, as I understand Supreme Council v. Lippincott, this election by the plaintiff was final, as a further quotation from the opinion in that case will, I think, make clear. Quoting with approval from Clough v. Railway Co., L. R. 7 Exchr. 26, 34, the court of appeals goes on to say:

"Speaking of the right of election to avoid a sale of personalty, the court there said:

" 'And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And as is stated in Com. Dig. Election, c. 2, if a man once determines his election it shall be determined forever; and as is also stated in Com. Dig. Election, c. 1, the determination of a man's election shall be made by express words or by act. And consequently we agree with what seems to be the opinion of all the judges below that, if it can be shown that the London Pianoforte Company have at any time after knowledge of the fraud either by express words

or by unequivocal acts affirmed the contract, their election has been determined forever.'

"The principle of the finality of an election once made is applicable, we think, to the present case."

If I have correctly apprehended the scope of the decision just cited, it is a complete answer to the plaintiff's claim.

But I think there is a second answer, that is equally complete, namely, that no anticipatory breach whatever was committed. As it seems to me, the situation was simply this: The plaintiff and the defendant's president differed widely concerning the true construction of the by-law that formed a part of the contract, but neither of them intended to refuse to be bound by the contract, as he understood it. In this respect, the controversy is altogether different from the ordinary case to be found in the books, where the defendant has either denied the existence of any contract at all, or has flatly refused to go on with it. In my opinion, therefore, the plaintiff's suit was at least premature. Even on his own construction of the by-law, he was still bound to pay the difference between $212.50 and $86.50 during the year 1903; and until a larger sum than such difference was demanded from him by the defendant company, he would, upon his own showing, suffer no harm. But if harm should be threatened, if the defendant should demand more than the contract properly allowed to be charged, at least two courses were open to him, by either of which his rights could be effectively preserved. He might either have continued to tender whatever sum he believed to be due under the true construction of the contract; and, if the risk he was thus taking of being correct in his understanding of the by-law should be determined in his favor, his beneficiary would be entitled to recover the full amount of the policy at his death. The better course, however, would have been to avoid this hazard by an appeal to a court of equity setting forth the dispute that existed between himself and the company, pointing out the danger that he ran of having his policy forfeited if he should be mistaken in the proper construction of his contract, and asking the court to determine whether his view or the company's, was correct. I am, of course, outlining merely the substance of what such a bill in equity should contain. Instead, however, of taking either of these courses, he chose to consider the difference of opinion between himself and the president of the defendant company as a breach of the contract, and has brought the present suit upon that theory. It seems to me so clear that no anticipatory breach was committed that I forbear to discuss the subject further.

If, however, I should be wrong in my view of the law, and if the plaintiff should be entitled to recover something, a word or two may be added concerning the subject of interest. The verdict includes a considerable sum upon this account, and, even if it should be allowed to stand for the principal sum paid in, I do not see upon what ground the plaintiff should be permitted to recover interest. The money paid into the company's treasury for mortality assessments was not used for the company's benefit at all, but was at once distributed to the holders of other policies, upon which death losses had been sustained.

The company was merely the hand by which the plaintiff's money was distributed, and did not retain the money and make a profit out of its use. I cannot see, therefore, a sufficient reason for compelling the payment of interest.

But, if either of the grounds referred to in the foregoing opinion is well taken, the plaintiff has no right to recover either principal or interest, and, as I believe that both are sound, I direct judgment to be entered upon the reserved point in favor of the defendant, notwithstanding the verdict.

UNITED STATES v. PECKHAM.

(District Court, N. D. New York. January 16, 1906.)

1. HABEAS CORPUS—REMOVAL OF FEDERAL PRISONER TO ANOTHER DISTRICT FOR TRIAL—REVIEW OF COMMISSIONER'S DECISION.

   A person arrested in one federal district for removal to another for trial on a criminal charge who, after a partial examination before a commissioner waived further examination and on a finding by the commissioner that the offense charged was committed and that there was probable ground for believing defendant guilty thereof gave bail for his appearance before the court in the other district, cannot obtain a review of the commissioner's decision by a writ of habeas corpus on his subsequent surrender by his bail, since if such surrender was valid and legal he is lawfully in custody and that is the only question which can be inquired into on such writ.

2. SAME—APPLICATION FOR ORDER OF REMOVAL.

   On application for an order for removal of a defendant from one federal district to another for trial on a criminal charge if the decision of the commissioner holding him for removal is valid and regular on its face it is binding on the judge, as such, to whom the application for the order of removal is made, and its correctness cannot be reviewed by the judge.

3. SAME—REVIEW—HOW OBTAINED.

   Such decision of the commissioner may be reviewed by either the District or Circuit Court on habeas corpus and writ of certiorari, bringing before the court the whole proceeding, at any time before the defendant gives bail for his appearance in the district to which removal is sought.

This is an application by the United States Attorney for the Northern District of New York, under section 1014 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 716] for an order removing the defendant Peckham from said district to the District of Columbia for trial on an indictment against the defendant found in said District for an alleged offense against the United States, and also a proceeding on the return of a writ of habeas corpus to inquire into the legality of the detention and imprisonment of said defendant by the marshal of the Northern district of New York.

George B. Curtiss, U. S. Atty.

Nash Rockwood (Mr. Davis, of counsel), for defendant.

RAY, District Judge. The defendant, with another person, was indicted in the District of Columbia for an offense alleged to have been committed by him and such other person in that District. The indictment was found at the April term of the court, which term continued

until the indictment was presented some considerable time later. The defendants were not in the District of Columbia at the time the indictment was found or at the time the warrant for their arrest was issued out of the Supreme Court in said District, but were in the state of New York where they reside. Bench warrants for their arrest were issued out of the Supreme Court of the District of Columbia, and with a duly authenticated copy of the indictment, were sent to the proper officers of the Northern district of New York for the purpose of having due proceedings under the law taken to apprehend the defendants and remove them to the District of Columbia for trial. The defendant Peckham was found at Saratoga Springs in the Northern district of New York, and a complaint in due form was made before the United States commissioner at said place, and upon such complaint a warrant for the apprehension of said Peckham was requested. Peckham was arrested by the U. S. marshal for the Northern district of New York on the warrant issued by the commissioner and a time and place fixed for the examination. On such examination the government of the United States was represented by George B. Curtiss, United States Attorney for said district, and the defendant was represented by Hon. Nash Rockwood who appeared as his attorney and counsel. The defendant objected to the jurisdiction on the ground the complaint did not show the commission of an offense but the objection was overruled. The defendant Peckham then pleaded not guilty to the charge made and demanded an examination. His right to an examination was conceded and such examination was proceeded with. The defendant admitted his identity; that is, that he was the person named in the complaint and in the indictment which accompanied the complaint and formed a part thereof. A duly authenticated copy of the indictment was put in evidence to prove the commission of an offense in the District of Columbia and that the defendant was guilty of the commission of such offense or that there was probable cause to believe him guilty.

The matter having proceeded thus far, the defendant waived further examination, whereupon the commissioner held and decided on the concession of identity and on the indictment as evidence, that the crime charged therein had been committed, and that the acts stated therein to have been done by the defendant constituted a crime against the United States, and that there was reasonable cause and ground to believe that the defendant was guilty of the commission of such crime within the District of Columbia at the time charged in the indictment. The commissioner fixed bail. Thereupon the defendant then and there before the commissioner elected to give bail to appear and answer said charge before the Supreme Court of the District of Columbia in said District and he entered into the usual bond required by the statute in such cases. He also expressly reserved the right to demur to or question in any way the sufficiency of the indictment in the courts of the District of Columbia. Having entered into this bond as required by law and by the commissioner, the defendant Peckham was discharged from custody. Some time elapsed, and just before the convening of the court in the District of Columbia, where the defendant was to appear and had given bond to appear for trial, his bondsmen surrendered him under the provisions of

section 1018 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 719]. The provisions of the statute were complied with and thereupon the commissioner made and signed a new commitment reciting the facts, reciting the giving and acceptance of the bond, the discharge of the defendant, the surrender of the defendant by his bail, and the acceptance of such surrender, and by such commitment the defendant Peckham was committed to the custody of the United States marshal of the Northern district of New York and the marshal was directed to take him into custody. Pursuant thereto the marshal did take the defendant into custody, and, not having given bond to appear for trial in the District of Columbia, he is now held by the marshal under and pursuant to the terms of and by authority of such commitment made on the surrender of the defendant by his bail. On these facts and with the matter in this condition this writ of habeas corpus was sworn out. The petition for the writ sets forth all the proceedings. The office of the writ is to inquire into the legality of the detention and holding of the defendant.

While this proceeding in the Northern district of New York was in this condition, or at some time during the pendency of the proceedings, the government of the United States obtained in the District of Columbia another indictment against the same defendants for substantially the same offense. The subsequent indictment is fuller and more complete and perfect perhaps in its statements. A warrant for the arrest of the defendants was issued out of the Supreme Court of the District of Columbia on the new indictment, and they at the time being in the Southern district of New York were there arrested on a complaint duly made and warrant issued by a commissioner of the United States. They were taken before such commissioner and an examination had and on such examination the new indictment being in evidence, they were discharged. The commissioner held that the facts stated in the new indictment, conceding them to be true, did not show that any offense against the United States had been committed and that, therefore, they should not be held and could not be held or removed for trial to the District of Columbia. The office of a writ of habeas corpus in such a case as this is to inquire into and determine the legality of the holding of a defendant by the officer in whose custody he is. The commissioner in the Northern district of New York, with the indictment before him, identity being conceded, held and determined and entered judgment accordingly (1) that a crime against the United States had been committed in the District of Columbia at the time stated in the indictment, and (2) that the defendant Peckham was one of the persons alleged in the indictment to have committed that crime, and (3) that there was probable cause to believe and grounds for believing that he was guilty of the offense charged in the indictment.

The only evidence as to the commission of the crime charged in the indictment, if it charged a crime, was the indictment itself, and the only evidence of probable cause was the allegations of the indictment. The defendant had it within his power to question the validity and legality of this holding by the commissioner. It was within his power by writ of habeas corpus and writ of certiorari to bring the whole record before

either the Circuit or District Court for review. Had he done so and had the court issuing the writ held that there was no evidence of the commission of a crime or that there was no evidence that the defendant was probably guilty of the commission of a crime as charged in the indictment, or that the indictment did not charge a crime, it would have so determined and would have ordered the discharge of the defendant. It was within the power of either of these courts to in effect nullify the decision and holding of the commissioner. This course was not pursued, and the finding and determination of the commissioner stands. The defendant elected to give bail for his appearance for trial in the District of Columbia and did give such bond, and clearly while under bond he could not have reviewed the holding and determination of the commissioner on habeas corpus aided by a writ of certiorari bringing up the record. True, in a sense, he was in the custody of his bail. They had the right to arrest and surrender him at any time pursuant to the provisions of section 1018 of the Revised Statutes. Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 371, 21 L. Ed. 287, but before surrender and while enlarged on bail the writ of habeas corpus would not have issued to inquire into the legality of his detention, etc. Hurd on Habeas Corpus (2d Ed.) 201; Dodge's Case, 6 Mart. (O. S.) 569; 1 Bouv. L. D. 574; Respublica v. Arnold, 3 Yeates, 263; Commonwealth v. Eyre, 1 Serg. & R. 356; 15 Am. & Eng. Enc. of Law, 159.

The proceeding by the bail of the defendant surrendering him was and is an independent proceeding specially provided for by section 1018, Rev. St. U. S., and by virtue of that proceeding and its validity, the defendant is now in custody and held by the marshal. Having waived further examination and having elected to give bail and having given bail to appear for trial in the District of Columbia it was too late then to question the validity of the decision made by the commissioner in the Northern district of New York that a crime had been committed, that the defendant was the person charged with the commission of the offense, and that there was reasonable cause and ground to believe him guilty. The defendant is now held under and by virtue of the proceedings had on the surrender of the defendant by his bail, and if that proceeding was regular and his surrender legal and legally made then he is legally in the custody of and is legally held by the marshal of the Northern district of New York. That proceeding is held to have been regular, and the defendant is therefore lawfully held by the marshal and lawfully deprived of his liberty. Further than that the court cannot go for it finds the cause of his detention and imprisonment to be legal. It was within the power of the defendant to waive an examination entirely and to give bail for his appearance in the District of Columbia there to stand trial on the charge of crime alleged in the indictment. Had he done so and had he subsequently been surrendered by his bail it is clear that he could not then have demanded an examination. It would have been too late to make such a demand, and the commissioner, in case such a demand had then been made, would have been under no obligation to grant it.

The statute for removal of a defendant indicted in one district of the United States and found in another to the district where indicted for

trial makes it the duty of the district judge of the district where apprehended seasonably to grant an order of removal whenever the commissioner has held and decided that an offense was committed as charged in the indictment and that there is reasonable ground to believe the defendant guilty of the commission of such offense. The district judge, as such, on the application for a warrant of removal, when confronted by such a decision and holding of the commissioner, has no power or right to inquire into the validity of the holding of the commissioner except so far as to look at the face of the commitment itself and determine whether it recites a legal proceeding and determination. If the decision or determination of the commissioner made on the hearing remains, is prima facie valid, and has not been set aside or overthrown by the decision of a higher tribunal, the judge must regard it as final and conclusive on the application for a warrant of removal. In short, when applied to for a warrant of removal the judge, as such, has no power to review, annul or disregard the determination of the commissioner. The District Court or the Circuit Court may, on habeas corpus, review those proceedings, and if either of those courts in the proper proceeding determines that no crime has been committed or that there was no evidence of probable cause against the defendant, then it would be its duty to so find and hold and order the discharge of the defendant. Here the right to such a review of that holding was waived or abandoned when the defendant elected to give bail for his appearance and trial in the District of Columbia. I am aware that it has been held that on the application for the order or warrant of removal, the judge, no writ of habeas corpus having issued, may inquire into the validity of the whole proceeding before the commissioner. With such holdings this court does not agree.

It is now contended that the government has abandoned the first indictment under which Peckham was arrested and held to bail in the Northern district of NewYork. I find no evidence that it has been abandoned. It has not been dismissed. The government is pressing the proceeding and insisting that the defendant be sent to the District of Columbia for trial under the indictment. It is true that another indictment was found for the same offense apparently. It is true that in the Southern district of New York a commissioner of the United States held that that indictment did not state facts which, if conceded to be true, show the commission of an offense in the District of Columbia by the defendant, and, therefore, he discharged the defendant. That action by the commissioner in the Southern district of New York would not be binding upon either the Circuit or District Court in the Northern district of New York were the record before either of those courts on a review of the legality of the decision of the commissioner in the Northern district of New York. But that decision of the commissioner in the Northern district is not under review and this court has no jurisdiction at this stage to review that decision. This court can inquire now into the legality of the detention of the defendant only. The defendant is detained and deprived of his liberty by reason of a commitment issued by a United States commissioner in the proceeding had and taken on his surrender by his bail. That proceeding is regular and he is legally held.

But the defendant contends that when he was surrendered by his bail, his being under bail being but a continuance of his original imprisonment, he was relegated to the same position and rights he held and had at the time he was held to bail by the commissioner and before he entered into the bond required. That he then had the right to refuse to give bail and to bring up the whole question of the validity of the holding of the commissioner by writ of habeas corpus before or at the time the order of removal was applied for and that, being now in custody, he has the same right. That he could not and has not waived that right. If this contention be true then defendants in these proceedings may indefinitely postpone and delay removal to the district where the indictment is found. The defendant when arrested and brought before the commissioner will waive examination. If held to bail he will give it and when the court at which he is to appear and answer is about to convene he will procure his bail to surrender him and then demand an examination and sue out a writ of certiorari and a writ of habeas corpus and compel the court to inquire into the legality of the proceedings, including the validity of the indictment and the jurisdiction of the commissioner. If judgment goes against him and the writ is dismissed and a warrant of removal is granted he may appeal, and if the order dismissing the writ is affirmed he is entitled to then give bail for his appearance in the court where the indictment was found. When that court is about to convene he may procure another surrender by his bail and sue out another writ. Quite likely this writ will be dismissed but in the meantime witnesses may die or go beyond the jurisdiction of the court and the administration of justice be greatly delayed if its ends are not wholly defeated.

It seems to this court plain that when the defendant has waived examination and given bail or given bond after examination, he has waived his right to the writ for the purposes mentioned, the right to have the courts of the district where arrested inquire into the validity of the holding of the commissioner, and that it is the duty of the district judge to grant the order of removal in case the defendant is surrendered by his bail, or fails to appear for trial in the jurisdiction where the indictment was found and is then arrested on a new warrant. Or is it the law that the defendant may elect to give bail and having given it, fail to appear and then when arrested have and exercise the same rights he would have had in case the election to give bail had not been exercised?

In Commonwealth v. Nelson G. Green, 185 Pa. 641, 40 Atl. 96, it was held:

"One who enters into a recognizance to appear at the quarter sessions when required, and then, without application to such court to correct any error in the proceedings before the judge sitting as committing magistrate, either in holding him for appearance in court or in demanding excessive bail, voluntarily surrenders himself to the sheriff, is not entitled to a habeas corpus from the Supreme Court."

The defendant Peckham is legally held and deprived of his liberty by the marshal of the Northern district of New York. This court cannot, at this stage, inquire into the question whether the indictment charges a crime against the United States.

The writ is dismissed, the defendant remanded and the warrant for the removal of the defendant to the District of Columbia for trial under the indictment granted.

CONKLIN et al. v. UNITED STATES SHIPBUILDING CO.

(Circuit Court, D. New Jersey. January 17, 1906.)

1. CORPORATIONS—INSOLVENCY—PROCEDURE UNDER NEW JERSEY STATUTE.
Corporation Act N. J. §§ 75-78 (Laws 1896, pp. 301, 302, c. 185), provides for the proving and allowance by the receiver of claims against an insolvent corporation and that an appeal may be taken from his decision to the court of chancery, by either the corporation or a claimant. Section 85 (page 304) provides that before distribution of the assets the court shall allow a reasonable compensation to the receiver for his services, and the costs and expenses of the administration of his trust. *Held*, that a claim for services rendered to a receiver, under a contract with him, was not one against the corporation which could be adjudicated by the receiver, but a part of the costs of administration to be adjusted under section 85.

2. SAME—CLAIMS AGAINST INSOLVENT CORPORATION—SALARIES OF OFFICERS.
Under the New Jersey corporation act (Laws 1896, p. 277, c. 185), which fixes the term of the president of a corporation at one year, the president of a corporation, on an adjudication of its insolvency and the appointment of a receiver, can have no legal claim against it for salary, beyond the current year for which he was elected, based on an alleged agreement that he should be employed for a further term.

3. SAME—CREDITORS.
A maker of notes claimed to have been assumed by a corporation, but which are owned by a third party and unpaid, is not a creditor of the corporation, nor entitled to prove a claim against it in insolvency, the owner of the notes being the only person who could make such claim.

In Equity. On appeal from decisions of receiver.
See 123 Fed. 913; 124 Fed. 1020.

William H. Jackson, for appellant Nixon.
Sherrerd Depue (Lindabury, Depue & Faulks, on the brief), for receiver.

LANNING, District Judge. James Smith, Jr., was appointed receiver of the United States Shipbuilding Company by this court on June 30, 1903. On April 15, 1904, and within the time limited by the court for the presentation of the claims of creditors to the receiver, Lewis Nixon presented to the receiver a claim against the United States Shipbuilding Company containing two items as follows:

To salary as president of said company from July 1, 1903, to April 1, 1904, at $30,000 per annum	$ 22,500
To salary as president from April 1, 1904, to August 1, 1907, at $30,000 per annum	100,000
	$122,500

His affidavit accompanying the said claim contains the following statement:

"That heretofore, and on or about the 1st day of August, A. D. 1902, the United States Shipbuilding Company entered into a contract with deponent

whereby deponent was to devote his entire time and attention to the affairs of the United States Shipbuilding Company, as president thereof, for a period of five years, in consideration of the annual sum of $30,000, payable in monthly installments of $2500 each; that in pursuance of said contract deponent, on said August 1, 1902, entered upon the discharge of his duties as such president, and said company complied with its part of the agreement upon its part to be performed by paying deponent the monthly sum of $2500 up to and including the month of June, 1903; that notwithstanding the fact that since the 1st day of July A. D. 1903, deponent has at all times held himself ready and willing to comply with his duties as president of the United States Shipbuilding Company, by reason whereof he has been prevented from engaging in any other occupation, nevertheless, the said United States Shipbuilding Company has not, nor has any one else in its behalf, paid to deponent the monthly sums of money due him under said contract as aforesaid; that, by reason of said contract, there became due to deponent on the 1st day of April, 1904, the sum of $22,500, as set forth in the statement hereto annexed. Deponent further says that on the 1st day of August, 1907, said United States Shipbuilding Company will be further indebted to him in the sum of $100,000, for salary due him, under the contract above referred to, for the period from April, 1, 1904, to August 1, 1907, the date on which the said contract of employment expires."

The receiver disallowed the claim, and Mr. Nixon has now appealed to this court from the receiver's decision. In his petition of appeal he states that he is a creditor of the receiver, James Smith, Jr., and of the defendant corporation, upon two separate claims, one of the claims being the above mentioned item of $22,500 and the other the item of $100,000. As to the item of $22,500 he alleges that it was for services actually rendered by him to the receiver for and on behalf of the United States Shipbuilding Company between July 1, 1903, and April 1, 1904, at the special instance and request of the receiver, and upon the understanding and agreement that he should be paid for those services at the rate theretofore paid him as president of the company; that such services were necessary and incident to the administration of the matters pertaining to the receivership and were operating expenses for the preservation of the trust fund, and that they were reasonably worth $2,500 per month, or $22,500 in all. He prays that the item of $22,500 may be allowed as an expense incident to the administration of the receiver.

The appeal is made under the provisions of section 78 of the corporations act of the state of New Jersey. Laws 1896, p. 302, c. 185. Before quoting that section it should be observed that section 75 (page 301) gives to the court of chancery of New Jersey the power to limit the time within which creditors shall present or make proof to the receiver of their respective claims against the corporation, and to bar all creditors and claimants failing to present or prove their claims within the time limited, from participating in the distribution of the assets of the corporation. Section 76 is as follows:

"Every claim against an insolvent corporation shall be presented to the receiver in writing and upon oath; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver shall direct, and shall produce such books and papers relating to the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims, or any part thereof, and notify the claimants of his determination."

Section 77 gives to any creditor or claimant who shall lay his claim before the receiver, or to the receiver himself the right to demand a trial by jury. Then section 78 is as follows:

"Every such insolvent corporation, or any person aggrieved by the proceedings or determination of such receiver in the discharge of his duty, may appeal to the court of chancery, which court shall, in a summary way, hear and determine the matter complained of, and make such order touching the same as shall be equitable and just."

Assuming that the provisions of the statute above quoted are applicable to a receivership in this court, it is clear that section 78 provides for an appeal from the determination of a receiver, only upon such a claim as he is authorized to adjudicate under the provisions of section 76. That section authorizes him to adjudicate claims against the insolvent corporation, and not claims for services rendered to the receiver in the administration of his trust. For this latter class of claims section 85 (page 304) makes provision. That section is as follows:

"Before distribution of the assets of an insolvent corporation among the creditors or stockholders the court of chancery shall allow a reasonable compensation to the receiver for his services and the costs and expenses of the administration of his trust, and the costs of the proceedings in said court, to be first paid out of said assets."

It follows that the claim of the petitioner set forth in his petition of appeal for $22,500 cannot be adjudicated in this proceeding. If the receiver did in fact make a contract with the petitioner for the petitioner's services, a claim based on that contract cannot be adjudicated by the receiver. The law furnishes ample remedies to such a creditor for the enforcement of all his legal rights, without calling upon the receiver to sit as a judge in his own case.

The second item of the claim is thus explained in the petition of appeal:

"Your petitioner alleges that the second claim, viz., for $100,000, submitted to said receiver, is for salary as president of said company from April 1, 1904, to August 1, 1907, at $30,000 per annum, pursuant to the contract entered into by and between your petitioner and said corporation, United States Shipbuilding Company, for five years of service by said petitioner as president of said corporation, at the rate of $30,000 per annum. Your petitioner says that the contract for five years' service, as president of said company, was made and entered into in the following manner, namely: On June 24, 1902, a written offer to sell certain properties to the said United States Shipbuilding Company was made by the promoter of said United States Shipbuilding Company, and in said written offer was included the property of the Crescent Shipyard Company. Said written offer of June 24, 1902, to sell, to the United States Shipbuilding Company, the property of the Crescent Shipyard Company, was subject to the following condition, viz.: 'It is a part of this offer that Mr. Lewis Nixon contract with your company to give to its business his time and attention for a period of five years at a salary to be agreed upon, and shall also enter into the usual contract with your company not to compete directly or indirectly with it in its business.' Thereafter, on said 24th day of June, 1902, the said United States Shipbuilding Company by a resolution of the board of directors duly accepted the offer to purchase the property of the Crescent Shipyard Company, and in said resolution agreed to employ said Lewis Nixon, as president of said company for a period of five years as stated in said offer as aforesaid. The said acceptance was contained

in the following resolution on the part of the directors, namely: 'Resolved that said offer be and the same hereby is accepted, and that the proper officers of this company be, and they are, hereby, authorized to do and perform any and all necessary acts and things, and to make, execute, acknowledge, deliver, and accept, all necessary contracts and instruments in writing, in such form as they may be advised, for the carrying out and consummation of said offer and its acceptance, and that the secretary of this company be, and he is, hereby authorized to affix to said instruments, or any of them, the corporate seal of this company and duly attest the same, and acknowledge the execution of such instrument.' Thereafter, and on September 10, 1902, the board of directors of said United States Shipbuilding Company, recognizing its obligation to employ said Lewis Nixon as president for a term of five years, proceeded to elect said Lewis Nixon as president of said company for the ensuing year, as appears from the following extract from the minutes of the board of directors of the said United States Shipbuilding Company held September 10, 1902: 'The board proceeded to the election of a president in the place of Mr. Newman, resigned. Ballot having been taken, it was found that Mr. Lewis Nixon had received the votes of all the directors present and was thereupon declared elected president of the company in place of Mr. Newman for the ensuing year.' Thereafter, and on October 29, 1902, the executive committee of the said United States Shipbuilding Company recognizing the obligation of the said company to employ said Lewis Nixon as president of said company for a period of five years, proceeded by resolution to fix the salary of said Lewis Nixon, as president of the said United States Shipbuilding Company, at $30,000 per annum, to be paid in equal monthly installments. Said resolution of October 29, 1902, is as follows: 'On motion made and duly seconded, resolved that the salary of Mr. Lewis Nixon as president of the United States Shipbuilding Company be, and hereby is, fixed at $30,000 per annum, to be paid in equal monthly installments beginning on the first day of September, 1902.'"

The office of a petition of appeal is to secure a review of a receiver's determination concerning a claim as it was presented to him. The petition here asks for no such review. In the affidavit annexed to the claim, filed with the receiver April 15, 1904, the declaration is that the United States Shipbuilding Company entered into a contract with Mr. Nixon, on or about August 1, 1902, whereby he was to devote his entire time and attention to the affairs of the company "as president thereof for a period of five years, in consideration of the annual sum of $30,000," and that on August 1, 1902, he "entered upon the discharge of his duties as such president." In his petition of appeal filed in this court a year later, he declared that the United States Shipbuilding Company, by its resolution of June 24, 1902, accepting the offer of that date, "agreed to employ said Lewis Nixon as president of said company for a period of five years." There is a fatal variance between these two papers. The contract set forth in the petition of appeal is not the contract mentioned in the affidavit. Furthermore, neither the resolution nor the offer of June 24, 1902, set forth in the petition of appeal, in anywise refers to the presidency of the company. According to the petition, the salary of the president was not fixed until October 29, 1902, nearly three months after the date of the contract mentioned in the affidavit, and after, in that instrument, Mr. Nixon declared he entered upon the discharge of his duties as president. The allegations of the petition show, it seems to me, that Mr. Nixon simply accepted the office of president to which he was elected, with the salary attached to that office. Under the law his term as president was for one year only. Without deciding

whether a salary attached to the office of president of a corporation ceases on the adjudication of that corporation's insolvency, the appointment of a receiver, and an injunction restraining the corporation and its officers from doing any business for the corporation, or exercising any of its franchises, it is clear that the president of such corporation can have no legal claim for salary beyond the end of the presidential year running at the time of the appointment of the receiver. When the presidential year current on June 30, 1903, the date of the receiver's appointment, ended, does not appear, nor is the claim for $22,500 for the 9 months from June 30, 1903, to April 1, 1904, for services rendered to the receiver on a contract made with him, consistent with a claim for salary as president for that period. After careful attention, I am not able to find any ground upon which either of the petitioner's claims can be supported.

The petitioner also presents a second petition of appeal from a decision of the receiver disallowing a claim upon three promissory notes. In it he alleges that he presented to the receiver in due form the following claim:

"To James Smith, Jr., receiver of the United States Shipbuilding Company: Please take notice that I do claim that there is due to me from said company the amounts hereinafter set forth, according to the terms of a certain contract made and entered into by the Crescent Shipyard Company with me, at the time that I sold said Shipyard Company my shipbuilding plant at Elizabethport, and whereby said Crescent Shipyard Company assumed and agreed to pay all existing debts contracted by me in the shipbuilding business at Elizabethport aforesaid, said contract having been retained by said company, and the terms of which have been entered in its official minutes. The following is a list of the debts due and unpaid at the time of the transfer of the said shipbuilding business to said company, contracted and incurred in the shipbuilding business, and covered by said contract, which still remain due and unpaid, namely: three promissory notes payable on demand, discounted by the National State Bank of the city of Elizabeth and held by it at this time, no part of the principal thereof having been paid: (1) Dated January 17, 1898, $4,000. (2) Dated February 10, 1898, $5,000. (3) Dated December 13, 1898, $10,000—with interest on all of the above notes from October 1, 1903, which notes were signed by me, and upon which, said bank claims I am primarily liable."

It will be observed that the notes are not held by the petitioner, but by the National State Bank of the City of Elizabeth. The petition fails to show that the petitioner is a creditor of the United States Shipbuilding Company. The petition, in express terms, is founded on section 78 of the New Jersey corporations act. That section, as already pointed out, gives an appeal from the determination of a receiver concerning the claim of a creditor of the corporation. Assuming that the United States Shipbuilding Company is liable for the payment of the notes, the claim should be presented by the owner of the notes, which is the National State Bank of the City of Elizabeth, and not Mr. Nixon. If Mr. Nixon shall pay the notes before the assets of the insolvent company are fully distributed, he may then possibly be allowed to present his claim under the authorities in Conklin v. United States Shipbuilding Company (C. C.) 136 Fed. 1006, and the cases there cited.

Both petitions of appeal must be dismissed.

THE FOLMINA.

(District Court, E. D. New York. November 17, 1905.)

SHIPPING—DAMAGE TO CARGO—LIABILITY OF VESSEL.

In an action to recover for damage to a cargo of rice alleged to have been received by the ship in good condition but to have been delivered at the end of the voyage in a damaged condition due to sea water and consequent heating, where the owners of the vessel clearly show that she was seaworthy and in all respects properly equipped for the carriage of the cargo at the beginning of the voyage, and also at its termination, that the cargo was properly stowed and that there was no negligence during the voyage which would account for the entry of sea water, they have fully established a defense under a bill of lading which exempted the vessel from liability for damage from sweating, natural decay, or from sea water caused without the ship's fault or negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 440, 449, 484.]

In Admiralty. Action for damage to cargo.

Butler, Norman & Mynderse (Frederick M. Brown, and Archibald G. Thacher, of counsel), for libelants.

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for claimant.

THOMAS, District Judge. The steamship Folmina, between February 4th and May 9th, carried in No. 3 lower hold rice in bags, from Japan to New York. During discharge the rice on the starboard side was found damaged. The area of the injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags, Planks several inches apart were fastened to and ran longitudinally along the perpendicular frames connected with the side plating of the ship and about 9 inches therefrom, and athwart such planks were arranged bamboo poles, 2 or 3 inches apart, and the lattice work thus formed supported mats. The bulkheads of the hold were similarly protected, and the ceiling was covered with dunnage, laid fore and aft, a second layer athwartship to which mats were attached. Three iron stringers, the upper one 5 feet, the middle one 10 feet, and the lower one 14 feet 2 inches below the between decks, were fastened to the perpendicular frames, with their outboard edges attached to the plating of the ship, from which their inboard side was distant about 2 feet. Angle irons were attached to each stringer, whereby was formed a trough, in its greater part about 15 inches wide and 3½ inches deep. It ran the whole length of the hold, in which dunnage, planks were placed, but any water entering the trough could escape at the ends of the hold, where holes were provided therefor. During and after the discharge it was found that either there was water standing in the trough for some distance, or at least that it was wet. The dunnage, poles, and mats were in a condition variously described as "damp," "wet," "wringing wet," "sopping wet," "soaking wet"; the bags were de-

scribed as "wet," "damp," "stained," "very wet," "hot," "black and rotted"; the rice as "off color," "caked," "mouldy." The odor from the mass was noticeably bad. That many of the bags and rice therein were impaired, seriously injured, or destroyed by the dampness and heat, cannot be doubted. There was some evidence of negligible damage to the bags on the port side. The libel states that the rice was delivered, "but not in like good order and condition as when received, 877 bags of said rice being wet with sea water and 8,564 bags thereof being seriously damaged by heating, owing to the proximity of said wet bags or through some other cause to the libelants unknown, at the time of said delivery to the libelants."

The answer alleges that the damage was caused by "sweat or heat, or by inherent deterioration due to its condition at time of shipment," and that the condition of the goods on arrival was the result of "sweating, heat, or natural decay due to the inherent and natural condition of the goods or to the latent dampness thereof due to wetting in craft in coming to the ship or while in store or on shore, or to defects in the preparing of said goods for shipment, or to perils of the seas, rivers, or navigation within the meaning of the foregoing exception, and that the said condition of the said goods and the damage, if any, resulting therefrom, were not consequent upon any neglect or default on the part of the steamship or those in charge thereof."

The bill of lading exempted the carrier from liability for any loss or damage from "the act of God, * * * loss or damage from machinery, boilers or steam, or from explosion, heat or fire on board, in hulk or craft or on shore * * * risk of craft or hulk or transshipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind. * * * The ship is not liable for insufficient packing or reasonable wear and tear of packages, * * * leakage, breakage, * * * sweat, rust, decay, vermin, rain, spray."

The evidence shows that the damage was caused by sweat and heat, or sea water and consequent heat. For some purposes of discussion let it be assumed that sea water entered and injured the cargo. Yet the evidence shows that it did not enter by reason of any negligence on the part of the master or crew, or of the carrier in outfitting the ship for the voyage. Hence, the invasion of the sea was beyond the cognizance or avoidance of the carrier or his servants, and without the fault of either. What was demandable of owners or crew to keep out sea water they did. There was upon arrival at New York no defect in the ship that accounted for the sea water. None was discovered during the voyage, whose history also shows that the crew by culpable action or omission did not suffer it to enter. Hence, when the libelant charges receipt of sound goods and delivery of the same injured by sea water, the carrier shows that neither he nor his servants were negligent in connection with the suggested injurious cause. The rule that when the fact is in doubt, or the court is in doubt as to the fact, the burden is on the carrier to solve the doubt, has been fully met. The carrier points to a sound ship, to which sea

water could not gain access, and shows the existence of such condition during the voyage, and due preparation of the ship for the protection of the cargo, and ample care during the voyage. Satisfactory and uncontradicted evidence that no defect discoverable in the exercise of requisite care existed between the receipt and discharge of the cargo is maximum proof. Evidence can produce no higher probative effect. Pass in review the variety of ways that sea water could enter, and the carrier's evidence meets them one by one and negatives not only the presence of every such opportunity, but also any negligence that would permit it. Both the fact and fault permitting its existence are absent. Immediately one suggests any practical way for sea water to enter, for instance around the scupper pipe, the ship is shown to have been sound in such respect. Was the way through a yielding plate? Not a strained or started rivet nor stained plate justifies even suspicion. Was the entry through the ventilators or hatches? They are shown to have been closed during all weather that would permit it, and the sound condition of the hold spaces and other cargo disputes the possibility. Yet the libelants persist that the ship should, to free itself, make further disclosure. Why? Conjecture even as to the cause has been exhausted, and the carrier to such limit has shown his innocence. Neither imagination nor experience suggests any way for the sea water to enter that is not negatived, or at least the evidence shows that the carrier did not contribute to it. Hence, the highest and most comprehensive proof has been reached. When it appears that the carrier not only used due diligence to furnish a seaworthy ship, but did actually furnish the same, that he used proper care in stowing the cargo, that his servants did not, by undutiful act or omission, suffer the cargo to be injured, that no defect was discovered during the voyage, and none existed at its termination, the carrier and his servants, at least, are not chargeable with negligence. Neither is the carrier in this case liable as an insurer, for he expressly stipulated against damage from sea water, to which was impliedly attached the proviso that his own and his servants' fault did not aid or suffer the same. Now the absence of the fault has been shown. Hence the proviso has been met and the stipulation for exemption takes effect. There may be some mystery about the damage. There would be none if the fact were that sweat and heat caused the injury, and there would be no difficulty in finding that as a fact, if the report of the libelants' analysis had not shown an undue proportion of salt in the bags and injured rice. The claimant's contention, that the rice absorbed the remnant of mineral salt on an earlier voyage carried in the same hold, may have some value. If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship, strongly aids the evidence that it did not enter. But that is left undecided. If the injury was the result of

sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. Clark v. Barnwell, 12 How. (U. S.) 282, 13 L. Ed. 985; The Prussia, 93 Fed. 837, 840, 35 C. C. A. 625.

If the injury arose from sea water, without the carrier's fault, he is released by the stipulation, provided he shows that fact. Clark v. Barnwell, supra; Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160; Cau v. Texas & Pacific Ry. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053. The evidence shows that it did arise either from heat and sweat, or sea water and consequent heat. Hence, the case is within the exception, and in either alternative the evidence exculpates the ship. In the present case the ship, from physical examination, appears to have been absolutely seaworthy at every stage of the adventure. To this it is answered that she was not seaworthy when and where the assumed sea water entered; and to this it is replied that the owner and his servants used diligence respecting every part or equipment whereby water, by any conjecture, could enter. Considering the recent construction of the vessel, her use and care after construction, the dry docking in New York preliminary to her eastern voyage, the inspection and care of the hold before the rice was loaded, the fact that she appeared in perfect condition upon her arrival, even to the degree that not a single suspicious condition appeared, all this points to but one conclusion, that the owners or their agents used due care in sending her out from Japan, and the crew discovered no defect on the way, and that no defect was discoverable. It does not seem just to condemn a ship with such a history.

The decision is placed upon the ground that the facts show that the ship was not negligent, although the Supreme Court has decided (Clark v. Barnwell, supra; Transportation Co. v. Downer, supra; Cau v. Texas & Pacific Ry. Co., supra) that when the carrier shows that a sea peril, in this case sea water, within the exception of the bill of lading, did the damage, the burden is upon the shipper to prove that the carrier's negligence intervened. But for these decisions it would seem that such position could not be sustained logically or by reference to recognized and pertinent legal principles. But in view of the succession of authoritative rulings, and of the respect due them, discussion at this time is precluded.

The libel will be dismissed, with costs.

UNITED STATES v. CARDISH et al.

(District Court, E. D. Wisconsin. January 20, 1906.)

1. CRIMINAL LAW—FEDERAL STATUTES—CONSTRUCTION—USE OF COMMON-LAW TERMS.

When Congress in a statute refers to or adopts a common-law offense without further definition, the common-law definition must obtain.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 8–12.]

2. ARSON COMMITTED ON RESERVATION—CONSTRUCTION OF STATUTE.

Act March 3, 1885, c. 341, § 9, 23 Stat. 385 [U. S. Comp. St. 1901, p. 362], which provides for the trial and punishment of any Indian who shall commit any one of the crimes enumerated, including "arson," upon an Indian reservation, uses such term in its common law meaning and is in effect an extension of the provisions of Rev. St. § 5385 [U. S. Comp. St. 1901, p. 3648], punishing the offense of arson within a fort, dockyard, etc., to the same offense committed by an Indian on a reservation; and an indictment charging an Indian with the burning of a "building" on a reservation, not averred to have been a dwelling house, nor occupied as such, does not state an offense thereunder.

On Motion to Quash Indictment.

H. K. Butterfield, U. S. Atty.
M. G. Eberlein, for defendants.

QUARLES, District Judge. This is a motion to quash an indictment framed under section 5386 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3648]. The indictment is in the words and figures following, to wit:

"The grand jurors of the United States of America, duly impaneled and sworn in and for the said eastern district of Wisconsin, in said district court upon their oath present: That Louisa La Motte and Lizzie Cardish are Indians, and were on the 17th day of January, A. D. 1905, each Indians, to wit, Menominee Indians, members of the Menominee Indian tribe, a tribe of Indians then occupying a reservation within the boundaries of the state of Wisconsin, called the Menominee Indian reservation, theretofore set apart by the United States as an Indian reservation for the use of the said Menominee Indian tribe, and then so occupied by said tribe, and that the said Louisa La Motte and Lizzie Cardish on the 17th day of January, A. D. 1905, in the daytime of said day, they then and there each being such Indian, as aforesaid, namely: a member of the said Menominee Indian tribe, did, within the limits of, and upon the Menominee Indian reservation, in said district and within the jurisdiction of this court, the said reservation being then within the boundaries of a state of the United States, to wit, the state of Wisconsin, a certain building of, and the property of the United States of America, to wit, a certain building used as a schoolhouse and building, and called the Menominee Indian Training School building there situate as aforesaid, feloniously, willfully and maliciously set fire to, and the said building then and there by said firing as aforesaid, feloniously, willfully and maliciously did burn and destroy, wherefore the grand jurors, aforesaid, upon their oath aforesaid, do say: That the said Louisa La Motte and Lizzie Cardish, they each being then and there such Indian, as aforesaid, did on the 17th day of January, A. D. 1905, commit the crime of arson agaist the property of the United States of America, within the boundaries of a state of the United States, and within the limits of an Indian reservation, as afore described, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

It will be observed that the defendants are Indians belonging to the Menominee tribe, and living upon the Menominee reservation within this state, and that by this indictment they are charged with burning "a certain building of and the property of the United States of America, to wit, a certain building used as a schoolhouse and building, and called the 'Menominee Indian Training School Building,' which was upon the Indian reservation set apart by the government for the use of said Menominee Indian tribe."

The indictment is attacked upon the ground that it does not state an offense cognizable by this court. Stated in other words, the contention is that there is no statute of the United States applicable to an Indian upon an Indian reservation which creates such an offense as is set out in the indictment. We may start with the fundamental proposition that there are no common-law offenses against the United States. United States v. Eaton, 144 U. S. 687, 12 Sup. Ct. 764, 36 L. Ed. 591. In order to sustain this indictment, therefore, we must be able to find some federal statute reaching the case, which has been extended over the Indians resident upon a reservation set apart for the occupancy of an Indian tribe, and conferring jurisdiction upon this court. The contention of the government is that this has been done by act March 3, 1885, c. 341, 23 Stat. 385 [U. S. Comp. St. 1901, p. 362], section 9 of which reads as follows:

"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction of all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

This legislation was a new departure. For the first time Congress undertook to punish an Indian living in a reservation for a crime committed against another Indian when such reservation is located within the limits of a state. Its constitutionality was promptly challenged. The Supreme Court, in U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, upheld the legislation. Thus it appears that the crime of arson, among other offenses, has been by force of this statute extended over Indian reservations; and that an Indian committing the crime of arson within the limits of an Indian reservation, shall be amenable to the same punishment, and tried by the same courts as though the crime had been committed within a fort or any other place exclusively under the jurisdiction of the United States. It has been further held that no jurisdiction exists to try or punish an Indian for an offense committed upon the reservation, which is not enumerated in this statute of 1885.

U. S. v. King (D. C.) 81 Fed. 625; U. S. v. Logan (C. C.) 105 Fed. 240.

It will be observed that the Act of 1885 creates no new offense and imposes no new punishment. It does not define the crime, but simply adopts the common-law term "arson." So far as this case is concerned the act would be wholly inoperative in the absence of some other statute of the United States imposing a specific penalty upon the crime of arson when committed within territory exclusively within the jurisdiction of the United States. In other words, the statute leaves us to look elsewhere for the definition of the term "arson," and elsewhere for the punishment. The term "arson" has a definite, fixed meaning at the common law. The crime of arson has been materially enlarged and subdivided by the legislation of the several states, and the burning of other structures than dwelling houses has been made punishable by federal statute, of which section 5386 is an example. Section 5386 imposes a penalty for the malicious burning of "any arsenal, armory, magazine, rope-walk, ship-house, warehouse, block-house, barrack, storehouse, barn, or stable not parcel of a dwelling house, or any other building not mentioned in section 5385," etc. It is on the strength of this section that the defendants are charged with burning "a certain building." It is conceded that it would not be arson at the common-law to burn the structures enumerated in section 5386.

If we now turn to section 5385, it will be apparent that it re-enacts by apt language, the common-law crime of arson, because it provides punishment for willfully and maliciously burning any dwelling house or store, barn, stable, or other building, parcel of any dwelling, or mansion house, which is situate within any fort, dockyard, navy yard, arsenal, armory, or magazine, the site whereof is under the jurisdiction of the United States. The contention of the government is that when Congress employed the term "arson" in the act of 1885, it had in mind and intended to include the malicious burning which is penalized by section 5386, as well as the technical common-law crime. It is hardly conceivable that Congress would have contented itself with the employment of the technical term "arson," having a well-understood significance in law, if it had intended to include all statutory offenses of kindred nature.

The rule seems to be well settled that when Congress by statute refers to or adopts a common-law offense, without further definition, the common-law definition must obtain. Re Greene (C. C.) 52 Fed. 104, 111. In 1790 Congress made the crime of manslaughter on the high seas punishable by fine and imprisonment. The act did not define the crime otherwise than by the employment of the common-law term. It was held that the courts were thus remitted to the common-law for a definition. U. S. v. Armstrong, 2 Curt. 451, Fed. Cas. No. 14,467. It will be further observed that the Supreme Court in the Kagama Case, supra, in discussing the act of 1885, twice refer to the offenses enumerated therein as "common-law crimes." It is inconceivable that Congress used the common-law term intending thereby to cover another distinct and different offense. The statutory offense created by section 5386 is so radically different that were an indictment framed under it, proof of arson

would amount to a variance. It is not the case of a higher and lower offense, one of which is included within the other, but of two different and distinct offenses. State v. Atkinson, 88 Wis. 1, 58 N. W. 1034.

Therefore I am persuaded that Congress meant by this enactment exactly what it said, nothing more and nothing less. It had in contemplation the well-known common-law offense. It intended that we should look to the common law for the definition, and should look to the federal statutes theretofore enacted for the penalty. This penalty is found in section 5385 which, as we have seen, aptly and accurately describes the common-law crime of arson committed upon the property of the United States and in a locus within the exclusive jurisdiction of the federal government. The effect of the enactment of 1885 was therefore to practically enlarge the fort or arsenal so as to take in the Indian reservation, and thus enlarge the territory so within the exclusive jurisdiction of the United States, and put Indians resident thereon precisely upon the same footing as any other person within such exclusive territory as so enlarged. This construction makes the legislation of Congress coherent and consistent.

The question then arises whether the indictment charges the crime of arson as known at the common law. It is elementary that at the common law the gist of the offense of arson lay in the malicious burning of a house or dwelling of another. It was not an offense against property, but against human life and safety. It was intended to protect the habitation of man. For obvious reasons it was not arson at the common law to burn a schoolhouse or any other building not used as a dwelling place. The language of the indictment fails to ascribe to the building alleged to have been burned by the defendants, this essential characteristic of the common-law crime. For aught that appears on the face of the indictment this building, also defined as a "training school," may not have been the dwelling place of any human being, and may not have been situated so near to a house as to come within the mischief and definition of arson. The learned attorneys for the government frankly conceded that the indictment was insufficient to charge the crime of arson at the common law. If, as was argued at the bar, this "training school" was used as a home, a dwelling place for pupils, and the abiding place of officers, teachers, and employés, it may be worthy of consideration whether the malicious burning of such a structure so employed would not constitute arson under the strict rules of the common law; and if so, then upon conviction, the defendants might by virtue of the enactment of 1885 be punished according to the terms and provisions of section 5385. But it is not our province to pronounce upon that question at this time. The indictment failing to charge the essential ingredients of the common-law crime of arson is not supported by any statute, to which the attention of this court has been called, which is in force within the limits of an Indian reservation, under which the malicious burning by an Indian of a building other than a dwelling house or place of abode can be punished.

For these reasons the motion to quash is granted, and the defendants are discharged.

VALENTINE CLARK CO. v. ALLEGHENY CITY.

(Circuit Court, W. D. Pennsylvania. February 1, 1906.)

No. 25.

1. MUNICIPAL CORPORATIONS—RATIFICATION OF UNAUTHORIZED CONTRACT—POWER UNDER PENNSYLVANIA STATUTE.

Notwithstanding the provisions of the statutes of Pennsylvania governing cities of the second class which require contracts for public improvements to be let to the lowest bidder after notice and to be based on and be within prior estimates of the cost, a claim for materials furnished a city for a public work under a contract made without such formalities, because of the urgency of the demand for such materials, may be legalized by a joint resolution passed by two-thirds vote of the councils and approved by the mayor, recognizing its validity and directing its payment, under Act May 23, 1874 (P. L. 232) § 5, which provides that "no ordinance shall be passed except by a two-thirds vote of both councils and approved by the mayor * * * providing for the payment of any claim against the city without previous authority of law."

2. SAME—APPEARANCE BY CITY CONTROLLER—CITY SOLICITOR.

The city solicitor, under the direction of councils, according to the Pennsylvania statutes, is the duly appointed representative of the municipality in legal affairs; and it is to say the least doubtful, therefore, whether the city controller is entitled to appear on behalf of the city in an action against it and contest the plaintiff's claim.

W. A. Way, for plaintiff.
Thomas P. Trimble, for defendant.

ARCHBALD, District Judge.[1] This is an action to recover the price of certain cedar poles sold and delivered by the plaintiffs to the defendant in June, 1903, on an order given by Edward J. McIlvaine, director of public works of said city. These poles were designed to be used for carrying an electric line to run a pumping station, whereby water might be supplied to a certain section of the city for which there had been an urgent demand for some time, and, in view of this urgency, were ordered by the director of public works without a previous ordinance authorizing the purchase, or any advertisement or public letting. Subsequently, however, the councils of the city, by joint resolution duly passed September 17, 1903, and approved by the mayor, recognized the validity of the bill, amounting to $2,033.75, and directed the city controller to execute a warrant therefor, making the same payable out of the proceeds of certain water bonds previously issued. The controller refused to follow the direction of councils, maintaining that their action was illegal, and thereupon the plaintiffs brought this suit.

When the case was called for trial, Mr. Porter, the city solicitor, appeared, but said he had no defense to it, having advised the director of public works as to purchasing the poles, and also suggested the passage of the joint resolution of councils providing for payment. It was stated that the controller had employed special counsel to contest the case, who had entered an appearance and plea, but he was not present in court, and an effort by the clerk to reach and advise him

[1] Specially assigned.

that the case was called was unsuccessful. A just cause of action having been apparently shown, the jury were directed to give a verdict in favor of the plaintiffs for the full amount of their claim. Application is now made for a new trial by counsel for the controller, who has satisfactorily accounted for his absence at the trial, on the same grounds as advanced by the controller, that no valid purchase could be made without a previous ordinance duly authorizing it, followed by advertisement and letting to the lowest responsible bidder, and an appropriation providing for payment, and that the attempted approval by councils afterwards was not within their power, and was therefore of no binding effect upon the city.

It is, to say the least, doubtful whether the city controller is entitled to appear on behalf of the city and contest the plaintiffs' claim. The city solicitor, under the direction of councils, is the duly appointed representative of the municipality in legal affairs. Act March 7, 1901, art. 9 (P. L. 20, 29); City v. Board of Publication (Pa.) 9 Phila. 499; City v. Strawbridge, 4 Wkly. Notes Cas. 215; City v. Trustees, 15 Wkly. Notes Cas. 477. And it would result in great confusion if other officials could intervene and interfere as they saw fit in the conduct of a case committed to his care. At the same time, as an officer charged within certain limits with the important duty of seeing that the expenditure of the city's money is not made without due warrant of law, the suggestions of the controller, through his counsel, are entitled to respectful consideration, and, if it now appeared that a recovery had been had which was clearly against law and justice, I should not hesitate to reopen the case and award a new trial.

Having regard, however, to all that has been said in that behalf, I see no occasion for disturbing the verdict. The plaintiffs' claim is a just one, whatever is to be said of it as a matter of strict law, and I would have to be convinced to the contrary before undoing what has been done. The poles were furnished at a fair price, which is alleged to have been less than the city had been previously paying, and while, as it turned out, there was no such urgency as was assumed, and the poles were not used until a considerable time afterwards, the supposed urgency was a reason at the time for dispensing with the ordinary formalities, and the city made use and had the benefit of them in the end. There was thus a moral obligation to pay for them, and, justice having been accomplished, the verdict should be allowed to stand.

But, whatever may be said of the liability of the city at the outstart, by the resolution of councils approved by the mayor the plaintiff's claim was fully legalized, and, even if the case were now open and undisposed of, the defense which is sought to be made to it could not be sustained. It is no doubt true that, by the act governing cities of the second class in Pennsylvania, of which the city of Allegheny is one, "all contracts relating to city affairs shall be let to the lowest responsible bidder, after reasonable notice," and "when the contract exceeds two hundred and fifty dollars, such notice shall be by advertisement"; also that "every contract for public improvements shall be based upon estimate of the whole cost, furnished by the proper

officer through the department having charge of the improvement, and no bid in excess of such estimate shall be accepted," and that, the liability of the city thereon shall be limited by the amounts which shall from time to time be appropriated therefor. Act March 7, 1901, art. 15 (P. L. 20, 36); Act June 20, 1901 (P. L. 586, 592). These and other formalities, which need not be enumerated, are unquestionably necessary to bind the city under ordinary circumstances, and it is the duty of the controller to see that they have been complied with before approving a warrant on the treasurer for payment.

It is provided, however, on the other hand, by Act May 23, 1874 (P. L. 232) § 5, relating to the government of cities generally, with regard to the payment of claims not having an original legal basis:

"No ordinance shall be passed, except by a two-thirds vote of both councils and approved by the mayor, giving any extra compensation to any public officer or servant, employé, agent or contractors, after services shall have been rendered, or contract made, nor providing for payment of any claim against the city without previous authority of law."

While negative in form, there can be no question as to the enabling character of this enactment, and that it is applicable here, provided only it is consistent with the special provisions of the act of 1901 which have been referred to.

It is contended by counsel for the controller that it is not, but I see no reason why both should not stand. The act of 1874 contains substantially the same restrictions as the act of 1901; it being provided (section 6) that all materials furnished and work to be performed shall be by contract to be given to the lowest responsible bidder under such regulations as shall be prescribed by ordinance, which is the essence of that which is insisted on here. Both provisions being thus found side by side in the same act, they could not have been regarded as inconsistent by the Legislature which enacted them, and they must be absolutely and irreconcilably at variance, in view of this, to be now so pronounced. It may be that the sanctions supposed to have been set about the incurring of obligations and the expenditure of the public moneys by municipal authorities may to a certain extent be thus weakened. But the whole subject of city government is lodged with the Legislature, and we must be content with what they see fit to provide.

There was abundant basis, in the present instance, in the benefits which the city had received, for the action of councils, which was unanimous and had the approval of the mayor, by which the purchase of the poles was ratified and payment directed to be made. A city may recognize a moral obligation. Bailey v. Philadelphia 167 Pa. 569, 31 Atl. 925, 46 Am. St. Rep. 691. And there was considerably more than that here. The refusal of the controller, therefore, to issue a certificate in favor of the plaintiffs, by which payment from the city could be obtained, was not justified. Commonwealth v. Philadelphia, 176 Pa. 588, 35 Atl. 195. And the reasons given for it which are repeated here cannot be sustained. By the resolution of councils the plaintiffs have a valid claim against the city, whatever may be said of it before, and the verdict which they have recovered must be allowed to stand.

The rule for a new trial is discharged.

In re HENDRICK.

(District Court, D. Connecticut. February 15, 1906.)

No. 1,467.

BANKRUPTCY—CREDITORS—DISSOLUTION OF PARTNERSHIP—DISCHARGE — PERSONS ENTITLED TO OPPOSE.

Where a partnership which had proved a claim against a bankrupt estate was dissolved pending the proceedings, without any disposition of the claim being made as between the partners, no one could thereafter maintain objections to the bankrupt's discharge without showing affirmatively that all assented to the action.

In Bankruptcy. On application for discharge.
See 138 Fed. 473.

Benedict M. Holden, for bankrupt.
Brown & Perkins, for objecting creditors.

PLATT, District Judge. The report of the special master appointed to try the issues raised by the bankrupt's petition for a discharge, filed October 9, 1905, which recommends that the discharge shall be denied, is before me upon exceptions thereto filed by the bankrupt on December 8, 1905. The exceptions important to be considered at this time are those which in effect say that the master should have reported that there were no specifications of objection to the granting of the discharge filed by any creditor of the bankrupt, or by any person having an interest in his estate. The master's report evidently assumes that Allen, Worth & Co. still remain upon the record as objecting creditors. If that were not so, the report would not appear to be based upon any real contention, because it plainly shows that, although several objectors appeared at the outset, it has so happened, for one reason or another, that each one has vanished, until, as the master states, on August 23, 1905, the only objector remaining was Allen, Worth & Co. The report brings with it the entire record, and I deem it to be my duty to determine whether or not that record confirms the position which the master has taken.

The following facts are gathered from the record alone, without other suggestions: The bankrupt applied for his discharge February 28, 1905. Allen, Worth & Co., a copartnership, having three members, George A. Allen and Joseph C. Worth, of Norwich, Conn., and Adelbert B. Beeman of Fairfax, Vt., filed specifications of objection on March 29, 1905, acting therein by Allen and Beeman, two of the copartners. Such action was without doubt regular and proper. The firm was in existence and could act as it did. As late as July 20, 1905, George A. Allen, pretending to act for the firm, verified certain necessary amendments, and at his instance the specifications, so amended and verified, were refiled in the name of the firm. It appears, however, that on March 31, 1905, the firm of Allen, Worth & Co. was dissolved, and its going business taken over by the Allen-Beeman Company, a corporation. It further appears that, while the act of dissolution was in progress, the claim against this bankrupt was

discussed, and, being considered worthless by all three members, was charged off to profit and loss. It will be noticed that this action was taken two days after the specifications of objection had been filed by the firm.

The law seems to me very clear that after the dissolution of a firm, without special action regarding the accounts receivable, the late partners remain tenants in common of the joint effects and all must join in any action to recover debts due the late firm. Joint action is required to settle all matters left unsettled at the time of the dissolution. The right of either joint tenant to proceed depends upon the consent of the others. An objection to a bankrupt's discharge is certainly a proceeding analogous to that of collecting a debt. Any fraction of the joint ownership, less than the whole, must inevitably be inoperative and fruitless. The record does not show that any partner dissented from a continuance of the objecting specifications. Neither does it show that all the partners consented thereto. A painful silence exists on that point. I cannot refrain from finding, however, upon the facts which appear, as above recited, that after a dissolution, which treated this claim as it was treated, it became the duty of any member of the late firm, undertaking positive action toward collecting the whole or any part of the debt, to show affirmatively that he was acting in accordance with the wishes of all the joint owners of the claim. There was no affirmative proof of any such joint consent exhibited to the master, and I am therefore compelled to find that Allen, Worth & Co. do not appear in the case as objecting creditors. Since all other objectors have confessedly vanished, it follows that no one now appears in opposition.

I am frank to say that the effort exerted in reaching this conclusion is one of the most disagreeable tasks which has fallen to my lot since assuming my present position; but it is a situation forced upon me by the logic of the events, and one from which I cannot, doing justice to my own self-respect, escape. From what has been said, it must be clear that action herein proceeds upon the record, and includes nothing outside of the record. Therefore exceptions filed February 9, 1906, signed "Allen, Worth & Co., by Brown & Perkins, Their Attorneys," protesting against the action of the bankrupt in sending me a certain letter purporting to come from J. C. Worth, one of the late partners of the firm, have no bearing upon the issues decided. Those exceptions filed by the bankrupt which have been discussed are sustained, and for that reason alone the master's report is rejected.

If the court can be satisfied by affirmative proof that the three men who composed the late firm of Allen, Worth & Co. still continue steadfast in their opposition to the bankrupt's discharge, the recommendation of the master in that respect will be accepted, and the discharge denied. It would seem that 20 days is a reasonable time in which such proof may be exhibited. At the end of that time, if nothing shall transpire, the court will consider the incident closed.

In re THE COPPER KING, Limited.

(District Court, N. D. California. February 5, 1906.)

No. 4,215.

1. BANKRUPTCY—DEBTS ENTITLED TO PRIORITY—COSTS OF ATTACHMENT SUIT.
The insolvency act of California of March 26, 1895 (St. 1895, p. 153, c. 143, § 69), which makes the costs incurred in an attachment suit a preferred claim if the claim upon which such suit was commenced is proved against the estate of the debtor in insolvency proceedings, is in conflict with Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], which makes the lien of the attachment void if obtained within four months prior to the bankruptcy of the debtor, and is therefore suspended by that act, and cannot be invoked to entitle the attaching creditor to priority as to such costs, under section 64b, subd. 5 (30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), as a debt entitled to priority by the laws of the state.

2. SAME.
A claim for taxable costs incurred in good faith by a creditor of a bankrupt in an attachment suit to recover a provable debt, which attachment was rendered void by the subsequent bankruptcy proceedings, is not a debt owing by the bankrupt, within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b, subd. 5, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], and entitled to priority thereunder as one given priority by St. Cal. 1895, p. 153, c. 143, § 69, conceding such provision to be in force and applicable, since, while it makes such costs a preferred claim against the estate of the debtor in insolvency, it does not make the insolvent personally liable therefor.

In Bankruptcy. On review of order of referee.

W. B. Kollmyer, for petitioner.
Walter D. Mansfield, for trustee.

DE HAVEN, District Judge. This is a petition by an attaching creditor for the review of an order made by the referee. It appears from the finding of the referee that the petitioner, on February 4, 1903, commenced in one of the courts of the state an action to recover from the bankrupt the sum of $10,404.96, for goods, wares, and merchandise sold, labor performed, and money advanced to the bankrupt. A writ of attachment was issued in that action and levied upon property of the bankrupt, February 5, 1903. This attachment was in force May 29, 1903, the date of the commencement of the bankruptcy proceedings herein. The referee also found that the petitioner necessarily, and in good faith, incurred and paid the sum of $1,017.20, as taxable costs, in the action referred to, and of this $133 was for the expense of keeping the property attached subsequent to the filing of the petition in bankruptcy. This last sum was allowed as a debt entitled to priority, and the remainder of the taxable costs, $884.20, was allowed as an ordinary debt not entitled to priority. The contention of the petitioner is that the whole amount of the taxable costs incurred in the action mentioned constitutes a debt entitled to priority, and that the referee erred in not so holding. The argument in support of this proposition is based upon subdivision 5 of section 64b of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], which provides that, among the

debts entitled to priority, are "(5) debts owing to any person who by the laws of the states or the United States is entitled to priority," and section 69 of the insolvency act of this state, approved March 26, 1895 (St. 1895, p. 153, c. 143), which is as follows:

"When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof shall be a preferred debt."

The question presented is an important one, and, in view of conflicting decisions, cannot be said to be free from doubt. The cases of In re Lewis (D. C.) 99 Fed. 935, and In re Daniels (D. C.) 110 Fed. 745, fully sustain the position of the petitioner, while a different conclusion was reached in Re Beaver Coal Co. (D. C.) 107 Fed. 98, and by this court in the case of In re Allen (D. C.) 96 Fed. 512, and to this latter opinion, I still adhere. The section of the insolvency act of the state of California, above quoted, makes the costs incurred in an attachment suit a preferred claim, if the claim "upon which the attachment suit was commenced is proved against the estate of the debtor," although such action may have been commenced for the purpose of obtaining a preference, and the court is not justified in construing it otherwise for the purpose of bringing it into harmony with the provisions of the bankruptcy act, which will not in such a case even permit the claim for taxable costs to be proved as an ordinary debt. The section must stand or fall as a whole, as it is not separable; and in providing, as it does, that costs incurred in an attachment suit constitute a preferred claim, if the debt sued for "is proved against the estate of the debtor," it is in conflict with the bankruptcy act, and is therefore suspended by that act. Its language cannot be given a narrower meaning than it plainly has, so as to make it applicable only to cases in which the taxable costs may be proven in proceedings under the bankruptcy act. That the court would not be warranted in introducing into the above-quoted section of the insolvency act any words of limitation so as to remove the conflict between it and the bankruptcy act, see Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 32 L. Ed. 766. But, independently of this consideration, I am of the opinion that a claim for taxable costs incurred in good faith by a creditor, in an action to recover a provable debt, is not a debt, within the meaning of subdivision 5 of section 64b of the bankruptcy act. A debt as defined in section 1 of that act (30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) includes "any debt, demand or claim provable in bankruptcy," unless such meaning is inconsistent with the context. This definition leaves open the question as to the meaning of the word "debts" in the particular clause under consideration; and, in my opinion, it is there used in its technical sense, and refers only to such debts as are based upon contract, express or implied, or to personal obligations for the payment of money imposed upon the bankrupt by statute. The insolvency law of California does not make the insolvent, upon the contingency therein named, personally liable for the costs incurred by his creditor, in an action in which

a writ of attachment has been issued. The liability is not personal, but is against his estate. The liability for such costs, therefore, even if considered as a debt, is not a debt "owing" by the bankrupt, and does not fall within the provisions of subdivision 5 of section 64b of the bankruptcy act. In some of the states certain classes of debts arising upon contract are entitled to priority of payment in the distribution of estates, such, for instance, as debts due from a guardian to his ward for moneys coming into his hands as such guardian; so also, the obligation of sureties upon bonds of guardians (In re Crow [D. C.] 116 Fed. 110); and in Massachusetts, counties are declared to be, as to certain claims, preferred creditors of an insolvent, and entitled to priority of payment from his estate (In re Worcester County, 102 Fed. 808, 42 C. C. A. 637). It was the purpose of subdivision 5, § 64b, of the bankruptcy act, to preserve the rights of creditors under such contracts; and it may extend to an indebtedness upon an implied contract which is given priority by a law of the state. But, in view of the fact that an attachment lien obtained within four months prior to the filing of the petition, which includes the lien for costs in the attachment proceeding, is dissolved by subdivisions "c" and "f" of section 67 of the bankruptcy act (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), it is not reasonable to conclude that Congress intended by subdivision 5 of section 64b to make the claim for costs, the lien of which is thus destroyed, a preferred debt; and there is certainly much force in what was said by the late Judge Bellinger, in delivering the opinion in the case of In re Beaver Coal Co. (D. C.) 107 Fed. 98:

"The claimants levied their attachment, as they had a right to do, and they did so in good faith; but this is as far as their equities go. The act does not allow a preference on such grounds, and there is no good reason why the expense of an attachment levied to secure a debt should have preference over a debt arising out of the payment of money or the transfer of property to the bankrupt, made also in good faith, and which may represent or constitute property of the bankrupt levied upon under the attachment."

The order of the referee is affirmed.

SHANBERG v. FIDELITY & CASUALTY CO.

(Circuit Court, W. D. Missouri. December 20, 1905.)

INSURANCE—ACCIDENT INSURANCE—CAUSE OF DEATH.

Where the holder of an accident insurance policy while assisting another to carry a door along a level street, said to the other that he was tired, and suddenly fell down and died, the death being ascertained by an autopsy to have resulted from a rupture of the heart, which was very badly diseased, the death was not the result of an injury sustained from extraordinary, violent, and accidental means, independent of all other causes, within the meaning of the policy, and there can be no recovery thereon, there being in fact nothing of an accidental nature, and no external cause not fully anticipated and expected by the insured.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1166–1170.

Accident insurance—Risks and causes of loss, see note to National Acc. Society v. Dolph, 38 C. C. A. 3.]

At Law. On demurrer to evidence.

I. J. Ringolsky, for plaintiff.
Harkless, Crysler & Histed, for defendant.

POLLOCK, District Judge (orally). The question is, should this case be submitted to the jury? That question is answered by another. If so submitted, and a verdict is returned for the plaintiff, should the court allow such a verdict to stand? In other words, should the court do a useless thing in submitting the case?

This is an action on a contract which the defendant in this case made with the deceased. An indemnity contract, in which it agreed if death should result within a certain period of time, and that death resulted directly and independent of all other causes, from bodily injury sustained from extraordinary, violent and accidental means, that it would pay the indemnity. Being a limited contract the consideration for the making of it of course is low and recognized to be so. What are the undisputed, and we may say, indisputable facts in this case? Because there are certain facts in the case that can never be changed, and facts are stubborn things. The deceased, under the testimony, was engaged in carrying one end of a door about 81 inches long and 41 inches wide, the entire door weighing about 86 pounds. They were carrying it along a level street. When they had proceeded about 800 yards, under the testimony, as I recall it, the deceased looked at the other party carrying the door and said, "I am tired," fell down and suddenly expired. An autopsy was made, and it was found the right auricle of the heart was ruptured; such a rupture as would and did in this case cause immediate death. The autopsy further disclosed that the heart was very badly diseased, and that deceased was suffering from what is known as fatty degeneration of the heart. In such case shall the defendant under the evidence pay, according to the terms of the contract? I apprehend what the contract means is this: While the deceased was diseased, yet, if he met with such an accident, such an unforeseen condition of affairs or chance happening that his death was caused independently of the condition of the heart, the company may be maintained liable. For instance, suppose this man's heart was ready to burst, and in such condition that the carrying of this door would burst it, yet from the way he had lived, guarding himself from peril, because of the known fact, if he had been struck by lightning, been kicked by a horse, had received some unforeseen blow, or had taken into his system a poisonous fluid, or substance by accident, without knowledge that it was that kind of a thing, or had he inhaled poisonous and noxious gas by accident, then in such case the condition of the heart would have nothing to do with the death.

On the other hand, suppose no accident happened. Suppose he walked rapidly upstairs and death had resulted, as it might have done in the light of the diseased condition of this man's heart. The parties contracted in contemplation of the deceased going along with the usual avocations of life. The company indemnify only against accidents. They do not issue an accident policy obligating them-

selves to pay in case of death, no matter how resulting, but resulting in certain ways specified in the policy. Now suppose one of us held an indemnity contract, such as the one in this case made by the defendant. And suppose, being in a hurry, we should rush up stairs to see some one, or suppose, we should walk rapidly up hill, thus, of course, exciting the heart action, or suppose we should pick up a load of something and carry it as we might do in the ordinary course of our business affairs, and everything should be done just as we intended to do it; we carried our load just as we intended; we rushed upstairs just as we intended; or we ran up the hill just as we intended, and the exertion ruptured the heart, and we fell dead. Can we hold it to have been in contemplation of the parties in making the indemnity contract that the company should pay for the death resulting in such a case, where as in this, the heart was badly diseased? To my mind, in such case, there can be no doubt because there is no accident. The death resulted in such case because of natural causes, nothing accidental having happened, all having been done as intended.

To distinguish a little the cases that have been cited and relied upon by counsel. In the Fetter Case (Mo. Sup.) 73 S. W. 592, 61 L. R. A. 459, the deceased was attempting to shove up a window with a rod used for that purpose, you have all seen them, used for opening windows which are too high to reach; he used the rod that had been employed for that purpose, but the rod slipped off. He fell over the edge of a platform or table and struck over the right kidney. That the rod used would slip off he did not expect, if I recall the testimony, and he did not contemplate he would fall, striking the table, and it is made quite a point in that case that while the kidney was found at the autopsy to be in a cancerous condition, yet, it could not be told how long it would take to develop such condition. As a matter of fact, that could not be told by the physicians testifying in the case, and it was held that death was due to the accident and fall. If he had pushed on that window as hard as he could push, exercising his own voluntary action in pushing, and nothing more, I do not think the Fetter Case would have been decided as it was.

In the Lowenstein Case (C. C.) 88 Fed. 474, death resulted from the inhaling of poisonous gas. There is no question about the correctness of the decision in that case. The case in 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, is a little more closely allied to this one. United States Mut. Acc. Ass'n v. Barrey. There three persons were together. Each of the three had jumped from a veranda or porch between four and five feet in height before deceased jumped. The finding in that case is that by losing control of the body, through some cause, he did not alight as people usually alight. Did not alight as he intended to alight, but did alight in such a way that the jar caused the rupture. That is something, though, that he did not intend should happen, some accident not intended by him produced the result. The trouble with the case at bar is, I do not find deceased did anything he did not intend to do. From the testimony

he did not slip, did not stumble, did not fall. He walked along to a certain place carrying the load he intended to carry. He did just exactly what he intended to do. He had, which he did not know and which he did not contemplate, a defective heart, but the very thing he undertook to do, the very thing he carried out, the very thing, without anything else happening to him that was unforeseen or a matter of chance, engaged in the business of his voluntary undertaking, carried out just as he intended, resulted in his death. For that reason, I am of the opinion in this case the death was not accidental. I am of the opinion it did not result under the terms of the contract independently of all other causes. Am further of the opinion that the death was the natural and proximate result of the diseased condition of the heart.

You may file the demurrer, and under the evidence, as I view it, I will have to sustain it.

The demurrer is sustained.

VILLAMIL v. HIRSCH.

(Circuit Court, S. D. New York. January 20, 22, 25, 1906.)

INJUNCTION—CORPORATE AFFAIRS—ENJOINING STOCKHOLDERS' MEETING—CONTROVERSY BETWEEN EXECUTORS OF MAJORITY STOCKHOLDER.

Where all of the stock of a corporation was owned by two persons, and after the death of the majority stockholder a legal controversy arose between his executors, in which one was temporarily enjoined from voting the stock, the minority stockholder is entitled to an injunction restraining the other also from voting the stock until the controversy is determined; but the court will, as a condition to such relief, protect the right of the majority stock by enjoining any stockholders' meeting for the election of officers pending the litigation between the executors.

In Equity. On motions to dismiss and to vacate temporary injunction.

See 138 Fed. 690.

Blandy, Mooney & Shipman, for complainants.

Blumenstiel & Blumenstiel, David McClure, and Albert C. Bostwick, for defendants.

LACOMBE, Circuit Judge. So far as the motion to dismiss is concerned, such progress seems to have been made in the proceedings for revivor that a further reasonable time should be allowed the successors of original complainant. As was stated when the restraining order was made, the sole object thereof was to preserve the status quo until final determination of the controversy as to administration of the Hirsch estate by the Surrogate's Court. Should the surrogate undertake by order or decree to remove one of the executors named in the will and substitute another person in his place, it is thought such a disposition of the case would be in excess of his power, and the probability of a reversal upon appeal would be so great as to warrant continuance of the restraining order until the surrogate's action should have been reviewed.

Counsel vehemently insist that the surrogate does not contemplate making any such order. This court, however, can infer his intentions only from the record. In his decision he says: "I concur in the very satisfactory opinion of the referee and will follow his recommendations." The report of the referee (or, rather, the copy thereof which has been furnished to this court) says:

"It is my opinion that the respondent's letters testamentary should be revoked and that he should be removed as trustee. It is also my opinion that a new trustee should be appointed in his place, who should not be either one of the children or the son-in-law of Mrs. Hirsch."

Under these circumstances it seems wiser for this court to defer action upon the present motion until the entry of an order or decree in the Surrogate's Court shall indicate precisely what disposition is to be made of the cause pending therein.

(January 22, 1906.)

In the memorandum filed January 20th on motion to vacate restraining order, no reference was made to a point raised on the motion. It is suggested that the existing order not only prohibits a vote of the estate stock by the executrix, but also prohibits any election at all at stockholders' meeting. That is so; and such prohibition was included in the original order of the court's own motion. Such addition, however, was made, as the court believed, in the interest of the estate, which holds four-fifths of the stock. So long as the executor was enjoined from voting the estate stock by temporary injunction of the surrogate, and the executrix from voting the same stock by injunction of this court until final decision in the state court, it was thought that the result might be that at the stockholders' meeting the original complainant, Villamil, although holding only one-fifth of the stock, might poll the only votes castable and control the situation. It seemed that such a result would be inequitable, and therefore, at the same time that the restraining order he prayed for was granted, the additional clause was inserted in order to prevent his obtaining an unfair advantage. If, however, counsel for the executrix wishes to have that clause eliminated, so that election can be held on the adjourned date, leaving the Villamil shares free to vote by whoever holds them, such modification will be made, because, as has been repeated at every hearing, the only interest which this suit is brought to protect is the minority holdings of Villamil. The controversy between executor and executrix (both citizens of the same state) should not be determined here. It is before the state courts, and the only object of this suit is to preserve the status quo until it be there determined whether both of the testator's designated executors, or one, or neither, shall administer his estate, and in so doing vote on its stockholdings.

(January 25, 1906.)

It now appears that, when this court filed memorandum in this cause on January 20th, the surrogate had finally decided the matter before him by entering a decree on January 19th removing the executor. That fact, however, was not communicated to this court

until yesterday afternoon. Upon taking up the papers this morning to dispose of the pending application, the court was further informed that the Appellate Division had granted a stay of all proceedings under said decree until the return day of an order to show cause on February 9th. That, of course, leaves the status quo unchanged. Under the circumstances the best disposition of the pending application will be to continue the present injunction "until further order of this court." When further action is had in the state court the matter may be again brought to the attention of this court.

SCHWARZCHILD & SULZBERGER CO. v. RUCKER, Collector.

(Circuit Court, N. D. Georgia. January 30, 1906.)

No. 1,914.

1. INTERNAL REVENUE—SUIT TO RECOVER TAX PAID—LIMITATION.
Under the provisions of Rev. St. §§ 3226, 3227 [U. S. Comp. St. 1901, pp. 2088, 2089], that no suit shall be maintained for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue and his decision has been had therein, provided that, if such decision is delayed more than six months, suit may be brought without waiting therefor "at any time within the period limited," which is fixed by section 3227 at two years next after the cause of action accrued, where the Commissioner's decision is not made within the six months the cause of action then accrues, and the suit is barred in two years from that time.

2. SAME—CONDITION PRECEDENT—APPEAL TO COMMISSIONER.
Under the provision of Rev. St. § 3226 [U. S. Comp. St. 1901, p. 2088], that no suit shall be brought for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected "until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the Commissioner has been had therein," where an appeal for a rebate of the tax, taken after its assessment, but before its payment, in accordance with the regulations of the department, has been adversely decided by the Commissioner on the merits, a second appeal after payment of the tax is not required before bringing suit.

On Demurrer to Declaration.

Mayson & Hill, for plaintiff.

F. C. Tate, U. S. Atty., and J. A. Henley, Asst. U. S. Atty., for defendant.

NEWMAN, District Judge. This is a suit brought to recover taxes claimed to have been illegally assessed and collected of the plaintiffs as dealers in oleomargarine. The case is now heard on demurrer on the ground that the action is barred by the statute of limitations. The suit is for three items—one item collected from the plaintiffs as dealers in oleomargarine in Atlanta, Ga.; one at Savannah, Ga., and one at Macon, Ga. The petition shows that in June, 1901, a tax was assessed upon plaintiffs as wholesale dealers in oleomargarine at Atlanta, total tax and penalty, $540, and that an

application was made to the Commissioner of Internal Revenue on form No. 47 for an abatement of the tax, which application for abatement was rejected on the 17th day of August, 1901. Afterwards, on January 25, 1902, the collector demanded payment of the assessment, and the same was paid, under protest and to prevent the seizure of property, by plaintiffs. Afterwards, on March 18, 1902, plaintiffs filed with the Commissioner, on form No. 46, an application for a refunding of this tax, which application was rejected October 9, 1903. This suit was filed in the office of the clerk of the superior court of Fulton county on December 28, 1904, having been afterwards, on the application of Rucker, collector, removed to this court.

In June, 1901, an assessment of the same character was made against plaintiffs as dealers in oleomargarine at Savannah, Ga.; the amount, embracing the special tax and penalty, being $540. On August 17, 1901, application was made to the Commissioner of Internal Revenue on form No. 47 for an abatement of said assessment. Afterwards, on January 28, 1902, payment was demanded by the collector of the amount of said assessment, and the same was paid, under protest and to prevent the seizure of its property. Afterwards on March 18, 1902, petitioners filed on form 46 an application with the Commissioner to refund the tax, which application was rejected on October 9, 1903.

As to these two items the question raised by this demurrer is as to when the cause of action accrued. The language of section 3226, Rev. St. [U. S. Comp. St. 1901, p. 2088], is as follows:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provision of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: Provided, that if such decision is delayed more than six months, from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

The next section here referred to is section 3227 [U. S. Comp. St. 1901, p. 2089], so much of which as is material here reads as follows:

"No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued."

It will be perceived from this that the plaintiff had a right to sue in six months after the appeal was taken to the Commissioner, which was six months after March 18, 1902, as to both of these items; that is, September 18, 1902. It seems to me perfectly clear from the two sections of the Revised Statutes referred to, and which seem to be controlling here, that the plaintiffs' cause of action accrued six months after the appeal was taken to the Commissioner of Internal Revenue. The language is:

"That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section."

The very language which fixes the right to sue within six months, if the Commissioner shall fail to act within that time, refers also to the limitation period, and it is evident that the cause of action accrued after the expiration of six months from the time of entering the appeal. I think this is about as clear as anything can be.

The other item in this suit is for $996 taxes claimed by the collector, and paid by plaintiffs as wholesale dealers in oleomargarine at Macon, Ga. The tax was paid on December 29, 1903, and suit was brought, as has been stated, on December 28, 1904. In the meantime, and between the time the tax was assessed and its payment, application was made to the Commissioner of Internal Revenue for an abatement of the tax, and this was refused on October 10, 1903. The question made on demurrer to this item is whether it is necessary, when there has been an application to the Commissioner of Internal Revenue for an abatement of the tax after it is assessed and before it is paid, to appeal after the payment of the tax for its refunding. The plaintiffs propose to amend the declaration and to allege that on the application for an abatement of the tax assessed against them at Macon the Commissioner considered the matter on its merits and determined that the tax was properly assessed and should be paid.

Plaintiffs claim that, this being true—that is, the correctness of the tax having been considered on its merits by the Commissioner on the application for abatement—there was no necessity for an application subsequently to refund. I am inclined to think this contention is sound. While the pleadings do not show it, nor do I find the statute to be clear about it, even if there are rules and regulations made by the Commissioner of Internal Revenue which authorize the application for an abatement of the tax claimed to have been wrongfully assessed before it is paid, and also for an appeal to the Commissioner for a refund of the taxes after payment, as seems to be assumed in argument, it seems to me that either would be sufficient. If the Commissioner considers the matter on its merits on an application for an abatement of tax before payment, and decides that the tax has been properly assessed and should be collected, there could hardly be any necessity for appealing to him to refund it. After a full investigation he has just held that it was legally assessed and directed that it should be paid. In San Francisco, etc., Society v. Cary, 2 Sawy. 333, Fed. Cas. No. 12,317, Circuit Judge Sawyer ruled as follows:

"The first point made by the defendant is that the suit was prematurely commenced, on the ground that an appeal must be taken to the Commissioner after payment before suit brought. Act July 13, 1866, c. 184, 14 Stat. 152, § 19, and regulations prescribed by the Secretary of the Treasury. But an appeal was taken from the assessment before payment, and decided against plaintiff. This I think sufficient. There could be no object in appealing a second time to the same officer in the same case and upon precisely the same question. The Commissioner had already decided the identical question, and the object of the law was accomplished in the first appeal."

The conclusion is that the demurrer to the declaration will be sustained so far as the suit seeks to recover the amounts paid at Atlanta and Savannah, and overruled as to the amount paid at Macon; and an order may be taken to that effect.

SOUTHERN CASH REGISTER CO. v. NATIONAL CASH REGISTER CO.

(Circuit Court, N. D. Georgia, W. D. February 1, 1906.)

No. 63.

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—AVERMENT IN PETITION.

Where plaintiff's pleading in a state court contained a number of counts or paragraphs, each claiming damages for alleged wrongful acts of defendant in the sum of $1,900, and also a prayer for an injunction to restrain a continuance of such acts, an allegation in a petition for removal that the amount in controversy exceeds $2,000 must be accepted as true, even of the prayers for damages be construed as claiming only $1,900 in all; there being nothing in the pleading showing the value of the matter involved in the controversy with respect to the injunctive relief sought.

[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.]

On Motion to Remand to State Court.

Crawford & Ricketson, for plaintiff.

Felder & Rountree and E. D. Thomas, for defendant.

NEWMAN, District Judge. This is a suit by the Southern Cash Register Company, which is engaged in selling the Hallwood Cash Registers, against the National Cash Register Company. The petition contains a number of paragraphs, in each of which damages to the amount of $1,900 are claimed. The plaintiff claims under separate paragraphs, and, indeed, what might be called separate counts, a different character of damages. The first claim is on the ground that, after the Hallwood Cash Register Company had made certain sales in Columbus, Ga., the defendant through its agents called upon the purchasers, and by false and fraudulent representations, and by artful means and deceitful practices, etc., persuaded customers of the Hallwood Company to withdraw their orders, and this is said to be to the damage of plaintiff $1,900. Then in the next count it says that the agents of the defendant company took a Hallwood cash register machine, stripped the machine, and removed the back therefrom in the presence of customers of petitioners, and did "manage, display, and manipulate said cash register, and by fraudulently displaying said parts thereof and touching certain parts of the mechanism of said machine did then and there cause said machine to falsely report sales, and make incorrect additions and registrations," etc., and that this was to its injury and damage $1,900. The next count seems to be (although it claims $1,900) a part of the preceding count with reference to manipulating and handling one of the Hallwood machines so as to create a wrong impression on the plain-

tiff's customers. In the next count it is claimed that it is damaged $1,900 in that, as alleged, the defendant company keeps a school wherein agents are instructed in the mechanism and construction and operation of the Hallwood register, and are taught in an artful manner to so handle and display the Hallwood register that the parties to whom the agent is showing and demonstrating the machine will be led to think that the same is worthless, and to persuade such customers to withdraw and countermand orders given for a Hallwood register; and then it is alleged that by the use of false and fraudulent representations, etc., by the agents so trained, plaintiff has been damaged $1,900. There are four other counts, besides these, each of which claim $1,900 damages, substantially for false and fraudulent representations, and for fraudulent devices used against it, to the injury of their business.

It is claimed by the defendant removing the case that these amounts are cumulative; and by the plaintiff that it is only several ways of claiming the same $1,900. After setting out the various items of damages in the manners stated, or its claim for damages in different ways, whatever it may be, the plaintiff, evidently assuming that under the practice in the state courts an action for damages may be combined with a claim for equitable relief, and for an extraordinary remedy by a writ of injunction, proceeds to state: "Only under the equitable jurisdiction of this court can their rights be protected and their interest conserved." Then follows a prayer for injunction against the defendant to restrain it from displaying the Hallwood cash register, stripped of all its outer covering, etc., and from interfering with any sales of the Hallwood cash register, and from persuading and enticing customers purchasing Hallwood cash registers to withdraw their orders, and that the National Cash Register Company, its agents and servants, be enjoined from misrepresenting the construction, mechanism, reliability, durability, strength, and merit of said Hallwood register, etc. The plaintiff having under the state practice combined an action for damages with a proceeding for equitable relief and for injunction in the same suit, the jurisdictional amount of over $2,000 may be very well involved in the case. Certainly the suit claims $1,900 by way of damages, and the amount or value in controversy, so far as the equitable side of the case is concerned, does not appear in the plaintiff's petition at all.

The petition for removal stated the amount in controversy to be $3,800. Certainly, if the prayer for injunction makes any controversy at all, its value and amount would appear to be easily over $100; so that, even allowing that the amount of damages claimed is only a single amount of $1,900 stated in different ways, that, with the amount and value of the controversy as to the injunction prayed, would appear to be more than $2,000. In view of the fact that the petition for removal places the amount in controversy at $3,800, I do not see how there can be any good reason for remanding the case for lack of the jurisdictional amount, looking at the entire record as presented here.

As to the importance of the petition for removal on the question of the jurisdictional amount, see Gold Washing & Water Co. v.

Keyes, 96 U. S. 199–202, 24 L. Ed. 656; Banigan v. City of Worcester (C. C.) 30 Fed. 392; Postal Telegraph Co. v. Southern Railway Co. (C. C.) 88 Fed. 803; Lord v. De Witt (C. C.) 116 Fed. 713.

The motion to remand will be denied.

In re GRANT.

(District Court, D. Rhode Island. February 21, 1906.)

No. 410.

BANKRUPTCY—PETITION TO REVIEW ORDER OF REFEREE—TIME FOR FILING.

While no time is fixed by Bankr. Act. July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], nor by the general orders thereunder within which a petition to review an order of a referee must be filed, it must, at least, be within a reasonable time in the absence of a rule of court on the subject, and within such time as will not unjustifiably delay the administration of the estate; and where a referee repeatedly called the attention of counsel for the petitioner to the matter a petition filed more than three months after the order was made, and on the day fixed for the declaring of a dividend was not within a reasonable time, and, on objection by the trustee, the referee was justified in refusing to certify the facts and his findings to the court.

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

In Bankruptcy. On petition to review order of referee.

Cooke & Angell, for Doe.

Robert W. Burbank, for trustee.

BROWN, District Judge. By the referee's certificate, it appears that, after a hearing, the referee entered on October 25, 1905, an order denying the prayer of the petition. Copies of the findings were sent to the attorneys for Doe and the trustee respectively, and the attorney for Doe was notified that a petition for a review, by the judge, of the referee's order, if desired, should be filed within 10 days from said October 25, 1905. No further steps were taken in the matter, and the administration of the estate has been held up pending the question whether an appeal should be taken. On February 2, 1906, no steps toward an appeal having been taken, and the trustee having made frequent requests to be allowed to distribute the fund among the general creditors, notices of a dividend to be declared on February 12, 1906, were sent to creditors, and on the same day Doe's attorney was notified of said proceedings, and the failure of Doe to file his appeal was again called to his attention. No further steps being taken toward an appeal, on February 10, 1906, said attorney was notified that unless an appeal were filed on February 12, 1906, the date set for the declaration of said dividend, the funds in question would be distributed among the general creditors of said Grant; and on February 12, 1906, the petition for a review of the referee's order was filed by said Edgar J. Doe. At the expiration of 10 days from October 25, 1905, the attorney for the trustee notified the referee that he should object to the filing of any petition for a review of the

above-mentioned order, on the ground that it had not been filed in time, and, upon notification of the filing of the present petition, has objected to the granting of the same, and to the certification of the facts and findings of the referee to the judge, alleging that the petitioner has not come within the terms of General Order No. 27, (89 Fed. xi, 32 C. C. A. xxvii). The referee thus discusses the question of law involved:

"The length of time which may be had for an appeal under General Order No. 27 seems to be uncertain. An opinion of Hon. Nathan W. Littlefield reported in the sixth of American Bankruptcy Reports, in 6 Am. Bankr. Rep. 709, in Re Chambers, Calder & Co., very forcibly sets forth the suggestion that a limit of ten days is proper for such appeals and supports the position by analogy to other provisions of the bankrupt law. Since said opinion the law in this jurisdiction has been administered on this basis, all appeals having hitherto been taken within ten days. This time limit is fixed by rule of the court in some jurisdictions (Erie Co., N. Y., Rule 16), and in others it is held that an appeal may be taken within a reasonable time, each case standing on its own foundation (Re Scott, 3 Am. Bankr. Rep. 625, 99 Fed. 404; Crim v. Woodford, 14 Am. Bankr. Rep. 302, 136 Fed. 34, 68 C. C. A. 584 (4th Circuit). Twenty days held reasonable, no objection being made.

"The test of a reasonable time undefined leaves the administration of each estate unsettled pending the caprice or whim of a dissatisfied creditor. Prompt settlement is an aim of the bankruptcy law. That law requires dividends to be paid as often as there is sufficient to pay 10 per cent. (section 65b of Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), and the test of a reasonable time undefined for taking appeal leaves the referee in a position of uncertainty as to what he should or can do under circumstances similar to those in the present case. If a dividend were to be paid and an appeal filed thereafter there is the possibility, though perhaps not the probability, of holding that the appeal was seasonable and reversal of the referee's finding would result in liability of the trustee or referee or both to the claimant whose funds have been distributed. In the case at bar while Doe has always stated he intended to appeal, no reasons are given in his petition for the delay from October 25, 1905, to February 12, 1906, the very day on which the dividend was to be declared and after all creditors had received notice of the same.

"The referee, therefore, declines to certify his facts and findings on the above-entitled claim without instructions from the judge, and hereby certifies the above facts to the judge for his opinion as to whether said petition for review has been filed in due season."

Upon the facts set forth, I am of the opinion that the petition for review of the referee's findings was not filed within a reasonable time, and that the referee properly declined to certify his facts and findings. While General Order No. 27 fixes no time within which a person desiring a review by a judge of an order made by a referee shall file his petition, and while no rule has hitherto been made by this court fixing the time, it is apparent that the right to file such a petition for review cannot be so exercised as unreasonably and unnecessarily to delay the distribution of the assets of the bankrupt. Upon the referee's certificate, it appears that he gave repeated notice to the attorney for Doe, but that no petition for review was filed until February 12, 1906, the very day on which a dividend was to be declared. Had the petition for a review been taken seasonably, it could have been disposed of long before February 12, 1906. It thus appears that the delay in filing the petition for a review would prove an unjustifiable interference with the administration of the estate, were it now allowed.

A somewhat analogous question arose in the case of Chow Loy v. United States, 112 Fed. 354, 360, 50 C. C. A. 279, 285, where it was said:

"It is very certain that the officers of the government cannot be delayed indefinitely by the claim of appeal; that at some time it must fail for lack of prosecution; and that it is within the power of the district judge, in his sound discretion, to determine when that time has arrived. There is nothing in this record to show that the action of the district judge in dismissing the appeal was improper."

While that case is no longer an authority upon the main question there involved (see Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121), it seems to be an authority for holding that the right of review or appeal, for which the statute fixes no time limit, is, nevertheless, not unlimited; but that it casts upon the person seeking a review the duty of proceeding with some degree of diligence, and that a failure to so proceed must be construed as an abandonment of the appeal.

I am of the opinion that the referee properly declined to certify his facts and findings, dismissing Doe's petition filed February 12, 1906, for a review by the judge of the referee's order of October 25, 1905; and said action of the referee is hereby affirmed.

In re ROSENBLATT et al.

(District Court, E. D. Pennsylvania. February 21, 1906.)

No. 2,420.

BANKRUPTCY—RIGHT OF RECEIVER TO BOOKS OF ALLEGED BANKRUPT—CLAIM OF PRIVILEGE.

An alleged bankrupt will be required to turn over books of account relating to his business to a receiver appointed by the court of bankruptcy, where it is shown that they are necessary to enable the receiver to continue the business as directed by the court, notwithstanding a claim of privilege by the bankrupt on the ground that the books contain evidence which will tend to incriminate him, unless it appears that such claim is made in good faith and has a reasonable foundation; it not being his right to determine such question for himself.

In Bankruptcy. On petition of receiver to require alleged bankrupts to deliver to him their books of account.

Hepburn, Carr & Krauss, for receiver.
Furth & Singer, for alleged bankrupts.

HOLLAND, District Judge. The requisite number of creditors of the above-mentioned bankrupts filed an involuntary petition in bankruptcy against them on the 28th day of December, 1905, and the following day H. K. Mulford was appointed receiver and entered bond in the sum of $100,000. The nature of the business was such that upon petition the court was moved to make an order authorizing the receiver to continue the business for a limited time, and upon taking possession of the property, which is a manufacturing establishment, he found that the bankrupts had removed a number of the

books of account which had been kept by them in the conduct of their business. He thereupon presented a petition alleging that it was necessary to have the missing books in his possession in order to conduct the business in accordance with the order of the court, and for the purpose of preserving the estate, and asked that an order be made directing the bankrupts to deliver them to him, to which they filed an answer in which they claimed that the receiver had already sufficient books for the purposes of his appointment, and that they should not be required to deliver the books, held by them, to the receiver, because they contained evidence which might incriminate them.

The petition and answer were referred to a special referee to ascertain whether or not the receiver has in his possession sufficient books to enable him to perform his duties as receiver under the law, and if not, what additional books are necessary. On February 7, 1906, the referee filed a report in which he states that he took the testimony of H. K. Mulford, the receiver; of John E. Klienhurst, who had been the bookkeeper for Rosenblatt & Co., and now acting in that capacity for the receiver of Henry J. Walters, and of Robert E. Stockwell, a certified public accountant, from which he finds the following: That the books in the possession of the receiver consist of sales books, invoice books, and other books of original entries; that the books kept and taken by the firm are the sales ledger, private ledger, invoice ledger and cashbook; that there are from 2,000 to 3,000 accounts, aggregating $80,000 outstanding and due the firm, and that the receiver cannot make up any of these accounts, or carry on the business as directed by the court, or collect, or render accounts to the creditors, without having possession of the books now held by the alleged bankrupts. He further finds that these books had been placed in the possession of Henry J. Walters for several days, during which time he had statements copied from them of accounts which had been assigned to him. The petition alleges that between the 16th and 23d days of December, 1905, the bankrupts transferred and assigned to Henry J. Walters a large amount of book accounts, contained in the books kept by the firm, as security for certain alleged moneys loaned, and the receiver testified before the referee that without the possession of these books he was unable to know which accounts were assigned, and when money was received, whether it was upon such assigned accounts, or upon those still remaining in the bankrupts' estate. It was shown by the bankrupts' bookkeeper that these books were correctly kept and that all entries were correctly made from the books of original entries into the sales ledger.

It does not appear from anything in the record, either in the answer of the alleged bankrupts or in any of the evidence taken before the referee, that there is anything in these books which will tend to incriminate them. It is contended that the bankrupts are the sole judges of that question, and they are not required to do more than to claim their constitutional privilege that they are the sole judges of the question as to whether or not the books do contain such evidence, and that they are not required in any manner, by the production of evidence, to satisfy the court that their claim has some founda-

tion in fact. If this be the law, then, bankrupts in every case can retain their books, and creditors will be unable to secure evidence of what in most mercantile concerns is the most valuable asset, to wit, the book accounts. It would be the greatest possible encouragement to dishonest debtors to practice frauds upon their creditors and then destroy the evidence of it. But this question has been settled by the courts. They have taken a more reasonable view, which requires that it shall appear to the court that the claim is made in good faith and that there is reasonable ground to apprehend danger from the production of the books, and when this fact does appear then great latitude should be allowed the claimant in judging for himself as to the effect of any particular question or production of a book. "But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice." Brown v. Walker, 161 U. S. 599, 16 Sup. Ct. 648, 40 L. Ed. 819. And it would be equally potential in converting a salutary protection into a means of abuse if a bankrupt were permitted to judge entirely for himself, regardless of the facts, whether or not the production of a book will tend to incriminate him. The referee finds that it is necessary, in order that the receiver may perform the duties for which he was appointed, to have (1) the sales ledger of the firm; (2) the private ledger of the firm; and (3) the cashbook covering the period from March 1, 1904, to June 1, 1905.

It is therefore ordered that Henry M. Rosenblatt, William B. Landauer, and Emanuel H. Massman deliver (1) the sales ledger of the firm; (2) the private ledger of the firm, and (3) the cashbook covering the period from March 1, 1904, to June 1, 1905, to H. K. Mulford, receiver.

In re INTERNATIONAL COAL MINING CO.

(District Court, E. D. Pennsylvania. February 21, 1906.)

No. 2, 398.

1. BANKRUPTCY—CORPORATIONS—EFFECT OF STATE INSOLVENCY LAW.

Act Pa. April 7, 1870 (P. L. 58), which provides that on return of an execution against a corporation of certain classes unsatisfied the judgment creditor may procure a special writ of fieri facias on which all the property of the corporation, except real estate held in fee, shall be sold and the proceeds distributed by the sheriff among all its creditors as provided in Act Pa. June 16, 1836 (P. L. 775), is in effect an insolvency law and proceedings thereunder cannot defeat the operation of the bankruptcy law. While such proceedings do not give the creditor a preference so as to constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (3), Stat. 546 [U. S. Comp. St. 1901, p. 3422], they result in placing the sheriff as a receiver or trustee in charge of the property of the corporation because of its insolvency which constitutes an act of bankruptcy under section 3a (4) as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683].

[Ed. Note.—Effect of national bankruptcy act on state insolvency laws and assignments for benefit of creditors, see note to Carling v. Seymour Lumber Co., 51 C. C. A. 11.]

2. SAME.

Proceedings under Act Pa. April 7, 1870 (P. L. 58), by which all of the property of an insolvent corporation is sold under a special writ of fieri facias for distribution among its creditors does not work a dissolution of the corporation so as to defeat subsequent bankruptcy proceedings against it, based on such proceedings as constituting an act of bankruptcy, or disenable its directors to admit its insolvency and its willingness to be adjudged a bankrupt which constitutes an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (5), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422].

In Bankruptcy. On petition in insolvency proceedings and answer of creditor.

Wessel & Aarons, for petitioning creditor.
Boyd Lee Spahr, for objecting creditor.

HOLLAND, District Judge. On July 14, 1905, a writ of fieri facias, on a judgment obtained by the Cresson & Clearfield Coal & Coke Company, was issued against the alleged bankrupt, which was returned unsatisfied. Whereupon the judgment creditor filed a petition under the Pennsylvania act of April 7, 1870 (P. L. 58), and the common pleas court of Philadelphia directed the issuance of a special writ of fieri facias authorized by this act, under which the sheriff seized upon the bankrupt's property and duly advertised for sale the "franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action arising out of contracts, torts, or penalties, and assets of every description belonging to or any way appertaining to the International Coal Mining Company, excepting only lands held in fee," and on the 29th day of September, 1905, sold the same to P. H. Walls for the sum of $40. The costs of the said proceedings were $25.92, which are retained by the sheriff, and the balance, $14.08, is distributable pro rata among all the creditors of the International Coal Mining Company under the seventy-fourth section of the Pennsylvania act of June 16, 1836 (P. L. 775). It does not appear, however, that this distribution has been made.

On December 5, 1905, an involuntary petition in bankruptcy was filed against the alleged bankrupt, setting forth as one of the acts of bankruptcy the execution and sale of the alleged bankrupt's property above mentioned, and its failure to vacate or discharge this alleged preference. It is also alleged in the petition that on the 25th day of November, 1905, the International Coal Mining Company admitted in writing its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground. The Cresson & Clearfield Coal & Coke Company, in due season, objected to the International Coal Mining Company being adjudged a bankrupt, for the reason that the sale under the special fi. fa. authorized by the Pennsylvania act of 1870, supra, worked under the laws of Pennsylvania a dissolution of the corporation, and at the time of filing the petition in bankruptcy it had no legal existence, and further, that the equal distribution required under the seventy-fourth section of the act of June 16, 1836, in effect prevented the preference, which is prohimited by Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, 30 Stat. 546

[U. S. Comp. St. 1901, p. 3422] and there was consequently no commission of this act of bankruptcy. It is further contended that on November 25, 1905, when the alleged bankrupt corporation, through its board of directors, admitted in writing its inability to pay its debts and itse willingness to be adjudged a bankrupt, that it had no legal existence, and this act of the board of directors is a nullity.

Prior to the passage of the act of April 7, 1870, supra, a return of "unsatisfied in part or in whole" to an execution against certain corporations entitled the plaintiff in the judgment, upon petition, to have a sequestrator appointed, whose duty it was to distribute the net proceeds of the property among all the creditors of such corporation according to the rules established in the case of insolvency of individuals, and such sequestrator was accorded all the powers and was subject to all the duties of trustees appointed under the law relating to insolvent debtors. The fi. fa. which this act of 1870 authorizes, after the insolvency of the corporation is established by a return of nulla bona, is in lieu of the provisions or proceedings by sequestration under the seventy-fourth section of the act of 1836—P. L. 775 (Appeal of Philadelphia & Baltimore Central Railroad Co., 70 Pa. 355)—and the duties of the sequestrator are performed by the sheriff, who is still required to make an equal distribution of the proceeds of sale to all the creditors of the insolvent corporation. Bayard's Appeal, 72 Pa. 453.

The proceeding in effect, beginning with an execution, a return thereto, establishing the insolvency, followed by a sale of all the property of the insolvent corporation on the special fi. fa. under the act of April 7, 1870, and an equal distribution among creditors of the corporation, is nothing more or less than a state insolvent law for the purpose of administering the property of insolvent corporations. It is made an act of bankruptcy to put a receiver or trustee in charge of the property of a corporation under state laws by section 3, subd. 4, and the substitution of the sheriff to effect the same result will not defeat the provisions of the act. In this proceeding, the property of the insolvent corporation is not placed in the hands of a receiver or trustee by that name, but it is so in effect, because the sheriff, after a sale of the property on execution, is required to distribute the net proceeds among the creditors of the corporation according to the rules established in cases of insolvency of individuals, and the same as a receiver or trustee would have been required to do under the law relating to insolvent debtors in the state.

The placing of the insolvent corporation's property in the hands of a receiver or trustee under the state laws is not charged as one of the acts of bankruptcy in the creditor's petition, and an adjudication cannot be entered for that reason as the record now stands, and we do not think that the execution and sale of the property and the distribution of the proceeds in this proceeding is an act of bankruptcy set forth in section 3, subd. 3, of the bankrupt act because there is no lien created by the levy (Bayard's Appeal, supra), and no creditors will obtain a preference, but the admission in writing by the board of directors of the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt is set forth as an act

of bankruptcy which will entitle the creditors to an adjudication, if, for the purposes of the bankrupt law, they had authority to pass upon this question. We think they had. The bankrupt law is paramount to all the state insolvent laws, and where the effect of enforcing the state law is to defeat the object of the provisions of the bankrupt act, that part of the state law must yield to the provisions of the latter.

To concede the contention of the respondent here, that the sale of the property of the alleged bankrupt by the sheriff of Philadelphia county on this peculiar writ worked a dissolution of the corporation so that proceedings in bankruptcy could not be instituted against it, would "result in the anomalous situation that the commission of an act of bankruptcy would prevent the bankrupt act from taking effect." But even under the act of 1870 the corporate existence does not entirely disappear upon the sale of the property and franchises upon an execution under that act, because the act "excepts land held in fee" from sale on the special fi. fa., "which must be proceeded against and sold in the manner provided for in cases for the sale of real estate." The title to this excepted real estate must remain in the corporation until sold, and a dissolution cannot take place so long as this asset exists, even under that act. But even if this were not so, the bankrupt act would so far control the matter of dissolution of the insolvent corporation as to prevent its legal extinction by superseding all state laws in conflict with its provisions to an extent necessary to enable creditors of insolvent corporations to have the assets of their insolvent debtor administered in accordance with its terms. Scheuer v. Book Co., 7 Am. Bankr. Rep. 384, 112 Fed. 407, 50 C. C. A. 312; In re Storck Lumber Co. of Baltimore, 8 Am. Bankr. Rep. 86, 114 Fed. 360; In re Hercules Atkin Co., Ltd., 13 Am. Bankr. Rep. 369, 133 Fed. 813.

The objections in the answer are overruled, and the clerk is directed to enter an adjudication.

In re CAVAGNARO.

(District Court, D. New Hampshire. February 27, 1906.)

No. 1,006.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE.

Property in the possession of a bankrupt under an unrecorded conditional sale, the title to which remains in the seller under the state law, except as against attaching creditors or subsequent purchasers from the purchaser without notice, does not pass to the trustee in bankruptcy, under Bankr. Act 1898, c. 541, § 70a (5), 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], as property which might have been levied upon and sold under judicial process against the bankrupt; such right being confined to a particular creditor who attaches without notice, resting on the es toppel of the true owner, and not extending to the general body of creditors, some of whom may have had notice.

In Bankruptcy. On review of order of referee.

P. H. Sullivan, for claimant.
Irving E. Forbes, for trustee.

ALDRICH, District Judge. Prior to bankruptcy proceedings Cavagnaro held two cash registers under an unrecorded conditional sale from the National Cash Register Company, in which it was agreed that title to the registers should not pass until purchase price or any judgment for the same was paid in full. The National Cash Register Company claims the registers on the ground that title never passed to the bankrupt, while the trustee of the bankrupt estate claims to hold them as a representative of the estate, in the interest of all the creditors, upon the ground that he succeeds by operation of law to the rights of individual attaching creditors without notice.

The question having reference to the right of individual creditors by virtue of a New Hampshire statute in respect to conditional sales, it is largely controlled by local law.

Much of the apparent conflict upon the authorities, in respect to the title of a trustee in bankruptcy to property in possession of the bankrupt under conditional sales, is relieved by a critical examination of the particular phraseology of the statutes upon which the various decisions are founded. In some of the states it is declared by statute that unrecorded conditional sales are only good as between the vendor and vendee, while in others that they shall be void for want of record as against creditors, subsequent purchasers, pledgees, or mortgagees, and in others that the contract shall be recorded within thirty days of the delivery of the property, and in others that it shall be acknowledged and recorded in order to be binding as against others than the vendee and his heirs. Isaac on Conditional Sales in Bankruptcy, 9–12. Thus it will be seen that under some of the state statutes creditors may hold against an unrecorded conditional contract of sale without regard to the question of actual notice, and under such circumstances trustees in bankruptcy reasonably enough hold a status, with respect to the title of the property, different from that which would exist under a state statute, where the property could only be held under judicial process by an attaching creditor without notice. Hence it becomes essential to look at the particular provisions of the New Hampshire statute and the New Hampshire authorities as to the status of the title under a conditional sale like the one in question.

Under such a sale in New Hampshire the title remains in the vendor (McFarland v. Farmer, 42 N. H. 386; Holt v. Holt, 58 N. H. 276), and until the statute of 1885 the conditional vendee had no title to the property which could be taken by an attaching creditor with or without notice of the condition (Batchelder v. Sanborn, 66 N. H. 192, 22 Atl. 535). The New Hampshire statute so far changed the situation as to declare in effect that no conditional sale shall be valid against attaching creditors or subsequent purchasers without notice unless recorded (Pub. St. N. H. 1901, c. 140, § 23); but under this statute it was held that the title of the vendor under an unrecorded

conditional contract was good as against an attaching creditor with actual notice (Batchelder v. Sanborn, 66 N. H. 192, 22 Atl. 535). The significance of this statute resides in the idea that the creditor attachment right is an individual statutory right by virtue of an attachment without notice, rather than a right created for the whole body of creditors some of whom may have had notice. The title in the property under the New Hampshire law thus remaining in the vendor, and the right of a particular creditor thus resulting upon principles of estoppel through the creditor's doing something without notice, like that of making an attachment under legal process, it is not influenced much, if at all, by section 67 of the bankrupt act or the decisions thereunder, which in a large sense relate to situations where the debtor has undertaken to place liens upon property the title to which was in himself, rather than in a vendor.

It has been said that a court of bankruptcy is a court of equity, seeking to administer the law according to its spirit, not merely by its letter (In re Kane, 127 Fed. 552, 62 C. C. A. 616); and it is difficult to see, either upon reasonable rules of legal construction or upon equitable considerations, why an individual statutory right, resulting to a particular creditor upon grounds of estoppel because he has incurred expense upon the property through instituting legal proceedings without notice of the true condition of the title, should pass by subrogation to a bankrupt estate for the benefit of a body of creditors who do not sustain a like, or even a similar, relation to the title to the property, or to the statutory or attachment right.

In this case the contention of the trustee in bankruptcy is principally based upon that provision of section 70 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), which by operation of law vests in the trustee title to such property of the debtor as might have been levied upon and sold under judicial process against him. Such contention under the circumstances of this case fairly puts in issue the question whether property which could have been held under judicial process by an individual creditor upon an attachment without notice can be held by the trustee for the general body of creditors under the doctrine of subrogation without regard to the question of notice.

I do not find that this precise point has been decided authoritatively in the First circuit, but in a situation where the trustee held the property because it could have been taken by the creditors generally, it was said by Judge Lowell in Re Hammond (D. C.) 98 Fed. 845, 862, in stating the principle underlying the decisions for the purpose of distinguishing the situation there from one like this, that:

"The assignee in insolvency does not take the title to property which can be attached as the property of the bankrupt, where the attachment can be upheld only through an estoppel in favor of a particular attaching creditor existing against the true owner of the property. 'This was not property which could be taken on execution by creditors generally, but only by creditors without notice.' Low v. Welch, 139 Mass. 34, 29 N. E. 217. See Lowell, Bankr. § 349."

A recent decision of the Supreme Court (Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986), which involved

a New York statute safeguarding subsequent purchasers, pledgees, or mortgagees in good faith, and therefore the same idea as that presented by the New Hampshire statute in respect to attaching creditors without notice, holds that the machines there in question were not property which under the law of New York might have been levied upon and sold under judicial process against the bankrupt within the meaning of section 70a, and that the bankrupt trustee, not being a subsequent purchaser in good faith within the meaning of the New York statute, gets no better title than that which the bankrupt had. See, also, cases collected in Isaac, Conditional Sales in Bankruptcy, 15–21. Under this view the holding of the referee must be reversed.

The order of the referee that the petition of the National Cash Register Company be denied, and that the trustee in bankruptcy take the registers, is vacated, and the referee is directed to take further proceedings not inconsistent with this opinion.

In re McKAY et al.

(District Court, W. D. New York. February 20, 1906.)

1. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—LAW GOVERNING TRUST FUNDS.

Whether or not the provisions of a will create a trust, such as to prevent a fund bequeathed from passing to the trustee in bankruptcy of the beneficiary or legatee, is to be determined by the law of the state.

2. SAME—TRUST—TITLE TO FUND.

A testator bequeathed to his wife and son, respectively, the use of a certain specified sum during their natural lives, the principal to be then disposed of as provided. The will directed the executors to pay such sums to a designated trustee, taking its receipt, showing the purpose to which they were to be applied, and directed the trustee to pay the income and principal to the legatees entitled thereto under its provisions. *Held*, that the will created an express trust in personalty, and under the law of New York the title to the funds vested in the trustee designated, or in the trustee appointed by the court on a failure of the one designated to serve, and did not pass to the trustees in bankruptcy of the wife and son.

Thomas L. Newton (William G. Laidlaw, of counsel), for bankrupts.
Hudson Ansley, for trustee.

HAZEL, District Judge. This is a review of the decision by Referee Peckham, which applies to both the above-entitled cases, holding that no express trust of which the bankrupts were beneficiaries was created by the last will and testament of Richard J. McKay, deceased, and that, accordingly, the income and profits of a certain fund passed to the trustee in bankruptcy. The single question submitted by the certificate is whether by said probated will an express trust was created for the individual benefit of the bankrupts. Counsel for the trustee relies upon the proposition that there was no express trust, because the essential elements of a trust relationship are not found in the transaction in question. The record shows that Amelia E. McKay and John J. McKay were adjudicated voluntary bankrupts upon their separate petitions on the 23d of February, 1904, and in the usual

course of proceeding the subject-matters were referred to the referee. Thereafter Horton A. Ostrander was appointed trustee of the estate of both bankrupts. The material facts are these: The testator bequeathed to Amelia E. McKay, his wife, and John J. McKay, his son, the use of the sums of $15,000 and $10,000, respectively, for and during the term of their natural lives (the principal in certain contingencies to be paid to the heirs of said John J. McKay), and provided for the payment to them of the income. The paragraph of the will under which the title to the trust fund is claimed to pass to the trustee reads as follows:

"Twenty-First. I hereby direct my executors hereinafter named to pay over to the Erie County Savings Bank at Buffalo, N. Y., within eighteen months after letters testamentary hereon shall be issued to them, all sums of money the income from or the use of which is herein bequeathed to any person and to take from said bank a certificate or certificates allowing the amount so received by said bank and the purpose to which the same is to be applied, and file such certificate or certificates with the surrogate of the county of Cattaraugus with their account of their proceedings as such executors. And I direct the said Erie County Savings Bank to pay the income and principal of the money so received by it, to the several legatees entitled thereto according to the terms of this will."

The statute laws of New York and decisions construing them must govern and control the question under consideration. Dooley v. Pease, 180 U. S. 126, 21 Sup. 329, 45 L. Ed. 457; In re Baudouine, 101 Fed. 574, 41 C. C. A. 318. By Section 3 of the personal property law (Laws N. Y. 1897, p. 508, c. 417), it is expressly provided that the right of a beneficiary to compel performance of a trust and receive the income of personal property is inalienable. This provision of the statute has frequently been upheld, and ordinarily the rights and benefits granted cannot be assigned or transferred by the beneficiary or interfered with by a court of equity. Lent v. Howard, 89 N. Y. 169. Concededly, a judgment creditor in a suit in equity could reach the surplus income, if it were shown that such income exceeded the necessities of the beneficiaries and those relying upon them for support. Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752. And that the rights of the testamentary trustee and the beneficiary are preserved, and not curtailed, by the bankrupt act, is clear from the decisions. In re Baudouine, supra. There, it was held that the testamentary trustees have a title or interest hostile to the trustee in bankruptcy of the beneficiary, "and, if they are entitled to be heard at all, they are entitled to contest his title as fully as though they were the equitable owners of the fund." Hence a plenary action must be instituted by the trustee in bankruptcy to recover the surplus income of the trust estate as assets in bankruptcy. The language of the will requiring the issuance of a certificate of trust by the bank, showing the amount of the trust fund received and the purpose to which it was applicable, together with the manner of its disposition, is opposed to the establishment of a mere debtor and creditor relation between the bank and the beneficiary. The essential elements of a valid trust of personal property are found in the last will and testament of the testator, who designated a beneficiary, a trustee, and specified a fund for disposal. And if the trust had been accepted by the bank the title to the trust

fund would undoubtedly have passed. That the bank subsequently declined to accept the trust fund is unimportant, as a trust solemnly created will not fail because the designated trustee refuses to accept the relationship. Tiffany & Bullard on Trusts and Trustees, p. 2. Creditors cannot be heard to object, as they are presumed to know the extent of the responsibility of their debtors. Nichols, Assignee, v. Eaton, 91 U. S. 716–729, 23 L. Ed. 254.

The proposition that the will does not specifically direct the payment of the trust fund to the creditor out of the rents and profits of the testator's real estate is completely answered by the fact that the trust relates to personal property, and therefore the provisions of section 76, subd. 3, Real Property Act (Laws N. Y. 1896, p. 571, c. 547), providing for the application of the rents and profits to the use of the beneficiary, is not strictly applicable. The will contains an unequivocal direction to pay the income to the cestui qui trust, and the principal, coming into the possession of the trustee, to the legatees therein mentioned. Leggett v. Perkins, 2 N. Y. 297; Lent v. Howard, supra. This, therefore, was a trust of personalty pure and simple; the title vesting in the trustee designated by the testator or the trustees appointed by the court. I am clearly of opinion that an express trust was created, and the trust fund, being inalienable, did not pass to the trustee in bankruptcy.

The question certified is answered in accordance with this opinion.

In re DAVISON.

(District Court, D. Rhode Island. February 28, 1906.)

No. 491.

1. BANKRUPTCY—DISOBEDIENCE OF ORDER TO SURRENDER PROPERTY—CONTEMPT PROCEEDINGS.

   A bankrupt should not be committed for contempt for failing to obey an order requiring him to turn over money or property to his trustee without a hearing on the motion to commit, nor unless the court is satisfied on such hearing of his present ability to comply with the order.

2. SAME—SUFFICIENCY OF EVIDENCE.

   While the admitted receipt of goods or money by a bankrupt and repeated refusals to explain or account for their disappearance may be a sufficient ground for a contempt order, they do not necessarily establish the present ability of the bankrupt to restore the property or money to his trustee, or that his failure to comply with an order requiring him to do so is contumacious and willful, and all the facts and circumstances in each case should be considered.

3. SAME—ABUSE OF POWER TO PUNISH FOR CONTEMPT.

   The court will not commit a bankrupt woman for contempt for failing to comply with an order to turn over property or money, where it is in doubt as to her ability to do so, in order to compel her husband or other persons who appear to have been the principals in the fraudulent conversion of the property to come to her relief.

In Bankruptcy. On motion of trustee to adjudge bankrupt in contempt of court.

J. Jerome Hahn, for trustee.

P. Henry Quinn, for bankrupt.

BROWN, District Judge. Upon a hearing, the referee found that the bankrupt had concealed and was concealing money or property from her trustee, amounting to at least $1,000, and directed that she turn over to the trustee such money or property within 10 days from the date of his order. Upon a petition for review, the findings and order of the referee were sustained, and a decree of this court was entered on the 13th day of December, 1905, ordering said bankrupt to pay to her trustee in bankruptcy $1,000 in money, or to turn over to him merchandise concealed by her from said trustee, amounting in value to at least $1,000, within 10 days from the date of the entry of that decree. On December 18, 1905, the bankrupt filed under oath a statement and petition for relief from the decree of this court. This statement contains a reiteration of her denials made before the referee that she had concealed property belonging to the estate. It also sets up that she has no property or money in her possession or control, belonging to the bankrupt estate, and knows of no such property that has not been surrendered to said trustee. She also avers, under oath taken before a notary public December 14, 1905, that she has "absolutely no money, property, or means to enable her to comply with the order of the court," and she avers that said order, if unreversed, will result in her being certified as in contempt, and in her subsequent imprisonment for her refusal to comply with an order that she is utterly unable to meet. The petition prays that the decree be vacated. On February 2, 1906, a motion was made by the trustee in bankruptcy that the bankrupt be declared in contempt of this court for her refusal to obey its said decree of December 13, 1905. This motion is supported by the affidavit of Mendell W. Crane, trustee, to the effect that no money or merchandise has been turned over to him in accordance with said orders.

The Circuit Court of Appeals for the First Circuit, in its opinion of February 16, 1906, in Re Annie M. Cole, Bankrupt, (Petition of Annie M. Cole) 144 Fed. 392, held that the proceeding for contempt is of a different character from one resulting in a mere order for the payment of money to the trustee in bankruptcy, and that the record should show that the bankrupt had had a day in court as to that part of the order of the District Court directing a commitment in default of obedience to the order to pay over the money or property to the trustee.

The attorney for the trustee has not asked for further hearing, but desires that a contempt order be entered upon the record as it now stands, namely, an order upon the bankrupt to pay over money, and an answer under oath by the bankrupt that she is without means to do so. It is quite true that a part of the statement of the bankrupt is inconsistent with the findings of the referee approved by the decree of this court on December 13th. It is not necessary, however, to decide whether, upon contempt proceedings, the bankrupt is concluded as to matters involved in a former hearing, or whether she may retry the former issue under a different rule as to the quantum of proof (see In re Cole, supra), since a portion of the bankrupt's answer relates to her present ability to comply with the order of this court.

The authorities seem to be agreed that no contempt order should be made unless the court is satisfied of the present ability of the bankrupt to comply with the decree for the payment of money. While the admitted receipt of goods or money, and repeated refusals to explain or account for their disappearance, may lead to a belief in a present possession or control, and be a sufficient basis for a contempt order (In re Levy & Co., 15 Am. Bankr. Rep. 166, 142 Fed. 442), yet it does not seem to me that the question of the present ability of a bankrupt to comply with an order should be determined upon an artificial rule of proof to be applied irrespective of the circumstances of the particular case.

That a person has been guilty of fraudulent appropriation of property, and has concealed it by falsehood or perjury, does not always lead to the belief that the failure to make restitution upon an order is contumacious and willful. Where the amount concealed is small, and such as might readily have been spent, or where the circumstances are such as to indicate that the bankrupt was merely the person in nominal control of the business, and merely the instrument of others in a scheme for defrauding creditors, it is quite reasonable, under such circumstances, to believe even a person who has been guilty of fraudulent appropriation, and of fraudulent statements, when she swears that she has not now the fruits of the fraud, nor any control over them.

I find myself in very serious doubt as to the present ability of this bankrupt to comply with the decree of this court. I regard it as extremely probable that what she says as to her present inability to pay over money in compliance with the order is true. She has sworn to it, and exposed herself to criminal punishment if her oath is false. The circumstances of the case tend to show that she was in nominal rather than actual control of the business, and that the scheme of fraud was arranged and perpetrated by others rather than by herself.

If, having doubts of her present ability to pay, I should commit this bankrupt to confinement in jail upon a conjecture that her husband or other persons, actual principals in the fraud, may come to her relief with a sum of money equal to that which she has been ordered to pay over, I should, in my opinion, be abusing the power to punish for contempt. Creditors who sell to persons of doubtful or unknown financial standing, and of unknown or suspicious character for integrity, and who, by their own lack of ordinary diligence, have become the victims of fraud, should proceed for redress under the ordinary methods of legal procedure, and cannot expect to use, as an ordinary agent in the collection of debts, the power to imprison for contempt, which is to be applied only in cases of contumacious resistance to the orders of court. While there is no doubt of the power of the court to enforce its order for the surrender of property or money, when clearly satisfied that it is within the power of the bankrupt or other person to comply with such order, I am not so satisfied in this case.

Motion denied.

THE CHARLES TIBERGHIEN.

(District Court, E. D. New York. November 21, 1905.)

SHIPPING—INJURY TO STEVEDORE—LIABILITY OF VESSEL.

A vessel *held* not liable for an injury to a stevedore caused by his stepping upon a section of a hatch cover which his fellow workmen, who were at the time engaged in covering the hatchway, had temporarily left in an insecure position so that it tilted and allowed libelant to fall into the hold; it not being shown that the cover was defective in construction or out of repair.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 349–351.]

In Admiralty. Action for personal injury.

Hover & Pettigrew, for libelant.
Convers & Kirlin, for claimant.

THOMAS, District Judge. The steamship was lying with her starboard side to the dock, bow in, when the libelant fell through hatch No. 4, under the following circumstances:

Some stevedores were in possession and control of the cargo spaces of the ship for the purpose of loading, and during the day in question had been loading at hatch No. 4. When the men stopped work in the afternoon, they came up from below, and found that the fore-and-after, which extended the entire length of the hatch, had been put in place by the direction of the foreman in charge, whereupon three men began to put on the covers on each side of the fore-and-after, without the presence of the cross beam, into a socket in which the fore-and-after fits. These men claim that they first put a cover at each end on the starboard side, and then laid the covers in the fore part of the port side, when finding that the fore-and-after was sprung to starboard, so that the covers nearer the center were too short, they began at the aft part on the port side, and laid all the covers but one, and stood waiting for more covers to be laid on the starboard side, so as to bend back the fore-and-after to port, when the libelant came up the companionway aft of the hatch, passed over the top of the barrels on the starboard side, stepped on to the starboard side, and thence down upon the last cover which had been put on by the men on the port side, whereupon the same tilted, and the libelant fell through into the lower hold. The covers were marked with Roman numerals, each numeral being followed by the letter B or the letter T, to indicate whether it was a port or starboard cover, B being the first letter of the French word "Babord" (port), and T being the first letter of "Tribord" (starboard). The libelant's witnesses state that they paid no attention to the numbers, but put the boards on as they found them lying along the hatch, and that it was the custom of the stevedores to replace the covers in the way that they were laid when taken off. There is, however, evidence that the covers were laid in different shapes on the deck. The men laying the forward port covers learned when reaching the center that they were too short, and so began at the after end, and so dangerously

short did they become that the men in laying them did not venture to step on them, but one man, as each board was laid, crawled along the fore-and-after, and put it in place there. The board which tilted was held only by the forward corner, while the after corner did not rest at all upon the fore-and-after. The men knew that this cover was not properly placed, and it is considered that it had not been laid with the intention of leaving it, for all three men on the port side testify that they knew that it was dangerous, and that when they saw the libelant coming, they would have prevented his stepping upon it by calling out, but that he came so quickly they did not have an opportunity. The libelant was coming over for the purpose of assisting in laying the covers on the port side. There was no occasion for his stepping on the board, nor did he stop to see whether the board was in place, or what its condition was. He knew the work he was to aid was incomplete, and had he given any attention he would have noticed that the third cover was only temporarily laid. In the first place, there was a cross-beam which should have been laid down, and the fore-and-after when fitted to it could not have bent. Evidence is given that it was not the custom of stevedores, where there is a single fore-and-after, to put in the cross-beam at night. But the ship furnished a perfectly good and reliable plan of hatchway. The cross-beam was undoubtedly there, and if the men did not use it, it was either the fault of the stevedore himself in allowing such a system to prevail, or it was the carelessness of the operatives in using the appliances that were present. Moreover the covers were numbered, so that each might be put in its appropriate place, and if the men put on the covers without paying any attention to the order in which they should go, according to their numbering, it was not the fault of the ship. In addition, it was perfectly apparent to the men who laid this third cover that it did not belong there, at least that it did not fit, and it was entirely their act that it was left even for an instant in such perilous condition that a person could not step upon it without falling. But these men did not intend to let it remain, or that it should be used. They were merely letting it rest for a brief time in its dangerous position, for the starboard covers to be put on. While the work thus halted, the libelant stepped upon the cover, obviously incomplete in position, and without taking pains to ascertain its condition. But it further appears that on each side of the hatch are two covers, which fit next to the cross-beam when it is in place, and that, to allow these covers to fit up around the socket into which the end of the cross-beam lies, they are notched at the coaming end for the distance of eight inches across and five-eighths of an inch in; and it is a fair inference that in the disorderly manner in which the men were putting on the covers, they did put this cover in the wrong place, so that while one corner of it would be supported, the other, being five-eighths of an inch shorter, had no rest upon the angle-iron on the fore-and-after. There is evidence on the part of the libelant that the four-and-after was sprung three inches. As the covers had only an inch and a half to rest upon, at either end, if the fore-and-after was sprung three inches at the center, there would be no support

whatever for the covers at that point. Moreover, the foreman who put the fore-and-after in place, before the men came up and stood behind it, seeing that the end nearest him was properly adjusted, and looking across to see that the same was the case with the other end, would have discovered any marked bend in a fore-and-after 19 feet long. But he says he did not notice it. Mr. Martin and Mr. Wilkinson, who superintended the building of the ship, examined the hatch afterwards and found the hatch in good condition. Martin states that he had all the parts unshipped, and that the fore-and-after was substantially straight, although there might have been a slight deflection. These men state also that the fore-and-after could not have a lateral spring at the maximum of more than an inch and a quarter, without breaking the strip which makes the angle iron which extends the whole length of the fore-and-after. It is probable from the evidence that merely putting covers down on the port side, in absence of covers on the starboard side, would not give sufficient force to bend the fore-and-after, but if they were driven down hard, or if too much force was used in shoving them in, that result might follow. It further appears that the proper way to put on the covers is to lay them with some correspondence on the port and starboard side, so as to prevent lateral pressure. Irrespective of such inquiry, however, it is considered that the accident happened because the man had incompletely laid a hatch cover that did not fit, and that they had not finished their work when the libelant came and stepped upon the partially supported cover. The careful brief of the libelant's proctors does not change the view entertained at the close of the trial, that the libelant was injured in the course of progressing work, while using a structure which his fellow laborers were engaged in perfecting, and to whose assistance he came, and that the ship is not chargeable.

The libel is dismissed.

McCARTHY v. AMERICAN THREAD CO.

(Circuit Court, D. New Jersey. January 17, 1906.)

COSTS—RECOVERY OF LESS THAN $500—PENALTY FOR COLORABLY INVOKING JURISDICTION.

The right or duty of the Circuit Court to penalize a plaintiff recovering less than $500 by requiring the payment of defendant's costs, under Rev. St. § 968 [U. S. Comp. St. 1901, p. 702], depends upon the same facts which authorize the court to dismiss the action under Judiciary Act March 3, 1875, c. 137, § 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511]; and such penalty should not be imposed unless it appears to the satisfaction of the court, either from the declaration or on the trial, that the damages were laid in the declaration at a sum in excess of $2,000 for the mere purpose of giving colorable jurisdiction to the court and without any expectation of recovering more than such sum.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 20, 47, 255.]

At Law. On motion of defendant concerning costs.

Donald G. Perkins, for plaintiff.

James and Malcolm G. Buchanan, for defendant.

LANNING, District Judge. The defendant is a corporation and citizen of New Jersey, but has its manufacturing plant in Connecticut. The plaintiff is a minor and a resident of Connecticut, and was injured in the factory of the defendant while engaged in its service. This suit was brought by her for the recovery of damages resulting from the injury. The jury awarded her $100. The defendant now moves that the plaintiff be required, under the provisions of section 968 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 702], to pay to the defendant its costs. That section is as follows:

"When in a Circuit Court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libelant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs."

Section 1 of the act of March 3, 1875 (18 Stat. 470, c. 137 [U. S. Comp. St. 508]), provides that:

"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," etc.

The ground upon which the motion is based is that the plaintiff must have known that she could not recover as much as $2,000 for her damages; that the claim for $5,000 set up in the declaration in her suit was for the mere purpose of giving colorable jurisdiction to this court; and that the real object in bringing the suit in this court, rather than in a court of the state of Connecticut, was to harass and vex the defendant, and to increase its expense in defending the suit. In Cottle v. Payne, Fed. Cas. No. 3,268, Greene v. Bateman, Fed. Cas. No. 5,762, Hunter v. Marlboro, Fed. Cas. No. 6,908, Hamilton v. Baldwin (C. C.) 41 Fed. 429, and Van Siclen v. Bartol (C. C.) 96 Fed. 796, the rule is quite clearly laid down that the plaintiff will not be required to pay the defendant's costs where the amount recovered by the plaintiff is less than $500, except by way of penalty for bringing in a federal court a suit that should have been tried in a state court.

The fifth section of the act of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], provides that:

"If in any suit commenced in a Circuit Court * * * it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court * * * the said Circuit Court shall proceed no further therein but shall dismiss the suit * * * and shall make such order as to costs as shall be just."

Section 968 of the Revised Statutes [U. S. Comp. St. 1901, p. 702] is substantially the same as section 20 of the original judiciary act of 1789 (1 Stat. 83, c. 20). Up to 1875, if any party brought suit in a Circuit Court of the United States averring his damages to be more than $500 when he knew they were less than that sum, while the court could not dismiss the suit it could penalize him by requiring him to pay the de-

fendant's costs. Green v. Liter, 8 Cranch, 242, 3 L. Ed. 545; Gordon v. Longest, 16 Pet. 104, 10 L. Ed. 900. But the fifth section of the act of March 3, 1875, c. 137, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], made two changes in the law: It raised the minimum jurisdictional limit of a Circuit Court from $500 to $2,000, and it requires the court, if at any time a suit pending in it shall appear not really and substantially to involve a dispute or controversy properly within the court's jurisdiction, to "proceed no further therein," but to "dismiss the suit." In Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, and Put-in-Bay Waterworks, Light & Ry. Co. v. Ryan, 181 U. S. 431, 21 Sup. Ct. 709, 45 L. Ed. 927, it was held that a suit cannot be properly dismissed by a Circuit Court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts, as they appear on the record, create a legal certainty of that conclusion. The averments in the declaration filed in this suit are not such as to create a legal certainty that the plaintiff could not recover more than $2,000. Therefore, the suit could not have been dismissed for any defect in the declaration. If, however, on the trial, the court had been satisfied that the plaintiff laid her damages in her declaration at a sum in excess of $2,000 for the mere purpose of giving colorable jurisdiction to the court, and without any expectation of recovering more than $2,000, the suit should have been dismissed, without submitting it to the jury, as one not within the court's jurisdiction. Wetmore v. Rymer, 169 U. S. 119, 120, 18 Sup. Ct. 293, 42 L. Ed. 682. While I think it clear that the proofs in the case would not have supported a verdict for $2,000, I am not satisfied that by fixing the damages in the declaration at more than that sum the plaintiff sought merely to give colorable jurisdiction to this court, or that the suit did not really and substantially involve a dispute or controversy properly within the court's jurisdiction.. The plaintiff testified that she still suffers pain as the result of the accident, and she is entitled to the presumption that her claim is made in good faith.

As the motion to impose costs on the plaintiff is based on the same grounds as those upon which a motion to dismiss would necessarily have been based, the motion now made must be denied.

SHAW v. HOTCHKISS et al.

(Circuit Court, N. D. New York. March 2, 1906.)

ACTION—PLEADING SEPARATE CAUSES OF ACTION.

In an action to recover for services rendered by plaintiff to defendants, in addition to alleging an express agreement by defendants to deliver to plaintiff specific property in payment therefor, the breach of such agreement, and the value of the property, plaintiff may also allege the reasonable value of the services rendered and recover on a quantum meruit, should the evidence fail to establish the special contract, and such allegation does not render the complaint demurrable as stating two separate and inconsistent causes of action.

On Demurrer to Complaint.

Demurrer to plaintiff's complaint, on the ground that two inconsistent causes of action are improperly united, viz.: (1) On a special contract by which plaintiff was to perform certain services and receive as compensation therefor certain specific stock in a certain corporation which defendants

refused to deliver, whereby, it is alleged, plaintiff sustained damages in the sum of $23,800, the alleged value of the stock; and (2) on a contract for the performance of such services by defendant and an agreement to pay therefor, and, by implication, to pay what such services were reasonably worth. The claim is that such causes of action are stated in the complaint, and that they are inconsistent with each other.

Miller & Fincke, for plaintiff.
Curtiss, Arms & Keenan, for defendants.

RAY, District Judge. In substance, the complaint alleges, in various numbered paragraphs, that defendants employed plaintiff to perform certain services, among other things services in and about the organization of a certain corporation, and that they agreed to pay plaintiff certain moneys and to give him certain shares of the stock of the corporation as compensation therefor; that the services were performed, the stock issued, and the money paid; and that the stock was worth, and of the value of, $23,800. The complaint then alleges:

"Fourteenth. Plaintiff further alleges that on or about the 27th day of December, 1904, at the city of Binghamton, N. Y., he duly demanded of defendants and each of them the performance of said agreement to deliver to plaintiff $17,000.00 at par, of the stock of the Snake River Valley Sugar Company, Limited, and defendants neglected and refused to deliver the same, and still neglect and refuse to deliver the same or any part thereof, to the damage of plaintiff in the sum of $23,800.00, with interest thereon from the date of said demand.

"Fifteenth. Plaintiff further alleges that he has kept and performed all the covenants and conditions by him to be kept and performed under and by virtue of said agreement between plaintiff and defendants, and has done all things to be done and performed by him thereunder.

"Sixteenth. Plaintiff further alleges that the services hereinbefore set out and performed by him for and on behalf of said defendants, and at their request, were and are reasonably and fairly worth the sum of $23,800.00, which sum became due therefor on the 27th day of December, 1904.

"Wherefore plaintiff demands judgment against the defendants in the sum of $23,800.00, with interest thereon from the 27th day of December, 1904, besides the costs of this action."

The complaint does not anywhere state that there was an agreement to pay what the services were reasonably and fairly worth. The complaint does specifically allege that the agreement was to pay certain moneys and deliver a certain number of the shares of the stock in question. Two separate and distinct causes of action are not stated in this complaint. But one cause of action is stated, viz.: An agreement by plaintiff to perform services for defendants; an agreement by defendants, in consideration therefor, to pay a certain fixed and definite compensation therefor; the performance of the contract by the plaintiff; a refusal to perform, or a breach of the contract by defendants; and the fact that by reason of defendants' failure to perform the plaintiff has sustained damages. Plaintiff says that these damages were $23,800, the value of the stock agreed to be delivered in payment and not delivered, or the value of the services rendered, which was $23,800, the same as the value of the stock. He says his damages may be measured by the value of the stock agreed to be delivered, or by the fair and reasonable value of the services, and that he, after setting forth the contract as he alleges it to have been, may allege both the special value agreed upon and the reasonable

value and give proof of both, in case defendants deny that a special sum was agreed to be paid. The plaintiff does not allege that the defendants agreed to pay for the services by giving him the stock, and also by paying him the reasonable value thereof; but he does claim that the defendants engaged him to perform the services and agreed to pay in a certain way by giving him a specific thing; that, even if he establishes by a fair preponderance of evidence only the fact that he performed the services at the request of defendants, he is not to be defeated in the action, as in that case the law entitles him to recover what the services were reasonably worth, and that therefore he may allege such value so that, if defendants take the position that he can recover on a quantum meruit only, they will have notice of his claim on that question and be ready to contest it without resort to a new action or an amendment of the complaint.

That this form of pleading in such cases is permissible and proper is well settled. Sussdorff v. Schmidt, 55 N. Y. 319–324; Baumann v. Manhattan Consumers' Brewing Company, 97 App. Div. 470, 89 N. Y. Supp. 1088; Shirk v. Brookfield et al., 77 App. Div. 295–298, 79 N. Y. Supp. 225; Farron v. Sherwood, 17 N. Y. 227; Taylor v. Pinckney, 3 N. Y. St. Rep. 158; Higgins v. N. & F. R. R. Co., 66 N. Y. 604; Hartley v. Murtha, 5 App. Div. 408, 39 N. Y. Supp. 212; Marsh v. Holbrook, 3 Abb. Dec. 176; Longprey v. Yates, 31 Hun (N. Y.) 432; Schuyler v. Peck (City Ct. N. Y.) 8 N. Y. Supp. 849; A. E. Tiling Co. v. Reich (City Ct. N. Y.) 11 N. Y. Supp. 776; Evans v. Kalbfleisch (N. Y.) 16 Abb. Prac. (N. S.) 13.

In Sussdorff v. Schmidt, supra, the court said:

"(1) The complaint contains sufficient averments to enable the plaintiff to recover the value of the services rendered, without reference to the allegation of an agreed compensation. (2) At most it was only a variance between pleading and proof, which might be disregarded unless it misled the defendants, which was not pretended. Code, § 169. (3) This objection was not taken at the trial. The exception to that part of the charge authorizing the jury, if they found that no specific sum was agreed upon, to find the value of the services, was too general to raise this question. The attention of the court should have been called to the point, as, if valid, it might then have been obviated by an amendment."

In Baumann v. Manhattan Consumers' Brewing Company, supra, the court said:

"The proof failed to establish with certainty the existence of the express contract as counted upon in the complaint. Upon this subject the court charged the jury: 'If there was no usual commission, if there was no usual contract, the plaintiff must fail because he does not sue on a quantum meruit. He does not sue for what his services were reasonably worth. The question is not open to you to determine what his services were reasonably worth. He must satisfy you that there was a usual commission and that he has earned that. * * * Upon the other side * * * witnesses * * * testified that * * * there was no usual commission, and, if you determine upon the weight of evidence that the plaintiff has not satisfied you that there was a usual commission, then he must fail, because having come into court upon a certain state of facts, as alleged in his complaint, he must stand or fall upon that complaint.' To this charge the plaintiff excepted. The charge as made was erroneous. It was decided by this court, in Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. Supp. 225, that, where the complaint counts upon a special contract and the plaintiff fails in establish-

ment of the same, but does show that in fact services were rendered, he may recover upon a quantum meruit. Such rule has long been the settled law. Sussdorff v. Schmidt, 55 N. Y. 319."

In Shirk v. Brookfield, supra, the court said:

"The motion to dismiss the complaint was based upon the ground principally that there was an utter lack of authority, upon the part of Ballou, to make a contract for the plaintiff's compensation, and that the contract as made fixed the measure of compensation at $7,000 a year, which had been fully paid and discharged. Under the issues as framed between these parties, the plaintiff claimed to recover on a quantum meruit, and the defendants averred a special contract, which had been fully discharged by payment. It is the settled law that under a declaration on a special contract, if the proofs fail in establishment of it, but do in fact show the rendition of services, a recovery may be had upon a quantum meruit. Farron v. Sherwood, 17 N. Y. 227; Taylor v. Pinckney, 3 N. Y. St. Rep. 158; Sussdorff v. Schmidt, 55 N. Y. 319. Under the averments of this complaint, it appears that the services were reasonably worth the sum of $18,416.66, and that the defendant receivers had agreed to pay the plaintiff for his services such sum. This authorized the plaintiff to give evidence showing the nature of the services and the extent thereof, the circumstances under which they were rendered and their fair value; and the contract which was made may also be shown in determining the value of the services rendered. Higgins v. N. & F. R. R. Co., 66 N. Y. 604; Hartley v. Murtha, 5 App. Div. 408, 39 N. Y. Supp. 212. Upon the proof as it stood when the plaintiff rested, he became entitled to recover upon a special contract for an agreed compensation at the rate of $15,000 per year, or upon a quantum meruit. The proof in the case tended to establish that the receivers had continued Ballou as the treasurer of the corporation, and, as receivers were without practical knowledge in the conduct of the business, Ballou was authorized by them, as the proof tended to establish, to conduct the business. Under such circumstances, he would be authorized to contract for services to be rendered in and about the management of the affairs of the corporation. If this view is to be adopted, then it appears that the plaintiff fulfilled upon his part, by causing the profits of the business to exceed in amount the approximate profits upon which his compensation at $15,000 a year was dependent."

Instead of alleging two inconsistent causes of action the plaintiff alleges but one cause of action, and alleges the special agreement to pay for the services by giving him a particular thing of a specified par value; and he then alleges the actual value of that thing and the refusal to deliver as agreed, and adds that the services rendered were actually and reasonably worth that sum. Within the authorities cited this is proper.

The demurrer is overruled, but defendants may answer within 30 days after service of a copy of the order entered pursuant hereto.

ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO., Limited, v. WOOD. SAME v. HAYWOOD. SAME v. LEWIS.

(Circuit Court, E. D. Pennsylvania. February 21, 1906.)

Nos. 97, 98, 99.

1. ACTION—JOINDER OF CAUSES—LAW GOVERNING.
   The right of a plaintiff to join different causes of action in the same suit is to be determined by the law of the place where the suit is brought.
2. SAME—SUIT AGAINST STOCKHOLDERS.
   The double liability of stockholders in corporations under the Constitution and laws of Kansas, while statutory, is contractual in its nature;

and under the law of Pennsylvania which permits the joinder of causes of action on contract in the same suit, a judgment creditor of a Kansas corporation suing a stockholder in a federal court in Pennsylvania may join in his statement of claim a count, based on Gen. St. Kan. 1889, c. 23, § 32, giving him a right of action because of the insolvency of the corporation, and one based on section 44, giving him a right of action because of its dissolution.

At Law. On rule to compel plaintiff to elect upon which cause of action in its statement of claim it will proceed.

Duane, Morris, Heckscher & Roberts, for plaintiff.

Dickson, McCouch & Glasgow, for defendants.

HOLLAND, District Judge. Under the Constitution and laws of the state of Kansas, stockholders of certain corporations of the state are liable to creditors of the corporation to an amount equal to the stock owned by each stockholder.

Upon section 32, c. 23, Gen. St. 1889, the creditor has a right to proceed against the stockholder because the corporation is bankrupt, though not necessarily dissolved; and under section 44, of same chapter, because the corporation is dissolved, though not necessarily a bankrupt. Cottrell v. Manlove, 58 Kan. 405, 49 Pac. 519. In these cases, the Kansas corporation, of which the defendants are stockholders, is both bankrupt and dissolved. Judgments have been obtained by creditors against the corporation in Kansas, and it is conceded that a dissolution has been effected under the laws of that state.

The plaintiff brought suit in this district against the above-mentioned defendants to recover against them on their double liability as stockholders of the Kansas corporation, and in its statement of claim it has combined both remedies authorized by the two sections above mentioned in two separate counts. It is contended by the defendants that the Supreme Court of Kansas, in the case of Cottrell v. Manlove, supra, has decided that both grounds of recovery cannot be included in a statement of claim in one suit. There are some expressions in this case from which this conclusion might be drawn, but whatever the law in Kansas is in regard to the joining of different causes of action in the same suit, these suits are to be controlled as to the pleadings by the laws of the state of Pennsylvania. Matters respecting the remedy depend upon the law of the place where the suit is brought. Bank v. Donnally, 33 U. S. 361, 8 L. Ed. 974; Scudder v. Union Bank, 91 U. S. 406, 23 L. Ed. 245; Pritchard v. Norton, 106 U. S. 124–130, 1 Sup. Ct. 102, 27 L. Ed. 104.

The liability of the stockholders in these cases, though statutory in origin, is contractual in its nature (Anglo-American Land Co. v. Lombard, 132 Fed. 729, 68 C. C. A. 89), and under the Pennsylvania Practice Act of 1887 (P. L. 271), both these remedies can be declared upon in different counts in an action of assumpsit. In Jones v. Conoway, 4 Yeates (Pa.) 109, the Supreme Court of Pennsylvania declared that the question is whether the action is founded on tort or contract; if the former, it may be joined with any tort, and if the latter, with any contract. In Robinson v. Taylor, 4 Pa. 242,

the plaintiff was permitted to declare on a promissory note in one count, and on the original debt in another. In Winters v. Mowrer, 1 Pa. Super. Ct. 47 (since the enactment of the practice act of 1887) plaintiff was permitted to declare on a promissory note and upon the original indebtedness in different counts. In Fairchild v. Furnace, 128 Pa. 485, 18 Atl. 443, 444, the plaintiff was permitted to join in one suit a claim for trespass for cutting timber and in a separate count for treble damages under the statute. In the case of Brown v. Bank (C. C.) 34 Fed. 776, Justice Brewer, in the Eighth Circuit, now of the Supreme Court, held in effect that two causes of action, similar in their nature, can be joined in a declaration by separate counts. In commenting upon the declaration in that case he said:

"The demurrer raises, first, the question of a misjoinder of causes of action. Obviously this is not well taken, for a demurrer lies on the ground of misjoinder only when there are two causes of action united in one complaint, which, by reason of a dissimilarity in their nature, ought not to be prosecuted together, as, for instance, one cause of action in ejectment with one for libel. Under the statutes, no such joinder can be had. Here, even if there were two different transactions—two separate causes of action for the recovery of distinct and independent assets—each cause of action would rest upon an implied promise to pay, would be similar in nature, and the two could be joined in one complaint. As a matter of fact, there is but one cause of action stated in two counts."

Rule to show cause dismissed.

WALKER v. UNITED STATES.

(District Court, E. D. Pennsylvania. February 24, 1906.)

No. 1.

CONTRACTS—CONSTRUCTION BY PARTIES—ESTOPPEL.

Plaintiff contracted to furnish to the United States three wood-turning lathes for use at a navy yard. Being apparently in doubt as to the meaning of one part of the specifications he wrote the naval constructor, and was informed specifically as to the requirement and afterward delivered the lathes in conformity therewith, without objection, and also signed a voucher for the contract price. *Held*, that, conceding the contract to have been ambiguous, he was bound by the construction placed thereon by the government and on which he acted in performing it, and could not thereafter insist on a different construction and recover an additional sum, on the ground that the lathes furnished were more expensive than those required thereby.

At Law. Trial by the court without a jury.

Edward A. Waters, for plaintiff.

J. Whitaker Thompson and William M. Stewart, Jr., for the United States.

J. B. McPHERSON, District Judge. This suit was brought under Act March 3, 1887, c. 359, 24 Stat. 505, 1 Supp. Rev. St. 559 [U. S. Comp. St. 1901, p. 752], to recover the sum of $500, which the plaintiff avers to be due him from the United States upon the following state of facts: In June, 1898, he submitted a proposal to fur-

nish three wood-turning lathes with certain fittings, for use in the Brooklyn navy yard, at the price of $300. Each lathe was "to swing 22 inches in diameter," and the present dispute turns upon the meaning of this clause. The plaintiff himself was apparently in doubt about its meaning, for, on August 9th, he wrote a letter upon the subject to the naval constructor at the yard, who replied on August 10th, as follows:

"Referring to your letter of the 9th inst., I respectfully request you to forward the three sets of wood lathe fittings as per specification, for 22-inch swing; that is, the largest diameter of work to be turned will be 22 inches outside diameter, and the fittings will be so constructed as to make it possible to turn that size."

No written contract was ever executed, although the plaintiff's proposal was duly accepted and the lathes were delivered on October 27th, were inspected, accepted, and put into use. After they had been received, the authorities at the yard, in December, 1898, for the purpose of complying with official requirements, prepared an open-purchase voucher, in which the lathes were referred to as having been bought for $300, and this voucher the plaintiff receipted in full. An action by the United States upon another claim was pending against him at the time, and, as the amount claimed in that suit by the government was deducted from the $300 due for the lathes, he refused to accept payment of the difference, and therefore no part of the $300 has ever been paid. The other suit has now been fully settled. The plaintiff's contention is that the letter of the naval constructor modified his contract, and required him to furnish larger machines than those described in his proposal, and for these machines he asks to be paid $500.

I am unable to sustain his position. Assuming that the contract was ambiguous—the testimony concerning the proper meaning of the clause in question is not very satisfactory—the ambiguity was removed by the letter of August 10th, which gave the plaintiff distinct notice of what the government understood by "22 inches swing," and if he did not agree with this construction, he was bound to speak at once, and to refuse compliance with what he believed to be an unwarranted demand. Instead of insisting upon his own view, however, he accepted the government's construction of the proposal, delivered the machines described in the naval constructor's letter, and signed a voucher in which he receipted for $300, in full of a bill in which the lathes are charged at $100 each. After all this, it seems to me that the plaintiff cannot afterwards change his attitude, but is bound by the construction of his proposal, to which he assented by unmistakable act and writing.

He is entitled to recover no more than $300, without interest; and for this sum a judgment may be entered.

LATHROP, SHEA & HENWOOD CO. v. INTERIOR CONST. & IMP. CO.

(Circuit Court, W. D. New York. January 29, 1906.)

No. 113.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

The complaint, in an action in a state court, stated a joint cause of action against two defendants, one a domestic, and the other a foreign, corporation. The latter, which was brought in by substituted service, made default, and a judgment was entered against it thereon. On a trial of the case against the domestic corporation, a judgment was rendered in its favor, from which plaintiff appealed. *Held* that, until final disposition of the appeal, it was not established that a separable controversy existed between plaintiff and the foreign corporation which entitled the latter to remove the cause.

[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.]

On Motion to Remand to State Court.

Bushnell & Metcalf, for plaintiff.

C. Walter Artz, for defendant.

HAZEL, District Judge. This is a motion to remand the action to the state court, growing out of a second petition by the Interior Construction & Improvement Company, a foreign corporation, for removal to this court. After the action was remanded in March, 1905, the defendant construction company applied to the state court for additional time to plead, and until the question of joint liability upon the contract alleged in the complaint should be determined. Said application being denied, the plaintiff, on September 27, 1905, entered judgment against the construction company by default for damages in the sum of $47,363.15. Meanwhile the issues raised by the answer of the Pittsburg, Shawmut & Northern Railroad Company, a domestic corporation, and codefendant, were sent by the state court to a referee to hear, try, and determine. On motion of the railroad company, the referee held that such defendant was not liable, and, as to it, dismissed the complaint for lack of sufficient evidence. From this decision the plaintiff has taken an appeal to the Supreme Court, Appellate Division, Fourth Department, which is now pending undetermined. The defendant construction company, appearing specially, has filed a second petition for removal to this court, contending that the railroad company is no longer party defendant, and that it is now clear that a separable cause of action exists which is removable to this court. But until the determination of the appeal by the codefendant in the absence of fraud or improper joinder of defendants for the purpose of interfering with or obstructing the construction company's right of removal, it is not thought that a separable controversy exists. See Lathrop, Shea & Henwood Co. v. Pittsburg, S. & N. R. Co. (C. C.) 135 Fed. 619.

It is true that the referee has decided that no cause of action was shown against the railroad company; and a separate judgment has been entered against the moving defendant on account of its default

in pleading, but still, as said, there is no final disposition of the controverted question. It was entirely within the province of the plaintiff to bring a joint cause of action against the defendants and faithfully prosecute the same to a final determination. In Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, which was an action brought for partition of land, the court said:

"Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

The defendant urges that the proceedings before the referee indisputably disclose an election by the plaintiff to solely proceed against this defendant. The statements by counsel for plaintiff before the referee, perhaps, are not entirely harmonious, but such statements do not alter the nature of the complaint nor the force and effect of the proceeding had in court. It is unnecessary to pass upon the validity of the substituted service of process upon the defendant construction company.

The motion to remand is granted, and the motion to at this time quash the service of process is denied. So ordered.

UNITED STATES v. PERKINS et al.

(Circuit Court, S. D. New York. January 2, 1906.)

CONTRACTS—ACTION FOR BREACH—MEASURE OF DAMAGES.

A provision of a contract for doing work for the United States that, in case of failure to duly prosecute the work, the contract might be annulled by the engineer in charge, in which case all percentages due or to become due to the contractor should be forfeited, is not inconsistent with a further provision that if the contractor failed to complete the work as agreed all sums due and percentages retained should be forfeited, and the United States might recover any damages sustained in excess of the amount forfeited, and both may be enforced, the contractor being given credit, when the full measure of compensatory damages has been ascertained, for all sums so forfeited.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 744.]

At Law. On demurrer to complaint.

Henry L. Burnett and Arthur M. King, for the United States.
John N. Browne and Frederic J. Swift, for defendants.

HAZEL, District Judge. This is an action to recover damages on an annulled contract. The facts are sufficiently stated in the opinion of the court. The defendants have demurred to the plaintiff's complaint and claim that a cause of action is not stated. The contract which is the subject of the controversy was annulled by an agent of the United States before the expiration of the time of performance. Such annullment con-

cededly was within the scope of the contract, and was permissible whenever, in the judgment of the United States engineer in charge of the construction, the contractors failed to faithfully and diligently prosecute the work. It is provided in the agreement that all percentages due or to grow due under its terms were to become forfeited to the United States upon written notice to the contractors, in case such contractors omitted or failed diligently to perform the work in accordance with the specifications and requirements of the contract. It was also stipulated as follows:

"It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon that all sums due and percentage retained, shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same."

Demurrants contend that the clauses relating to forfeiture of percentages and to recovery of compensatory damages are inconsistent with one another. I am unable to subscribe to the soundness of this contention, as defendant will be entitled to be credited with the amount forfeited when the full measure of damages is ascertained. This is not a case where the contractors were without sufficient cause prevented by the other party to the contract from performance. The annullment, as alleged in the complaint, was owing to the failure of the contractors to seasonably comply with the understanding. Whether the actions of the engineer, as indicated by the correspondence passing between him and the firm of Perkins & O'Brien and the subsequent annullment of the contract, were in good faith, or whether there was sufficient cause for his actions in that regard, is obviously a question for the trial court, to be determined by the jury from the elicited facts. Assuming, as we must, that the contract was properly annulled, the measure of the plaintiff's relief is firmly established. The clause of the contract above quoted lends emphasis to the suggestion that the recovery of damages, on account of defendant's failure to perform, was in contemplation of the parties at the time the contract was entered into. The intention of the parties under the contract is clear and a proper construction of its provisions is not difficult. Nothing illuminative of the propositions argued by counsel for defendants is found in either King v. United States, 37 Ct. Cl. 428, or in Hayes v. City of Nashville, 80 Fed. 642, 26 C. C. A. 59, and, hence, the demurrer is overruled with costs, and the defendants may answer within 20 days.

A. L. CAUSSE MFG. CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 1, 1906.)

No. 3,913.

1. CUSTOMS DUTIES—CLASSIFICATION—FRUIT IN BRINE—"BRINE."
In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 559, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1683], for fruit in "brine," *held* that, in the absence of proof of a commercial meaning of "brine" different from the dictionary definition of it as water highly impregnated with salt, fruit in a solution containing .0402 per cent. or less of salt is not within said provision.

2. SAME—PREPARED CHERRIES—FRUITS IN OWN JUICES.
Cherries which have been prepared by removing the stems and pits and washing away dirt, natural acid, etc., so as to prevent decay in transportation, and which are imported in a very weak saline solution, are dutiable as fruits in their own juices, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

3. SAME—GREEN OR RIPE FRUITS—DRIED FRIUTS.
The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 262, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], for "green or ripe" fruits, indicates fruit in its condition as plucked or taken from the tree; and the provision in the same paragraph for fruits "dried, desiccated, evaporated or prepared in any manner," indicates fruits that have undergone a process of drying.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision under review, see G. A. 5,917 (T. D. 26,029) affirming the assessment of duty by the collector of customs at the port of New York. The pertinent portions of the paragraphs of Tariff Act July 24, 1897, c. 11, referred to in the following opinion, read as follows:

"262. Apples, peaches, quinces, cherries, plums, and pears, green or ripe, twenty-five cents per bushel; apples, peaches, pears, and other edible fruits, including berries, when dried, desiccated, evaporated or prepared in any manner, not specially provided for in this act, two cents per pound." Schedule G, § 1, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

"263. * * * Fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem." 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

"559. Fruits or berries, green, ripe, or dried, and fruits in brine, not specially provided for in this act." Free List, § 2, 30 Stat. 198 [U. S. Comp. St. 1901. p. 1683].

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The evidence of the importers that the articles in question (cherries) are fruits in brine is insufficient. The term "brine" as applied to water, according to the dictionary definition, is highly impregnated with salt; while the merchandise in question only variously contained .0118 per cent., .0174 per cent., and .0402 per cent. of salt. The lexicographers' meaning of the word "brine," in the absence of a commercial meaning, prevents the court from holding that the small quantity of salt present constituted such a saline solution as that

mentioned in the tariff act. Evidence has been taken in this court showing that the cherries when prepared for shipment are subjected to repeated washing to remove the acid natural to the fruit, the dirt, and juices, so as to prevent decaying while in transit. The stems and pits of the cherries are taken out, and after repeated washing to improve their condition as a confection they are put in a weak solution of salt and water. I conceive, however, that the claim of the government—i. e., that the cherries are preserved in their own juices within the meaning of paragraph 263 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651])—is correct, especially as a prior adjudication construing paragraph 580 of the act of 1890 (Act Oct. 1, 1890, c. 1244, 26 Stat. 606), in Johnson v. United States (C. C.) 66 Fed. 725, suggests that the words of limitation, "green or ripe," which are also contained in paragraph 262 of the present tariff act, indicate an intention on the part of Congress to include the fruit specified in the act as plucked or taken from the tree. The suggestion that the cherries are "prepared in any manner" is equally futile, for the language of the second subdivision of paragraph 262 evidently refers to fruits that have undergone a process of drying.

I concur in the opinion and conclusion of the Board of General Appraisers, and therefore the decision holding the merchandise dutiable at 1 cent per pound and 35 per cent. ad valorem is affirmed.

ALFRED H. SMITH CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 10, 1906.)

No. 3,956.

CUSTOMS DUTIES—CLASSIFICATION—RUBBER SPONGES.

Paragraph 82, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1631], relating to "sponges," does not include rubber sponges, which are not within the dictionary definition of that term.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,944 (T. D. 26,091), affirming the assessment of duty by the collector of customs at the port of New York.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The importation consists of a manufacture of india rubber and is thought by the court to be dutiable under paragraph 449 of the tariff act of July 24, 1897 (30 Stat. 193, c. 11 [U. S. Comp. St. 1901, p. 1678]), at the rate of 30 per cent. ad valorem. The importers claim that the merchandise are sponges, and therefore dutiable under paragraph 82 of the existing tariff law (30 Stat. 155 [U. S. Comp. St. 1901, p. 1631]), which reads as follows:

"Sponges, twenty per centum ad valorem; manufactures of sponges, or of which sponge is the component material of chief value, not specially provided for in this act, forty per centum ad valorem."

The testimony of the importers is to the effect that the so-called sponges are commercially known as "Kleanwell Sponges," and were imported into the United States after the passage of the present tariff act. The doctrine of commercial designation, however, is inapplicable, as Congress could not have intended to include the article in question under paragraph 82, where denominative language is used without any qualification. Such use of words denotes an intention to simply include the commercial article then known in trade and commerce. Moreover, it has often been held that the commercial designation must have been the result of trade usage prior to the passage of the tariff laws (Maddock v. Magone, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482; Dennison Mfg. Co. v. United States, 72 Fed. 258, 18 C. C. A. 543), and not be a commercial designation after the enactment of the statute. The protestants, apparently, are the principal importers in this country of merchandise such as here considered. They extensively advertised the same for sale as the "Kleanwell Sponges." Such designation, as already stated, cannot be held to come within the established rule that the commercial designation shall be uniform and definite in this country. The dictionary definition of the word "sponge" is not so comprehensive as to include a manufacture of india rubber in resemblance of a natural sponge, even though such manufacture is confessedly useful and convenient in bathing. If the article were a natural growth or existence, and came within the proper definition of a sponge, undoubtedly a different conclusion would be warranted. Mathason v. United States (C. C.) 90 Fed. 276. But I think it may fairly be assumed that Congress, in establishing the rate of duty upon sponges, had in mind the sponge fiber and its complicated framework, an aqueous product, and not the arbitrary designation afterward given to the manufacture in question.

The decision of the Board of General Appraisers is affirmed.

FRAME & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 10, 1906.)

No. 4,034.

CUSTOMS DUTIES—CLASSIFICATION—GROUND PEPPER—"GRINDING."

The residuum in the process of decorticating pepper berries, consisting of the inner cuticle in the form of a powder, which, without further grinding, is mixed with ground pepper as an adulterant, is not within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 667, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], for pepper "unground." It is sufficient if the pepper reaches its ground condition by decortication, or some other process equivalent to grinding, to be excluded from this provision.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6,045 (T. D. 26,374), affirming the assessment of duty by the collector of customs at the port of New York.

Walden & Webster (Henry J. Webster, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The importation, described in the protest as spices, consists of ground pepper. The evidence shows that black peppers are decorticated by a boxlike machine, having in its center a revolving stone covered by a wire screen. The product from the machine has three parts—a coarse, broken shell, the middle portion, having a ground appearance, and a white kernel. The latter part of the pepper berry is entitled to free entry, while the finer material, though very cheap and used as an adulterant, was assessed for duty by the collector under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 287, 30 Stat. 173 [U. S. Comp. St. 1901, p. 1653], for "spices not specially provided for." The importers contend that the merchandise is entitled to free entry under paragraph 667, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], which specifies "pepper, black or white, and pimento, all the foregoing when unground," or, in the alternative, as waste or as a nonenumerated article. In United States v. Leggett (C. C.) 124 Fed. 1015, it was held that the outer shells of pepper berries and the kernels, in fact, are pepper. We are here concerned with an intermediate covering, between the outer shell and the kernel. As said in the opinion of the board:

"The goods subject of this protest are the residuum from this continued operation of removing the inner cuticle from the white kernel."

Such residuum has a ground appearance; hence, the single question involved for tariff purposes is whether the article has undergone a process of grinding or not. It is unimportant, I think, whether the commodity reached its powdery state by a system of decortication or grinding. The process by which the outer shell is removed to reach the kernel is thought to be the equivalent of grinding as that term is defined in standard dictionaries. The middle portion of the berry is used, according to the evidence, without further grinding, for the purpose of mixing the same with ground pepper, and after such admixture it is sold as ground pepper. The importers contend that the article is commercially known as pepper shells, and is sold and delivered by that designation. It is undoubtedly a general rule of construction that the trade understanding should govern the determination to which an article of merchandise pertains before recourse may be had to the common designation. The evidence, however, to establish such trade understanding, must be "definite, uniform, and general, and not partial or local." Maddock v. Magone, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482; Nordlinger v. U. S. (C. C.) 115 Fed. 828. In this case the evidence in relation to the claimed trade understanding or designation was before the board and was evidently regarded as insufficient to establish the claim. I have examined the proof, and it does not convincingly indicate that there was a general trade designation such as claimed by the importers.

The decision of the Board of General Appraisers overruling the protest is affirmed.

MERCK & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 10, 1906.]

No. 3,556.

CUSTOMS DUTIES—CLASSIFICATION—POWDERED OPIUM—DRUG.

Powdered opium, produced by grinding and sifting lump opium which has been subjected to an artificial process of evaporation, *held* to be dutiable as "opium, crude or unmanufactured," under paragraph 43, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 153 [U. S. Comp. St. 1901, p. 1629], and not as a "drug," under paragraph 20, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628]. The article is "crude" in the sense that it is not refined.

On Application for Review of a Decision of the Board of United States General Appraisers.

In the decision under review the Board of General Appraisers 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.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The appellants imported a large quantity of powdered opium, which they claim should have been classified under paragraph 20 of the tariff act of July 24, 1897 (30 Stat. 152, c. 11 [U. S. Comp. St. 1901, p. 1628]), as a drug advanced in value or condition by refining, grinding, or other process. The collector assessed a duty of $1 per pound under paragraph 43 of the tariff act (30 Stat. 153 [U. S. Comp. St. 1901, p. 1629]), which reads, in so far as applicable, as follows:

"Opium, crude or unmanufactured, and not adulterated, containing 9 per cent. and over of morphia, $1.00 per pound."

The controversy between the importers and the government resolved itself down to whether opium imported in a powdered condition containing more than 9 per cent. morphia is opium crude or unmanufactured. The expert witnesses for the importer testified that lump opium, to reduce the same to a powdered substance, is subjected to a process of evaporation, artificial heat of suitable temperature being employed to extract the moisture, and then the product is ground and "sifted so as to pass through 80-mesh seed." It is necessary to control the temperature or degree of heat so as to preserve the various alkaloids in the opium, and usually it requires two or three days to complete the process. There is no dispute over the proposition that an intending buyer of crude opium would probably not be satisfied with a delivery to him of powdered opium by the seller. Nevertheless, I agree with the Board of General Appraisers that in merely drying and grinding the opium it did not become a drug, within paragraph 20.

Evidence on the part of the government in this court by witnesses whose competency is not questioned, in contradiction of the expert witnesses of the importers, tended to show that for many years past opium

has been imported into the United States in the form of a natural gum, or in a dried condition; the moisture having previously been extracted. The testimony as to whether in trade and commerce such merchandise is distinctively known as powdered opium is conflicting. Mr. Mercereau, a witness for the United States, who for many years was connected with a large wholesale drug and chemist establishment, testified that the dried opium is a trifle different from Exhibit A (lump opium), in evidence, and in commercial usage he would regard Exhibit 1 (powdered opium) as crude and unmanufactured. He says that opium is ordinarily sold simply by its denominative term. There was other evidence to a similar effect. It is true, as claimed by the importers, that the various constituents of opium are useful in the preparation of medicinal compounds; but in view of the fact that the merchandise is specifically provided for in the existing act and according to the evidence of the government is usually sold by its distinctive name, the preliminary process of drying and grinding did not operate to convert its original character. As said by Judge Townsend in Roessler & Hasslacher Chem. Co. v. United States (C. C.) 94 Fed. 822:

"It is not 'crude' in the common or dictionary sense of an article not manufactured, but it is 'crude' in the sense of an article not refined. * * * Inasmuch as all of said articles or substances have necessarily undergone some preliminary process of manufacture, and are considered crude only by referring to the purposes for which they are to be used, I think that this article may be 'crude' under the tariff designation, although it is the result of a manufacture."

The language quoted aptly applies, although in the case from which the quotation is taken the manufactured article was considered by the court as a by-product.

The decision of the Board of General Appraisers is affirmed.

HILLS BROS. CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1905. On Rehearing, January 6, 1906.)

No. 3,870.

CUSTOMS DUTIES—MEASUREMENT—DUTIABLE WEIGHT OF ONIONS—"BUSHEL."

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 249, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1650], providing a specific rate of duty "per bushel" on onions, *held*, that duty was correctly based on the long established practice of customs authorities to regard 57 pounds as a bushel, in default of evidence justifying a different basis of measurement.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,888 (T. D. 25,941), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported under the tariff act of 1897.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

Henry A. Wise, Asst. U. S. Atty.

PLATT, District Judge. This controversy is over Spanish onions, which are assessed under Act July 24, 1897, c. 11, § 1, Schedule G, par. 249, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650]: "Onions, 40 cents per bushel."

It has long been the practice of the customs authorities to consider that 57 pounds of onions constitute a bushel, and they were assessed on that basis. The importers object to this, and claim to have shown by their testimony before the board, which was repeated to some extent before the court, that, as a fact, the onions of the invoice weigh rather more than 60 pounds to the bushel, but are courteously willing to permit the assessment to proceed on the basis of an even 60 pounds to the bushel. The way they get at it is this: They take a standard Winchester bushel measure, and, after filling it with onions in such a way as they consider fair, weigh the contents, and argue that they thus establish an average weight for all the bushels of the invoice.

It is agreed that the bushel measure used is of exactly the right size, but the whole trouble arises over what shall be considered a fair way of filling the measure. And when it is considered, as found by actual test during the hearing of the court, that two onions taken at random from a single bushel weigh about a pound, it is easy to see how difficult it is to arrive at an exactly fair way of getting at what the exact weight ought to be. There was so much uncertainty about the matter before the board, which still exists after the testimony in court, that it would seem that the board was quite right in holding that the duty was properly assessed upon the long established basis of 57 pounds to the bushel.

The decision of the board is affirmed.

On Rehearing.

This case was decided in December last and an opinion filed at the time. Reference was therein made to an object lesson presented in court, which was said to be a reproduction of one made before the board. The sample onions then used are no longer available. At the request of counsel for the importers, I will therefore amplify my former opinion, with a detailed statement of what actually took place in court. A metal measure was used which held, when even full, a standard Winchester bushel. A sample of the imported merchandise, consisting of Spanish onions, some weighing a half pound each, and many perhaps a little less, were taken from a crate in which they had been kept. A keeper began to put them in the measure one by one, but, after so placing less than enough onions to cover the bottom of the measure, he tipped up the crate, at the suggestion of the assistant district attorney, and the onions poured in until the measure was so full that they began to roll off upon the floor of the court room. The measure then stood before us filled with the onions to an irregular height, not less at any point than several inches above its top.

I have stated the facts. Now let me add, on my own account, that it was evident that, as the measure should be filled from time to time

with like onions, the excess height above its top could easily vary by accident to a considerable degree, and when with that likelihood is coupled the fact that a single onion of the sample lot weighed at least half a pound, and the further fact that importations of onions must differ in size, the entire situation seemed to offer no valid reason why the long established rule of the customs authorities that 57 pounds weight shall be considered a bushel of onions was not the fairest course to take in the matter.

Let the foregoing be considered as amending the opinion already on file.

THE SEEFAHRER.

(District Court, E. D. New York. November 21, 1905.)

MARITIME LIEN—REPAIRS—AGREEMENT OF THIRD PERSON TO PAY COST.

The fact that the owner of a vessel by which another was injured undertook to pay for the latter's repair, and that upon that understanding she was taken by her master to a repairer who did the work, does not raise an inference that it was done on the personal credit of such person, who had no connection with the vessel, and in the absence of an agreement to that effect the vessel is subject to a maritime lien for the cost of the repairs.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens § 48.]

In Admiralty.

Avery F. Cushman, for libelant.
John F. Foley, for claimant.

THOMAS, District Judge. In this case, Nickerson admitted his liability on account of injury done to the bark by his vessel, and undoubtedly all the parties understood that Nickerson undertook, as between him and the ship, to pay for repairing the bark. The captain on his part evidently intended that the repairs should be so thorough that the ship would be in as good condition as before she was injured. Therefore both Nickerson and the captain had occasion to talk about the repairs, and to be present at the time of the repairs, and give directions concerning the same. Nickerson was especially interested to see that it was done with economy, and the captain's aim was that it should be done thoroughly. It is very readily understood that Nickerson might assume that he was contracting with the Ross Iron Works for the payment for the repairs, and that the captain may have assumed not only that Nickerson was making such contract, but also, that primarily he was to pay the same. But it is not to be inferred from this that the Ross Iron Works made the repairs on the credit of Nickerson. He was to it a total stranger. He was a man of relatively small responsibility, not known generally to the trade, and although perfectly well intentioned, and presumptively able to pay, it is difficult to believe, without full proof, that on his unknown credit the Ross Iron Works made repairs to the ship of another. Even if the captain of the vessel or his agents did not make an agreement to

pay for the work, they did appoint the ship to the libelant for repairs; and even if Nickerson promised to pay for it, and the libelant understood that he was to pay for it, the inference is not to be drawn that the work was done on his credit, rather than on the credit of the ship. It is quite evident how the confusion arose, and how each party may honestly believe that the position taken by him, and the evidence given by him, is not only correct, but demands the legal inference claimed. But it is thought, that however the parties regarded the matter as between themselves, the ship was subjected to a maritime lien. The evidence is certainly ample, that when objection was made to taking out the plate, the captain assured payment therefor. Certainly the master of the vessel did order other repairs, alleged to be $33.20.

Pursuant to these views, the libelant should have a decree for $33.20, subject to correction, also a reasonable sum for taking out the plate and replacing it. It appears that the libelant's effort to straighten the plate without removing it was a failure, for which the ship is not liable. The libelant practically guarantied to do the work in place, and therefore the successful completion of the job was at the risk of the libelant.

LOEB & SCHOENFELD v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1905.)

No. 3,341.

1. CUSTOMS DUTIES—CLASSIFICATION—EMBROIDERY COTTONS.
   Thread or yarn used chiefly for machine embroidering *held* to be within the provision for "embroidery cottons," in paragraph 303, Schedule I, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1656.]
2. SAME—EVIDENCE—COMMERCIAL DESIGNATION.
   Held that testimony that thread used in machine embroidering was not "embroidery cottons" was insufficient, where it appeared that the witnesses had never seen the thread or yarn used in machine embroidery, and had no familiarity with the article in question.

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.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for the importers.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. This case presents only one question, and that is whether the merchandise was properly classified by the collector as "embroidery cotton," under Act July 24, 1897, c. 11, § 1, Schedule I, par. 303, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1656] or whether it should have been placed, as the importers contend, under paragraph 302 (30 Stat. 175 [U. S. Comp. St. 1901, p.

1655]) as cotton thread or carded yarn. The collector's assessment was undoubtedly right upon the facts which appeared before him, and, of course, should be sustained unless the importers presented testimony enough before the board, or since the board's decision before the court, to take the merchandise out of the classification adopted.

The importers attempted to show before the board through testimony of experts that the merchandise in question was, prior to the enactment of the present tariff act, not an article commercially known as "embroidery cotton." The main difficulty with the testimony is that the witnesses had gained their information about embroidery cotton by buying and selling it in the department stores and elsewhere. It is therefore quite natural that they should never have seen or have known anything about cotton thread or yarn used for machine embroidery, and their evidence really shows that they had no familiarity with the article in question. The same thought applies when we look at the testimony taken in the Circuit Court.

It is very plain that the chief use to which this merchandise was put was that of embroidery cotton in connection with machines. The case would therefore seem to be controlled by Magone v. Wiederer, 159 U. S. 555, 16 Sup. Ct. 122, 40 L. Ed. 258, as stated by the Board of General Appraisers; and I cannot find that the testimony taken in this court serves to change the situation.

GINTY v. NEW HAVEN IRON & STEEL CO.

(Circuit Court, D. Connecticut. February 16, 1906.)

No. 573.

PLEADINGS—COMPLAINT—MOTIONS.

A plaintiff is entitled to state his case in his own way, and motions to expunge or to require fuller and more particular statements under the Connecticut practice act cannot be used to require him to state it otherwise, provided he avoids the prohibitions which the act and the rules thereunder have laid down.

At Law. On defendant's motion to strike out and also to amend complaint.

Fitzgerald & Walsh, for plaintiff.
Chase & Woodruff, for defendant.

PLATT, District Judge. When allegations are irrelevant, immaterial, prolix, or redundant, they may be expunged on motion "when the defect is plain, not otherwise." When the pleadings do not fully disclose the ground of claim, "fuller and more particular statements" may be incorporated therein, on motion. Such motions appeal, of course, entirely to the discretionary power of the court. It was certainly not intended that they should be used for the purpose of so altering, emasculating, and revising a complaint that it might thereafter be unable to withstand the searchlight of a demurrer. The

plaintiff is always entitled to state his case in his own way, and neither defendant nor court can point out that way for him, provided he avoids the prohibitions which the practice act and the rules thereunder have laid down. Premising this much, my decision follows:

Let the plaintiff strike out in paragraph 2 of his complaint the words "and is a youth," because their presence cannot affect the cause of action, and their only use would be to serve as an argument, which, when the complaint shall be read to the jury, might inflame their passions and prejudices. With that change, and the one made at the hearing, viz., striking out "said likelihood" in the sixth paragraph, and inserting in lieu thereof the word "possibility," let the complaint stand.

SOUTHERN CASH REGISTER CO. v. MONTGOMERY.

(Circuit Court, N. D. Georgia, W. D. January 31, 1906.)

No. 69.

REMOVAL OF CAUSES—AMOUNT IN CONTROVERSY—CONSTRUCTION OF DECLARATION.

A declaration containing two counts, each claiming damages in the sum of $1,900, and which alleges that the acts of defendant complained of have caused damage to plaintiff in its present and accrued sales in the sum of $1,900, and also in its future sales and business in a like sum, authorizes a recovery of $3,800, and the amount involved is sufficient to render the cause removable, where the other jurisdictional facts appear.

[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.]

On Motion to Remand to State Court.

Crawford & Ricketson, for plaintiff.

Felder & Rountree and E. D. Thomas, for defendant.

NEWMAN, District Judge. The question raised on the motion to remand in this case is that of the jurisdictional amount. It is a suit by the Southern Cash Register Company, which sells the Hallwood Cash Register, against Hugh Montgomery, as the agent and representative of the National Cash Register Company. The declaration has two counts, and possibly it may be said to have three, each claiming $1,900 by way of damages for interference in different ways with its business. The petition for removal sets out the amount in controversy is $3,800, and this is true, independently of anything else contained in the declaration, by paragraph 7. This paragraph, which concludes the petition, except the prayer for process, is as follows:

"Petitioners show that by and because of the aforesaid willful, malicious, illegal, fraudulent, and false statements, acts, conduct, and doings of said defendant, petitioners were injured and damaged in their present and accrued sales and business in the sum of $1,900, and that for said causes and in like manner said petitioners were and are injured and damaged in their future sales, character, reputation, and business in the aforesaid sum of $1,900."

It seems from this that plaintiff would have the right to recover, if it has any right to recover at all, $1,900 for injury to its business up to the time of bringing its suit, and $1,900 injury and damage thereafter, making the total sum $3,800. Certainly this is claimed in the declaration.

It appears to me that the necessary jurisdictional amount is involved in this case, and the motion to remand on the ground that it is not so involved will be denied.

BROWN v. PEGRAM et al.

(Circuit Court, E. D. Pennsylvania. February 21, 1906.)

No. 19.

COURTS—FEDERAL COURTS—PROCESS—SUBSTITUTED SERVICE.

A suit by a receiver to adjust equities existing between himself as such receiver and nonresident defendants in whose behalf in part another defendant has obtained a judgment in his own name which he is seeking to enforce against a fund in the receiver's hands is one to remove an "incumbrance or lien or cloud upon the title to * * * property within the district" within the meaning of section 8 of the federal judiciary act of March 3, 1875, 18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p. 513], and in which substituted service may be made on the nonresident defendants, as therein provided.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 917.]

In Equity. On rule to dismiss bill.

Burr, Brown & Lloyd, for complainant.

H. Gordon McCouch, for defendant Pegram.

HOLLAND, District Judge. Arthur K. Brown is a receiver of this court, and has a fund of $40,000 within the jurisdiction for distribution among the creditors of the American Alkali Company. Thomas Pegram has secured a judgment for $52,887.45 against the receiver in this district, part of which, the bill alleges, he holds in trust for other parties, against which other parties the receiver has a claim of set-off. The bill filed by the receiver in this district is, among other things, for the purpose of ascertaining what portion of this judgment belongs to these other parties against whom he holds this claim of set-off, for the purpose of preventing them from collecting their share of this judgment through Pegram, in whose name it now stands of record. These parties, for whom Thomas Pegram holds part of this judgment as trustee, are residents of Great Britain, and extraterritorial service was had upon them, by order of this court, under the eighth section of the act of March 3, 1875 (18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p. 513]). Whereupon Thomas Pegram presented a petition, upon which a rule was granted on the plaintiff in the bill to show cause why the bill should not be dismissed, because (a) the receiver is not here attempting to enforce an equitable lien upon or a claim to property within this district; (b) the receiver is not here attempting to remove any incumbrance, or

lien, or cloud upon the title to property within this district; (2) there is no fund before this court for distribution; (3) this defendant has not any lien upon and could not attach or levy any moneys in the hands of the receiver appointed by this court; (4) and for other good and sufficient grounds apparent from the face of the record herein. It is true the receiver is not attempting to enforce an equitable lien upon or a claim to property within this district, but he is attempting to obtain a decree which will prevent Thomas Pegram from enforcing a claim to property within this district, which he should not be permitted to receive, and we are not inclined to believe that Congress used the words "incumbrance or lien or cloud upon the title to property within the district" in such a technical and restricted sense as contended for by counsel for the rule.

The case is clearly within the meaning of the act of Congress, as it is a proceeding to adjust the equities existing between the receiver and the parties for whom Thomas Pegram holds a larger part of this judgment, which is a lien upon the fund in the hands of the receiver in the sense that it is an established claim entitled to participate in a distribution among creditors.

Rule to dismiss is overruled.

FRANK v. UNITED STATES.

(Circuit Court, S. D. New York. January 10, 1906.)

No. 3,754.

CUSTOMS DUTIES—CLASSIFICATION—REMANIT—MANUFACTURES OF SILK.

So-called remanit, in the form of ropes, braids, and mats, which has been manufactured from silk produced by carbonizing rags containing silk, *held* to be a manufacture of silk, within the meaning of Tariff Act July 24, 1897, c. 11, § 1, par. 391, Schedule L, 30 St. 187 [U. S. Comp. St. 1901, p. 1670].

On Application for Review of a Decision of the Board of United States General Appraisers.

In the decision below (G. A. 5,854, T. D. 25,779) the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on an importation by Emil Frank, which was classified under paragraph 391, Schedule L, § 1, c. 11, Tariff Act July 24, 1897, 30 St. 187 [U. S. Comp. St. 1901, p. 1670].

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The importation is classified by the collector as a manufacture of silk not specially provided for, and was assessed for duty by the collector at 50 per cent. ad valorem under the existing tariff act. According to the appraiser, the merchandise consists of "packing for machinery, made of silk, and of silk and metal, silk chief value." The protestant claims that the merchandise is silk waste, and exempt from duty under section 2, Free List, par. 661, 30 Stat. 201

[U. S. Comp. St. 1901, p. 1688] or dutiable under section 6 of the tariff act of July 24, 1897 (30 Stat. 205, c. 11 [U. S. Comp. St. 1901, p. 1693]), at 10 per cent. ad valorem, or that said merchandise was partly manufactured, and therefore dutiable at 20 per cent. ad valorem under said section 6 of the existing tariff act. The evidence, however, does not support the claim. The merchandise, which is called "remanit," is a nonconductor of heat, and generally used as a wrapping or covering for steam pipes and boilers. The proofs show, as stated in the decision of the Board, that "remanit" is made—

"From silk rags, some of which may contain an admixture of cotton and wool; the rags being placed in a large drum which is charged with various acids, the purpose being to destroy the cotton and wool by the process known as carbonization. The carbonized silk thus obtained is bound together with metal threads, and made in the form of ropes about 1¼ inches thick, or braids about ⅝ of an inch thick, or into mats, as may be desired."

It may be remarked in passing that many ways have been devised to utilize all waste products, and different methods have been devised by modern industries to turn things hitherto regarded as valueless into articles of great usefulness; but the evidence here indicates, as found by the Board, that the merchandise is not silk waste, and to produce it the article chiefly used is composed of silk.

The decision of the Board of General Appraisers is right, and it is therefore affirmed.

UNITED STATES v. BRACE et al.

(District Court, N. D. California. January 17, 1906.)

No. 4,352.

INDICTMENT—DEMURRER—DEFENSE OF LIMITATION.

A defendant indicted for an offense against the United States, not capital, cannot avail himself of the defense of the three-year limitation contained in Rev. St. § 1044 [U. S. Comp. St. 1901, p. 725), by demurrer, where the indictment does not show on its face that defendant is not within the exception of persons fleeing from justice created by section 1045 [U. S. Comp. St. 1901, p. 726]. In such case, the proper practice is for defendant to file a special plea in the nature of a plea in abatement, or to avail himself of the defense by evidence under the general issue.

On Demurrer to Indictment.

A. P. Black, Asst. U. S. Atty.

J. H. G. Weaver and W. F. Clyborne, for defendant.

DE HAVEN, District Judge. The defendants demur to the indictment upon the grounds, first, that the matters therein charged do not constitute any offense against the laws of the United States; and, second, that the alleged public offense is barred by the provisions of section 1044 of the Revised Statutes [U. S. Comp. St. 1901, p. 725].

1. The indictment sufficiently charges the defendants with the crime of conspiracy to defraud the United States of the title to certain public lands therein described.

2. Section 1044 of the Revised Statutes provides:

"No person shall be prosecuted, tried, or punished for any offense, not capital. * * * unless the indictment is found, or the information instituted within three years next after such offense shall have been committed."

It is further provided by section 1045 of the Revised Statutes [U. S. Comp. St. 1901, p. 726], that the provisions of the preceding section 1044, shall not extend to any person fleeing from justice. The indictment under consideration here does not show upon its face that the defendants are not within the exception created by this last section. This being so, the defendants cannot, by demurrer, avail themselves of the objection that the offense charged in the indictment is barred by the statute of limitations. United States v. Cook, 17 Wall. 168, 21 L. Ed. 538. The court in that case said:

"Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception."

From this it would seem that when a defendant is arraigned upon an indictment in form like that now before the court, and he wishes to avail himself of the limitation prescribed by section 1044 of the Revised Statutes, the proper practice is for him to interpose a special plea in the nature of a plea in abatement, or the question may be presented by evidence given under the plea of not guilty.

The demurrer is overruled.

WILSON et al. v. CHICAGO LUMBER & TIMBER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 26, 1906.)

No. 2,145.

1. APPEAL AND ERROR—DISMISSAL—INFORMALITY IN PRODUCTION OF EXHIBITS.
Where, at the argument and submission of a case in the appellate court, exhibits used in the trial court are referred to and treated by both parties as properly before the court, any informality in the manner in which they were brought into court is waived, and is not ground for dismissal of the writ of error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3133.]

2. BOUNDARIES—CONFLICTING ELEMENTS—CONTROL—REFERENCE TO MAP.
In a deed to a tract of land in the townsite of Denver, Colo., executed in 1872 by the probate judge, who held the title of the townsite in trust for the occupants, under acts of Congress, to be conveyed to those entitled thereto under regulations prescribed by the Legislature of the territory, the boundaries given were as follows: "Beginning at a point on the west line of F street in the East division of the city of Denver, in said county and territory 106 feet northerly from the Northwest corner of F street and Williams street; thence on the west line of F street 144 feet; thence at right angles with F street westerly to the east line of the old bed of the South Platte river, as the same is marked and defined on the map of said city as per survey of F. J. Ebert; thence southerly along the east line of the old bed of the South Platte river 62 feet; thence in a direct line southerly and parallel with F street to a point 106 feet northerly from Williams street and 125 feet westerly from the westerly line of F street; thence at right angles and in a direct line easterly 125 feet to F street, the place of beginning." At this time, as well as when the map referred to was made, the lines of the old river bed had been obliterated by floods and could not be located on the ground with certainty, but they were shown on the Ebert map, which was drawn to a stated scale and was of record, and according to such map the east line was some 350 feet west of F street. Other deeds under which defendants claimed, made about the same time, conveyed adjoining tracts and the river bed itself, and all referred to said map as showing its location. Plaintiffs claimed under the deed set out. *Held*, that the map must be regarded as an artificial monument adopted by the parties to the original conveyances as a final and conclusive reference for the location of the east line of the old river bed, and in the deed set out controlled the call for the distance of 125 feet for the last course, which must be rejected as an error.

3. SAME—CONSTRUCTION.
Where in a deed a recorded map is referred to as monument fixing a boundary, the addition of the words "as per survey of" a person named must be construed only as intended to identify the map, and they do not render the map impeachable by the field notes of the survey.

4. PUBLIC LANDS—TOWNSITE ENTRY—PROBATE JUDGE—JUDGMENT—VALIDITY AND EFFECT—DEPARTURE FROM PLEADING.
Where a probate judge, in whom title to a townsite was vested by law in trust for the benefit of the several occupants of the land, was authorized by statute to determine summarily, on a petition filed before him, the right of any occupant to land claimed by him and to execute a conveyance therefor, his decision to be final and conclusive, unless a rehearing was obtained, the validity and effect of a decision and conveyance made by him thereunder are not affected by the fact that the extent or boundaries of the tract conveyed are not the same as those claimed in the petition, whether the quantity be more or less.

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

For opinion below, see 129 Fed. 636.

This was an action in ejectment brought by Wilson and others, as plaintiffs, against the Colorado & Southern Railway Company and its lessee, the Chicago Lumber & Timber Company, to recover possession of a certain tract of land in the city of Denver, the eastern boundary line of which is 150 feet west from and parallel with F or Fifteenth street, extending thence with a uniform width of 173 feet westerly to the east line of the old bed of the South Platte river, as marked and defined on the map of the city of Denver, as per survey of F. J. Ebert.

By an act of Congress approved May 23, 1844, c. 17, 5 Stat. 657, as extended by an act approved May 28, 1864 (c. 99, 13 Stat. 94), the legal title of section 33 and the west half of section 34 in township 3, range 68 west, was vested in the probate judge of Arapahoe county "in trust for the several use and benefit of the rightful occupants of said land and the bona fide owners of the improvements thereon according to their rightful interests." He was to be governed in the disposal of the same by rules and regulations to be laid down by the legislative authority of the state, then territory, of Colorado.

By the provisions of section 3 of the Act of February 8, 1872 (Laws Colo. 1872, p. 192), any person claiming a beneficial interest in the land was required to file his petition in writing before the judge, setting forth facts disclosing his interest in the land claimed by him. Whereupon it became the duty of the judge to set the petition down for hearing, and upon such hearing, if the result proved favorable to the petitioner, to execute and deliver a deed conveying to him the fee simple title to such land. The result of the hearing is made conclusive upon the city of Denver and all parties.

Polinah Truax claimed a certain portion of this land, and on September 7, 1872, filed her petition with the judge to procure a deed thereto. She claimed land described as follows: "Beginning at a point 65 feet from the northwest corner of F and Williams street; thence along the west side of F street to Bassett street 185 feet; thence westerly at right angles with F street 125 feet; thence southerly on a line parallel with F street 185 feet; thence easterly 125 feet to the place of beginning." Her petition was heard on the evidence adduced, and on September 17, 1872, an order was made reciting the filing of the petition, the hearing thereon, the finding that she had acquired an interest in a portion of the land described in her petition, and adjudging that she receive a deed therefor. The land described in the order is as follows: "Beginning at a point on the west line of F street in the East division of the city of Denver, in said county and territory, 106 feet northerly from the northwest corner of F street and Williams street; thence on the west line of F street 144 feet; thence at right angles with F street westerly to the east line of the old bed of the South Platte river as the same is marked and defined on the map of said city as per survey of F. J. Ebert; thence southerly along the east line of the old bed of the South Platte river 62 feet; thence in a direct line southerly and parallel with F street to a point 106 feet northerly from Williams street and 125 feet westerly from the westerly line of F street; thence at right angles and in a direct line easterly 125 feet to F street, the place of beginning."

A deed was duly executed bearing date September 17, 1872, conveying the land as last described, to her.

On January 3, 1873, the probate judge, acting by the same authority, conveyed to James Tynon the following described land: "Commencing at a point on the westerly line of F street 100 feet northerly from the northwest corner of F and Williams streets; thence westerly to the old bed [referring here to a former description where the old bed is described as 'the old bed of the South Platte river according to the map and survey of said city by F. J. Ebert'] of the South Platte river; thence northerly down the east line of the old bed of the South Platte river to a point where a line drawn westerly from a point on the westerly line of F street 187 feet northerly from

the northwest corner of F and Williams streets, would intersect the said east line of the old bed of the South Platte river; thence in a direct line southerly 87 feet to a point 106 feet northerly from Williams street and 125 feet westerly from F street; thence at right angles to said last line 125 feet easterly to F street; thence 6 feet southerly to the place of beginning. Also that piece of land described as follows, to wit: Commencing at a point on F street 250 feet northerly from the northwest corner of F and Williams streets; thence westerly to east line of the old bed of the South Platte river; thence northerly down the east line of the old bed of the South Platte river 23 feet; thence at right angles easterly to F street; thence 23 feet southerly to the place of beginning."

Tynon, by deed dated January 8, 1873, conveyed the same to Polinah Truax.

The three parcels of land, above described, by mesne conveyances afterward became vested in Robert Potter. He died, leaving five children. Three of his children, who are the plaintiffs, acquired the right and title of the other two.

Defendants deny plaintiffs' title and right of possession, set up title in themselves and plead the statute of limitation. They rely for title upon two deeds; one from James Tynon to John P. Heisler, dated July 10, 1882, whereby, as a part of a larger tract, Tynon conveyed to Heisler the western portions of the two tracts acquired by him from the probate judge, being all thereof west of a line drawn 150 feet west of and parallel with F street, extending back to the east line of the old bed of the South Platte river; the other from the probate judge to James McNasser, dated October 23, 1872, conveying the following described lands: "The whole of the old bed of the South Platte river as the same is marked and defined on the map of the said city of Denver as per survey of F. J. Ebert, and lying and being in said city of Denver," etc.

The record shows that by mesne conveyances the rights so acquired by Heisler and McNasser were vested in the defendant the Colorado & Southern Railway Company. The case was tried without a jury, and a general finding made in favor of the defendants. The case is brought here by plaintiffs to correct alleged errors committed by the trial court in admission of evidence and in rendering judgment for defendants without substantial evidence to support it.

R. H. Gilmore (John D. Fleming, on the brief), for plaintiffs in error.

E. E. Whitted (Tyson S. Dines and O. L. Dines, on the brief), for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

After the argument and submission of this cause on the merits, defendants in error filed a motion to dismiss the writ of error for the reason that certain maps and exhibits used at the trial were not incorporated in the record. We find, on examining the record, briefs of counsel, and exhibits filed with this motion, that some of the large and cumbersome original maps and exhibits, the absence of which furnished the occasion for the present motion, were, by an order of the trial court made by consent of both parties, sent to this court for use in the argument, without incorporation in the bill of exceptions. For reasons unnecessary now to state they failed to arrive until after the oral argument, but have since arrived and have been sufficiently examined and considered. Copies of other exhibits were presented to the court in the argument and briefs by both parties, and no objection

was made to the use or consideration of such copies. The argument and submission proceeded as if all exhibits were properly before us. We think, by the course of procedure, that counsel for both parties waived all objections to the informal way in which these exhibits were called to our attention. It would be manifestly unfair to sustain this motion. Such action would necessarily deprive plaintiffs in error of the opportunity which they would have had, if the motion had been seasonably made, to secure, by certiorari or otherwise, the perfection of the record. Moreover, we are satisfied that the record, as it is, and the exhibits which counsel on both sides have treated as properly before us, enable us to pass upon all the questions presented for our consideration. The motion to dismiss will therefore be denied.

A consideration of the force and effect of the "Ebert map," referred to in the descriptions of the several deeds, will first be had, because the solution of many questions raised by the assignment of errors depends upon their determination. That map purports to be the result of a survey made by F. J. Ebert, of section 33 and west half of section 34, which was the land committed in trust to the probate judge by the act of May 28, 1864, supra. The original map was filed in the recorder's office of Arapahoe county, May 29, 1865, and copies thereof were incorporated in the plat books of the office. A blue print taken from an accurate tracing of the original map, which has been used for the purposes of this hearing, discloses the platting of the land into streets, alleys, lots, and blocks, with a distinct location and delineation of the course of the old bed of the South Platte river on the map itself. This appears to indicate a general northern and southern course for the river and that it ran past the lot in dispute on the westward. The width of avenues and lots shown on the map is generally specified thereon, but the distance of the "old bed," Cherry creek and South Platte river, from avenues or lots is not stated. The scale of the map, 250 feet to the inch, is stated on its face, and this, by practical tests made in the measurement of distances marked on the map, is found to be substantially accurate and reliable. The map therefore was doubtless intended to, and does, disclose not only the location of the old bed, but its accurate relationship to the land in its vicinity.

It is apparent from the evidence that the true location of the "old bed" in 1872 was a matter resting in much doubt. Some of defendants' witnesses locate it from 120 to 150 feet west of F street. This would fix the western boundary of the Truax lot some 200 feet east of the east line of the old bed as it appears to be marked on the map. It is said that the field notes of the Ebert survey located it generally east of F street, making it cross Williams street and F street within 20 or 30 feet respectively from the corner of those streets, and to run, thence in a northeasterly direction past the lot in controversy, altogether on the east thereof.

The learned trial judge, who speaks not only in the light of the proof, but from a long personal acquaintance with that locality, says:

"When the Ebert map was made in 1865, the line of this channel was not visible at the point in dispute. It had been obliterated by the flood which took place in Cherry creek and in Plum creek in the month of May, 1864, so that the actual location of the channel and the east line of the old bed of the

South Platte river in the year 1865 must have been difficult, if not impracticable to locate."

From these facts the desirability of some fixed and permanent location of the old bed as it originally existed is apparent. A map was made, lodged, and filed in the office devoted to preserving records of land titles. This map definitely pointed out the old bed by name, and furnished data on its face, in the adopted scale of 250 feet to the inch, for determining its width, distance from and relationship to streets, alleys, and lots platted on the map.

The probate judge heard the petition of Polinah Truax, awarded the judgment, and made the deed in the light of the foregoing facts. He knew of the Ebert map and made use of it in describing the lands awarded to her. Both in the judgment and deed he limits the running of the second or westerly course by "the east line of the old bed of the South Platte river, not as it exists on the face of the earth, but as the same "is marked and defined on the map of the city as per survey of F. J. Ebert." The third and southerly course is "along the east line of the old bed of the South Platte river 62 feet." This, from its context, obviously refers to the same east line as was referred to in the second course, namely, as "marked and defined" on the Ebert map.

The next or fourth course is "in a direct line southerly to a point 106 feet northerly from the north line of Williams street; thence (with an omission of a call presently to be noticed) at right angles to the said last line (with another omission here) to the west line of F street, the place of beginning."

Without now heeding the omissions referred to, little doubt, if any, could be entertained concerning what the probate judge intended to convey. A complete and harmonious description would seem to have been made.

The omitted calls locate the point mentioned as 106 feet north of Williams street to be "125 feet west of F street," and also state, what necessarily follows, that the distance from this point to F street is 125 feet. These omitted calls, it is observed, deal only with the distance of the last course, to the place of beginning. Given the starting and ending points, a straight line between them could of course be readily traced without information as to the distance between them. The point referred to as 106 feet from Williams street is the limit of a course from which the next course runs at right angles and ends at the place of beginning.

On the theory that the east line of the old bed as marked and defined on the Ebert map is its western boundary, the Truax deed conveys practically a parallelogram of land, having a front of 144 feet on the west side of F street and running back with somewhat varying side measurements to the old bed. The other two tracts, conveyed by the deed of the probate judge to James Tynon, flank the Truax lot on the north and south sides. They are described in the statement preceding this opinion, and no further accurate reference need be made to them. They constitute, with the Truax purchase, a body of land fronting 173 feet on F street and extending back with like width to the old bed. The description of these remaining two tracts calls

for the east line of the old bed "according to the map and survey of said city, by F. J. Ebert," substantially as the Truax deed does, as the end of one course, and runs an important course along that line; but the description of the first tract contains the supposed infirmity found in the Truax deed, namely, a statement that the point fixed as 106 feet north of Williams street is 125 feet west of F street.

In the view we take of plaintiff's title, we do not find it necessary to consider the contention of plaintiffs' counsel that defendants are estopped from denying the correctness of the Ebert map or its availability as a monument of title, by the descriptions in the deeds which their remote grantors took from the probate judge, and which their successive grantors have employed in conveying to them. Nevertheless a short reference may appropriately and instructively be made to them.

The first deed relied on by defendants is that of James Tynon to John P. Heisler, dated July 10, 1882. This is a quitclaim deed. He had, before making this deed, conveyed the property by him acquired from the probate judge, to Mrs. Truax by exactly the same description as that employed in the conveyance to him. At the time he made the quitclaim deed he had no title to convey. This last mentioned deed was undoubtedly secured after new light had appeared to defendants' grantors. It called for the "old bed," but not as marked and defined on the Ebert map. This quitclaim deed amounts to color of title only, and was doubtless secured and is now utilized by defendants as the initiation of the right of possession which they claim confers upon them title by virtue of the statutes of limitation, which will be later considered. The deed under which defendants claim title, as distinguished from possession, is that of the probate judge to James McNasser. The property conveyed by this deed is "the whole of the old bed of the South Platte river as the same is marked and defined on the map of the said city of Denver as per survey of F. J. Ebert."

By mesne conveyances consisting of six different deeds from successive owners, this McNasser title is finally lodged in John P. Heisler, the grantee in the quitclaim deed of July 10, 1882, from James Tynon. In every one of these six deeds the description was practically the same as in the original deed from the probate judge. No description is made of the granted premises except by references to the Ebert map. "The whole of the old bed * * * as marked and defined" on that map was conveyed, and nothing else. Without the map the subject of the grant could not be identified. McNasser accepted a conveyance from the probate judge with this description, and the successive grantees, including Heisler, in 1882, accepted the conveyance by the same description, except that at the end in the final conveyance from Woodbury to Heisler the description of the premises conveyed makes no reference to the survey of Ebert, but was simply this: "The whole of the old bed of the South Platte river as per said map of F. J. Ebert."

It thus appears that all the parties, with whom the plaintiffs and defendants are privies, in the transactions with reference to the title in dispute, for about nine years recognized the Ebert map as controlling of their rights and interests in the land in question.

The deeds under which defendants, as well as those under which plaintiffs, claim title, clearly recognize the east line of the old bed as marked on the Ebert map as plaintiffs' western boundary and the same line as defendants' eastern boundary of their respective possessions. If the distance call of 125 feet from F street as found in the deeds in question is correct, then all the other calls found in the descriptions (if the location of the old bed of the South Platte river as marked and defined on the map is a fixed and controlling monument) are wrong. If all the others are right, this distance call must be wrong. Courses and distances, by a familiar rule of law, must yield to monuments. Accordingly, this distance call of 125 feet, if the Ebert map is a monument, must be rejected as a patent and palpable mistake.

What is the Ebert map? As already observed, it was born of the uncertainty of the location in question occasioned by recent floods and consequent different opinions touching a former well-known landmark. It was filed and recorded in the recorder's office and was known to and recognized by the probate judge. He frequently referred to it in the Truax and other deeds executed at about the same time.

In Coles v. Yorks, 36 Minn. 388, 31 N. W. 353, the Supreme Court of Minnesota, considering a question of surveying, says:

"When there is a description by courses and distances, and another by reference to known monuments, the latter prevails; and a map or plan referred to (certainly if a public record) stands upon the same footing as a monument."

In Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. 33, the Supreme Court of that state, in a case involving a recorded plat as part of a description of a grant, observes that there are "two very familiar and well-established principles in the construction of conveyances: * * * First, where a map or plat is referred to in a conveyance, it becomes for the purpose of the description and identification of the land, a part of the deed," and, "second, courses and distances must yield to monuments, visible objects, or natural boundaries called for in the deed." In that case, Mitchell, Judge, speaking for the court, says that the plat, according to which plaintiffs conveyed and to which his deeds referred, "makes Sand creek the south boundary as distinctly as it makes Water street the north boundary of lot 1. It represents the east and west lines of the lot as extending from the street to the creek." That language, mutatis mutandis, might well apply to the case before us. The probate judge makes the east line of the old bed of the South Platte river, as marked and defined on the Ebert map, the western boundary of the land conveyed by the Truax deed as distinctly as he makes F street the eastern boundary thereof.

In Vance v. Fore, 24 Cal. 436, a case was under consideration involving the construction of a deed in which the boundaries are described as "on a certain map thereof made by Thos. M. Swan." The court says:

"There is a discrepancy or conflict between the verbal discription by courses and distances and the description furnished by the map. * * * We

consider that the map constituting a part of the deed now in question * * * is more stable and certain, and less likely to be affected with mistakes, than the other description by courses and distances contained in the deed. In effect, the map makes the deed a conveyance by monuments."

In Chapman v. Polack, 70 Cal. 487, 495, 11 Pac. 764, 768, the Supreme Court of California lays down the rule in the following language:

"Where a map or plan of a tract of land, with lines drawn upon it marking the boundaries, and with the natural objects upon its surface laid down, is referred to in a deed containing a description of the premises therein conveyed, this map or plan is to be regarded as giving the true description of the land conveyed, as much as if it was expressly recited and marked down in the deed itself."

The court held in that case that the line as designated upon the plat so referred to in the deed, whether accurate or not, is conclusive of the rights of the parties bounding upon it.

In Jones v. Johnston, 18 How. 150, 15 L. Ed. 320, the owners of two lots of ground, numbered, respectively, 34 and 35, had acquired title from the same source. The deeds to each referred to the town plat as recorded in the office of the recorder of Cook county. A mistake was made in recording that plat. By reason of the mistake, evidence was introduced concerning the original plat, and consideration was given to it by the court in its charge to the jury. The Supreme Court, in disposing of the case, makes use of the following language:

"The case was a good deal embarrassed on the trial, arising out of the evidence in respect to this original plat. * * * We think the court erred in admitting it as evidence to control, or in any way to affect, the recorded plat. Both lots in controversy were conveyed with express reference to that, and without such reference there is not a sufficient description given in the deeds of the boundaries to admit of a location of either. If there was in fact any error or mistake in this reference, by way of description of the premises conveyed, the remedy was in chancery to reform the deed. So long as that remained unreformed, the description of the lot by reference to the recorded plat was conclusive upon the parties."

To the same effect are the following cases: Denver v. Clements, 3 Colo. 472, 481; Davis v. Rainsford, 17 Mass. 207; Magoun v. Lapham, 21 Pick. (Mass.) 135; Prop'rs Kennebec Purchase v. Tiffany, 1 Me. 219, 223, 10 Am. Dec. 60; Lunt v. Holland, 14 Mass. 149; Shufeldt v. Spaulding, 37 Wis. 662; Fox v. Union Sugar Refinery, 109 Mass. 292; Jefferies v. East Omaha Land Co., 134 U. S. 178, 194, 10 Sup. Ct. 518, 33 L. Ed. 872.

In the light of these authorities we are of opinion that the Ebert map must, for the purposes of this case, be regarded as an artificial monument adopted by the parties to the original conveyances in question as a final and conclusive reference for the location of the east line of the old bed of the South Platte river.

Defendants' counsel call attention to the fact that the descriptions employed in the deeds from the probate judge, referring to the "old bed as marked and defined on the map," are qualified by the words "as per survey of F. J. Ebert," and contend that such qualification necessarily incorporates the field notes of the survey into the description. Evidence was introduced tending to show that the field notes located the "old bed" as crossing Williams street and F street

near their corner and running northwardly east of F street. Evidence was also introduced by defendants, over plaintiffs' objection, tending to show that the old bed actually ran in a general northerly direction about 125 to 150 feet west of F street. The admission of this evidence is assigned for error.

The evidence offered to show what was disclosed by the field notes in question consisted of a copy of an unauthenticated or supposed copy thereof. Technically, for this reason, it should have been excluded; but we desire to place our reasons for excluding it on a more substantial basis. The words relied upon by counsel for defendant "as per survey of F. J. Ebert" were, in our opinion, not intended to incorporate the survey as made, or the field notes from which the map was drawn, in the reference, or to include them together with the map as a part of the deed. As already observed, the uncertainty as to the true location of the "old bed" in 1865 probably induced the adoption of the map as a fixed artificial monument of reference in the conveyance in question. To adopt defendants' view would interject doubt and uncertainty in the place of that certainty which the map itself was obviously intended to afford. We think the proper and natural office intended by the words in question, considered in the light of their context, was to more specifically designate the particular map of the city to which reference was made. There appears to have been other maps of Denver; one certainly, known as Boyd's map. That map was not referred to in the deeds in question; but on the contrary, the map made by (or what is the equivalent, after the survey of) Ebert was so referred to. The cases cited by defendants' counsel, as authority for the proposition that the field notes must be treated as incorporated in the Truax and other deeds, have been carefully examined and considered. They are found, upon examination, to relate to descriptions in deeds involving a general reference to a "map and survey." As heretofore pointed out, the case before us is not of that kind. The reference in the Truax deed is not to Ebert's map and survey generally speaking, but to the old bed or east line of the old bed as marked and defined on Ebert's map. This is essentially different and more accurate than the general reference to both map and survey as is found in the cases relied on by defendants' counsel. For these reasons we conclude that the trial court erred in admitting the field notes in evidence.

The evidence offered and received concerning the true location of the "old bed" as it existed on the face of the earth was also, in our opinion, erroneously received.

The deeds upon which plaintiffs rely for title do not describe the land as bounded by the "old bed," but by the "old bed" as marked and defined on Ebert's map. The evidence so offered and received introduced the uncertainty which the parties to the original deeds sought to and did avoid. The trial court admitted in evidence, over plaintiffs' objection, the petition of Polinah Truax preferred to the probate judge in September, 1872, wherein she described the land in which she claimed to be interested and to which she desired a deed, as containing a front of 185 feet on F street by a depth westwardly of 125 feet.

The acts of Congress of 1844 and 1864, supra, vested title to the land in question originally in the probate judge, as trustee, for the benefit of those interested in it; and the act of the Legislature of Colorado in 1872, supra, empowered the probate judge, whenever a petition was filed before him by any person for any portion of the trust property, to find the facts and determine the validity of the claim and "to execute and deliver to such petitioner or petitioners a deed or deeds granting and conveying to him, her, or them, the fee simple title to any such lot or lands." By the provisions of the act his finding was "final and conclusive," unless he should award a new trial. The act seems to have provided for a summary proceeding on the part of the probate judge. The proceeding was instituted by a petition, contemplates notice thereof to the city attorney of the city of Denver, and provides, without any further pleadings, for a finding of facts, judgment. and execution of the judgment by the making and delivery of deeds corresponding thereto. Such was the proceeding had in the case under consideration. The judgment recited the filing of the petition; the finding that Mrs. Truax was not entitled to 185 feet of ground fronting on F street, but only to 144 feet of such frontage, but was entitled to extend westerly from F street not only the distance of 125 feet, as petitioned for, but to the eastern line of the old bed of the South Platte river, as marked and defined on the Ebert map. The deed was made according to this finding and judgment. In other words, the judge found that she had a meritorious claim to a lot of less frontage, but greater depth, than she had petitioned for.

All experienced lawyers know how common it is for judgments and decrees, even in courts where proceedings are statutory and formal, to depart in many particulars from the prayers of the original petitions. Statutes providing for amendments, formal and substantive, and statutes of jeofail are enacted to meet such emergencies. The probate judge, in administering the trust in question, was not governed by a Code of Procedure. He was, in a large sense, a law unto himself, so far as the practice before him was concerned. Non constat that there may not have been an amended petition filed or an oral modification of the original petition permitted.

However these things may be, and they are alluded to for the purpose of showing how unsafe and unreliable are the inferences attempted to be drawn from the facts stated in the original petition, we see no reason for departing from the accepted general rule that the judgment as rendered must be definite and final. 1 Freeman on Judgments, § 2; Eppright v. Kauffman, 90 Mo. 25, 1 S. W. 736. This rule is applicable whether the bodies authorized to investigate and determine questions are the established courts of the land or special tribunals designated for a particular purpose. 2 Freeman on Judgments, § 531 and cases cited. There is no latent ambiguity in the judgment which could be explained by reference to the original petition. We have found that by principles of law well recognized and applied in conveyancing the only irreconcilable call mentioned in the judgment or in the Truax deed is a distance call of 125 feet, and that this is a patent mistake and one which, when ignored, leaves a perfect and

harmonious description. Ordinarily, when a judgment is offered in evidence, the pleadings on which it was rendered are admissible in connection with it to determine its true import. There was therefore no error in receiving the petition of Mrs. Truax, but its evidential force, for reasons already stated, was insufficient to modify the description of the land contained in the judgment and deed which followed. The judgment was the ultimate and clear expression by the probate judge of the extent and description of the land to which Mrs. Truax was entitled.

Because it appears that the learned trial judge did not treat the Ebert map as a monument of title, but entertained evidence concerning the true location of the old bed on the face of the earth and other evidence touching the intent of the probate judge in making the original grant, he reached a conclusion adverse to the plaintiffs in this case. This conclusion, although in our opinion incorrect, cannot be disturbed, if other phases of the record disclose that plaintiffs have no title or right of possession to the land in controversy.

This brings us to a consideration of defendants' contention that plaintiffs' claims are barred by the statutes of limitation.

Defendants first invoke the General Statute of Colorado requiring actions for the recovery of lands to be commenced within 20 years after the right to bring the same accrues. 3 Mill's Ann. St. Rev. Supp. § 2923. Defendants' possession, according to the averments of their answer, was taken under the Tynon deed, dated July 10, 1882, and certainly not till then did the right of plaintiffs to bring an action against defendants or their grantors accrue. This suit was instituted within 20 years thereafter and was not barred by that statute.

Defendants next claim that, under the provisions of the same section (prior to its amendment), they or their successive grantors had been in the peaceable and undisturbed possession of the land in controversy for a period of five consecutive years, and had, during that period, paid all taxes legally assessed against the land and had thereby acquired title to the same. In substantiating this defense the burden was cast upon defendants to establish two facts: First, that they or their grantors had been, for a period of five consecutive years, in the peaceable and undisturbed possession of the land in question; and, second, that they had during that period paid all taxes legally assessed against the land. Neither of these facts, in our opinion, sufficiently appear from the proof to justify a verdict or finding for defendants. There is much controversy and doubt concerning what land is included in many of the tax receipts offered in evidence, and as to which party paid the taxes for given years. In some years, defendants or their grantors, in the hope, doubtless, of retrieving a lost position, paid taxes a second time after plaintiffs had already done so. In other years the lands were sold for nonpayment of taxes according to law, and afterwards redeemed by defendants. These redemption certificates were offered in evidence, but excluded by the court. The years represented by them therefore cannot be considered in computing the five years in question. The tax limitation act of Colorado was borrowed from the state of Illinois. Prior thereto, the Supreme Court of the parent state had held that the first payment of taxes on any lot of

ground discharged both the land and the owner from liability therefor, and that any second or subsequent payment was unavailing as evidence of a continuous payment, within the meaning of the tax limitation law. Morrison v. Kelly, 22 Ill. 610, 626, 74 Am. Dec. 169; Ross v. Coat, 58 Ill. 53.

Defendants again claim that they were in possession of the land in controversy and paid taxes thereon for seven consecutive years, as provided by the amendatory act of April 8, 1893 (Sess. Laws Colo. 1893, p. 327, c. 118), and thereby acquired title thereto. Whatever taxes defendants paid, available to them as a defense under this last-mentioned act, must have been paid after 1893. On June 7, 1893, plaintiffs paid all the taxes due that year, and, without mentioning the evidence as to payment of taxes in the intervening years, it appears that plaintiffs paid them for the year 1899. This disposes of defendants claim of title under the act of 1893.

The conclusions reached on the several questions considered dispose of the assignment of errors without more specific reference to them.

It results that the judgment must be reversed, and the cause remanded with directions to grant a new trial.

WALLACE et al. v. ADAMS et al.

(Circuit Court of Appeals, Eighth Circuit. February 21, 1906.)

No. 2,313.

1. INDIANS—CITIZENSHIP IN INDIAN TRIBES—POWER TO DETERMINE LEGISLATIVE, NOT JUDICIAL.

   The power conferred upon the Dawes Commission and the United States courts in the Indian Terrritory by Act June 10, 1896, c. 398, 29 Stat. 339, 340, and upon the Supreme Court by Act July 1, 1898, c. 545, 30 Stat. 591, to determine who were citizens of the Choctaw and Chickasaw Nations, was legislative, and not judicial, and judgments thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of lands were made to successful litigants.

2. SAME—JUDGMENTS OF CITIZENSHIP RIGHTS CONFERRED BEFORE ALLOTMENTS.

   Claimants of citizenship who secured judgments in their favor, which were final under these acts when they were rendered, and took possession of, and demanded suitable lands as their allotments, before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before the lands were allotted to them.

3. SAME—JUDGMENTS OF CITIZENSHIP REVIEWABLE BY SUBSEQUENT ACT OF CONGRESS.

   The judgments of citizenship rendered by the courts were conclusive upon the parties in the absence of subsequent legislation, but, though final when rendered, were voidable and reviewable by subsequent acts of Congress enacted before allotments of land were made under them.

4. SAME—CITIZENSHIP COURT—VALIDITY.

   The Act July 1, 1902, c. 1362, 32 Stat. 641, whereby a citizenship court was created and empowered to review the final judgments of the courts of the United States under Act June 10, 1896, c. 398, 29 Stat. 339, which had been affirmed by the Supreme Court, was constitutional and valid

against successful litigants who had not procured allotments before its passage.

5. COURTS—TERRITORIAL COURTS LEGISLATIVE, NOT CONSTITUTIONAL.
The United States courts in the territories and the Supreme Court in reviewing their decisions do not exercise the judicial power granted by article 3 of the Constitution, but a jurisdiction conferred upon them by the legislative department of the government by virtue of the sovereignty of the nation and the authority granted to Congress by section 3, art. 4, of the Constitution, to dispose of, and make all needful rules and regulations respecting the territory belonging the the United States.

6. SAME—COURTS OF INDIAN TERRITORY—JURISDICTION—EJECTMENT FOR INDIAN ALLOTMENT.
The United States courts in the Indian Territory have jurisdiction ot an action of ejectment brought by an Indian allottee against one in possession of his allotment.

7. INDIANS—INDIAN ALLOTMENT—TITLE OF ALLOTTEE CHARGEABLE IN EQUITY IN THOSE COURTS WITH TRUST FOR RIGHTFUL CLAIMANT.
The United States courts in the Indian Territory have jurisdiction in equity to charge the legal title to land evidenced by a certificate of allotment issued by the Dawes Commission under the direction of the Secretary of the Interior, with a trust in favor of the rightful claimant, either on account of an error of the commission in the construction of the law or its misapprehension of the facts induced through fraud or gross mistake.

8. SAME—ALLOTMENT BY DAWES COMMISSION—EFFECT.
The jurisdiction of the Dawes Commission, under the direction of the Secretary of the Interior, and the effect of their action in the allotment of lands of the Choctaw and Chickasaw Nations, are the same as the jurisdiction and the effect of the action of the Land Department of the United States in the disposition by patent of the public lands within its control.

9. JUDGMENT—RECITALS—JURISDICTION.
The recital in a judgment or decree that a required notice was "given to the defendants in conformity of law" raises the presumption of due service and of jurisdiction of the persons, in the absence of any inconsistent record or evidence.

(Syllabus by the Court.)

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

For opinion below, see 88 S. W. 308.

A. C. Cruce (W. I. Cruce and W. R. Bleakmore, on the brief), for plaintiffs in error.

Thomas Norman and H. H. Brown, for defendants in error.

George A. Mansfield, J. F. McMurray, and Melven Cornish, in behalf of the Choctaw and Chickasaw Nations as amici curiæ.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This case is presented to test the validity of the decree of the Choctaw and Chickasaw citizenship court of December 17, 1902, which by its terms annulled all the judgments and decisions of the United States courts in the Indian Territory which had admitted persons to citizenship under the act of June 10, 1896, in either the Choctaw or Chickasaw Nation of Indians. These nations were the owners of a large and valuable tract of land in com-

mon, so that each and every member of each tribe had an equal undivided interest in the whole. Treaty with the Choctaw Nation of September 27, 1830, article 2, 7 Stat. 333; Treaty with the Choctaws and Chickasaws of June 22, 1855, articles 1, 2, and 3, 11 Stat. 611, 612. By the act of March 3, 1893, the Commission to the Five Civilized Tribes, generally known as the "Dawes Commission," was created and empowered to negotiate an extinguishment of the tribal title to these lands and an allotment thereof to the members of the tribes in severalty. 27 Stat. 645, c. 209, § 16. As soon as the allotment of these lands to the members of the tribes in severalty became imminent, citizenship therein became desirable. Many sought membership in the tribes whose claims to that relation were not conceded by the nations, and it became necessary to determine in some way who were the lawful citizens of these Indian tribes. Each nation had a roll of its acknowledged citizens and each denied the right of many applicants to membership. In this state of the case the United States, by Act June 10, 1896, 29 Stat. 339, 340, c. 398 (1) confirmed the rolls of citizenship of the tribes as they then existed, (2) authorized and required the Dawes Commission to hear the application and to determine the right of each applicant for citizenship in either of these tribes, (3) granted an appeal to the United States District Court in the Indian Territory to each party aggrieved by a decision of the commission upon this issue of citizenship, (4) declared that the judgment of that court should be final, and (5) required the commission to make a complete roll of the citizens of each of the tribes and to include therein the names of those whose rights of citizenship should be sustained by the courts. Hill, one of the defendants below in this action, and the only one whose rights it is necessary to consider because all the other defendants claim under him, was not enrolled or acknowledged by the Choctaw Nation as one of its citizens, but was, in fact, a member of the tribe by blood and entitled to all the rights of a citizen therein. He applied to the Dawes Commission to be admitted to membership. The commission denied his application. He appealed to the United States Court for the Southern District of the Indian Territory, and on March 8, 1898, that court adjudged that he was a member of the Choctaw Tribe by blood and that he should be admitted thereto as a citizen. Immediately thereafter, and during that month, he took possession of the land which is the subject of this action. This land is a tract not more valuable or extensive than he would be entitled to receive as his allotment if he were enrolled as a citizen of the Choctaw Nation. Before June, 1898, he placed improvements of the value of at least $1,000 upon this land, and has ever since retained the possession thereof with the intent to secure the same as his allotment.

On June 28, 1898, and while he was thus in possession of the land, Congress passed an act whereby it consented to the Atoka agreement with the Choctaw and Chickasaw Nations of April 23, 1897, empowered the Dawes Commission to allot the lands of these tribes to their members in severalty and provided that any member should be entitled to receive his allotment out of the lands in his possession if

he chose to do so. 30 Stat. 495, 498, c. 517. Hill made this choice. On July 1, 1898, Congress granted to the tribes an appeal to the Supreme Court from the judgment of March 8, 1898, in favor of Hill, and from all other judgments in the United States Courts in the Indian Territory in citizenship cases which involved the constitutionality or validity of any legislation affecting citizenship or the allotment of Indian lands. 30 Stat. 591, c. 545. The Choctaw Nation appealed from the judgment in favor of Hill, and his judgment was affirmed by the Supreme Court on May 15, 1899. Stephens v. Cherokee Nation, 174 U. S. 445, 19 Sup. Ct. 722, 43 L. Ed. 1041. In the proceedings which resulted in judgments of admission to citizenship in either the Choctaw or the Chickasaw Nation in the United States Courts notice had been given to only one of these nations and the courts had tried the actions upon the appeals de novo. The Indian Nations insisted that these proceedings were erroneous, and that the judgments were therefore unjust. On March 21, 1902, an agreement was made between the United States and the Choctaw and Chickasaw Nations, which was confirmed by Act Cong. July 1, 1902, c. 1362, 32 Stat. 641. This agreement and act were to the effect that the Choctaw and Chickasaw citizenship court, to be composed of three judges to be appointed by the President and confirmed by the Senate, should be created, that this court, upon the institution of a suit in equity therein by either or both of these tribes against 10 persons who had been admitted to citizenship or enrollment by the terms of the judgments of the United States courts in the Indian Territory, as representatives of all persons similarly situated, should inquire and determine (1) whether or not notice to each of the two nations was indispensable to the proceedings and judgments of admission to citizenship in those courts, (2) whether the proceedings of those courts should have been confined to a review of the action of the Dawes Commission upon the papers and evidence submitted to it or should have extended to a trial of the actions de novo, and (3) whether or not the judgments of the United States courts should be annulled on account of either or both of these alleged irregularities. The act and agreement also provided that, in case the citizenship court should decide that the judgments of admission to citizenship by the United States courts in the Indian Territory should be annulled or vacated, the papers in any action and that suit, wherein such a judgment had been rendered, should, upon seasonable application of either party, be transferred to the citizenship court which should proceed to a hearing and determination of it as the United States court ought to have proceeded, that the citizenship court should have appellate jurisdiction of the judgments of the United States courts in citizenship cases, and that its judgments should in all cases be final. Under this agreement and act the two nations brought a test suit in this citizenship court against J. W. Riddle and nine other persons who had been adjudged entitled to citizenship by the courts, as representatives of all others similarly situated, and on December 17, 1902, they obtained a decree from that court to the effect that the judgments of the United States courts in the Indian Territory whereby persons were

admitted to citizenship in the Choctaw and Chickasaw Nations, under the act of June 10, 1896, were annulled and vacated. The defendant Hill did not apply for a transfer to the citizenship court of the action in which he had secured his judgment, and no further proceedings were taken therein.

The action now in this court is an action of ejectment. Henry McSwain and Roma McSwain, by their guardian and next friend, were the plaintiffs below, and they are acknowledged citizens of the Chickasaw Nation who have received allotments of these lands from the Dawes Commission and have brought this action against Hill and those claiming under him to recover possession of them. Hill has presented his judgment in the United States court to the Dawes Commission, has demanded his enrollment as a citizen of the Choctaw Nation and the allotment to him of the land in dispute, but the commission has refused his request on the sole ground that his judgment was annulled by the decree of the citizenship court. Hill insists that that decree is void, and under the legislation which has been recited he is entitled to retain possession and to receive the land in dispute as his allotment unless his judgment of admission as a citizen of the Choctaw Nation has been avoided by that decree. The facts which have been recited appear in the complaint and answer in the action in hand or have been admitted by counsel in their briefs, and the defendant Hill prayed in his answer that the case be transferred to the equity docket, that his title be quieted, and that he have all other proper relief. A demurrer to his answer was sustained by the trial court and by the appellate court in the Indian Territory.

We are met at the threshold of the investigation of this case by the objection that the United States Court for the Southern District of the Indian Territory had no jurisdiction of this action because the land in dispute had been allotted to the plaintiffs by the Dawes Commission, and by the act of July 1, 1902, exclusive jurisdiction had been conferred upon that commission to determine under the direction of the Secretary of the Interior all matters relating to the allotment of land and to issue allotment certificates which should be conclusive evidence of the right of the allottee to the land therein described, and authority was given to the Indian agent at Union Agency to place allottees in possession of their lands upon application to him, free from the writ or process of any court. Chapter 1362, 32 Stat. 644, par. 23, 24. No application, however, appears to have been made to the Indian agent to place the plaintiffs in possession of the land here in dispute, and the rights and powers of the agent are not in question in this case. The plaintiffs commenced an action of ejectment in the trial court below which was met by the plea that in equity and good conscience the land which was its subject and the possession thereof were the property of the defendant and by a prayer for proper relief in equity. Jurisdiction of such an action was clearly granted to the courts in the Indian Territory by Act June 7, 1897, c. 3, 30 Stat. 83, which provides that on and after January 1, 1898, those courts shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted, as well as by section 3, Act of June 28, 1898, 30 Stat. 496, c. 517.

Nor did the grant to the Dawes Commission and to the Secretary of the Interior of exclusive jurisdiction to determine matters relating to the allotment of land and to issue certificates which are conclusive evidence of the right of the allottee to the land therein described deprive those courts of their jurisdiction in equity, after the Commission and the Secretary have exercised this power and exhausted their jurisdiction, to determine whether by error of law or through fraud or gross mistake the Commission and the Secretary have failed to allot the land to the party who was under the law entitled to it and have assigned it to one who had no right to it. The jurisdiction of the Commission and of the Secretary and the effect of their action in the allotment of the lands of the Choctaw and Chickasaw Nations are the same in effect as the jurisdiction and effect of the action of the Land Department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. U. S. v. Winona & St. Peter R. Co., 15 C. C. A. 96, 103, 67 Fed. 948, 955. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. James v. Germania Iron Co., 46 C. C. A. 476, 479, 107 Fed. 597, 600. In the case in hand all parties concede in the briefs which have been submitted for our consideration that the land in question has been allotted and that allotment certificates have been issued to the plaintiffs and the questions presented will be considered in view of this admission. The defendant avers that the commission failed to allot the land to him and assigned it to the plaintiffs by reason of its erroneous view of the law, in that it held that his judgment of March 8, 1898, was vacated by the decree of the citizenship court. If that ruling was erroneous, the defendant was entitled to the possession of the property and to a decree in

equity that the right and title which the plaintiffs had secured by the allotment certificates were held by them in trust for his benefit, and the court in the Indian Territory had ample power to grant this relief.

Attention is called to section 2, Act June 28, 1898, 30 Stat. 495, c. 517, which provides that, when in the progress of any civil suit in the United States court in any district in the Indian Territory it shall appear to the court that the property of any Indian tribe is in any way affected by the issues being heard, the court is authorized and directed to make such tribe a party, and it is contended that both by virtue of this provision and under the general rule in equity the Choctaw and Chickasaw Tribes were indispensable parties to this action. But the lands in controversy here have been allotted to the plaintiffs below. They are no longer the property of the tribes, and none of their property can in any way be affected, even remotely, by this action unless the averments of the answer entitle the defendant to relief. The courts below were of the opinion that they did not, and hence it did not appear to them that any property of the tribes would be affected by the issues in this action. Until their opinions in this regard are overruled, it will not so appear, and, if they should be, this case must be remanded for testimony and hearing, and there will then be ample opportunity for them to consider and determine whether or not the Indian nations should be made parties. The record before us does not show that this question has yet been presented to the courts below, and hence it is not now here for our consideration or decision. We come, then, to the crucial question in the case.

The Constitution of the United States had been extended over and put into effect in the Indian Territory before the legislation involved in this suit was enacted, and counsel for the defendant Hill contend that because his judgment of admission to citizenship of March 8, 1898, was by the terms of the act of June 10, 1896, final when it was rendered and he took possession of and improved the land he occupies before June 28, 1898, and because by the act of the latter date (30 Stat. 498) the right to select this land which was then in his possession as his allotment was granted to him, his right thereto then vested, so that Congress had no power either by direct enactment or by the creation of a commission or court to review or annul his judgment or to deprive him of his right to this allotment. In support of this position they cite Rutherford v. Greene's Heirs, 2 Wheat. 196, 4 L. Ed. 218; Gaines v. Nicholson, 9 How. 356, 13 L. Ed. 172; U. S. v. Brooks, 10 How. 442, 13 L. Ed. 489; Doe v. Wilson, 23 How. 457, 16 L. Ed. 584; Crews v. Burcham, 1 Black, 352, 17 L. Ed. 91; Best v. Polk, 18 Wall. 112, 21 L. Ed. 805; New York Indians v. U. S., 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. The argument is persuasive, and it is fortified by the suggestions that the defendant's judgment had been affirmed by the Supreme Court in 1899 and that the citizenship court was in reality a commission, and not a judicial tribunal. But none of the authorities cited contains a decision that one has a vested right in a judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the

ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property. The opinions in the cases cited are limited to rulings that grants to designated persons or classes of persons are grants in præsenti, and that after they have taken effect the rights to the property have vested so that they may not be lawfully destroyed by legislation without compensation. The contention of counsel based upon decisions of this nature fails to give adequate consideration to the origin and character of the defendant's claim, to the nature of the issue determine by his judgment, and to the relation of the legislative, executive, and judicial departments of the United States to this claim and issue. Prior to the act of June 10, 1896, the right and the power to determine who were the citizens of the Choctaw and Chickasaw Nations was vested in those tribes. It was one of the fast disappearing attributes of the domestic dependent nationality of the Choctaws and Chickasaws, which was vested exclusively in their nations and was guaranteed to them by treaties with the United States. 7 Stat. 333, 334, art. 4; 11 Stat. 611, 613, art. 8; Buster v. Wright, 68 C. C. A. 505, 508, 135 Fed. 947, 950. Those nations had rejected the defendant's claim that he was a citizen of the Choctaw Nation. That issue had become res adjudicata between him and the nations, and it was not cognizable by the judiciary of the United States or of the Indian Territory. No court had any jurisdiction to determine that he was a member of the Choctaw Tribe or that he should be admitted to citizenship therein. He was without remedy for the lawful refusal of the Choctaw Nation to admit him to citizenship, and hence without right to membership in that tribe.

The United States by its superior might took from the Choctaw and Chickasaw Nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States court in the Indian Territory to decide this issue, by the act of June 10, 1896. Here is the origin of every right of the defendant involved in this action. The maintenance by him of any claim in any court necessarily concedes the power of the legislative department of the government to create or to revive, and to enforce his demand for citizenship, because without that concession the provisions of the act of June 10, 1896, in this regard are void, and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw Nation. But, if the legislative department of the United States had the constitutional power to create or to revive the defendant's claim and to enforce it, it necessarily had the same power to determine whether or not it would revive or enforce it and to select its own method of deciding these questions. It might have determined this issue itself and have declared by direct enactment that the defendant Hill was a citizen of the Choctaw Nation. It might have empowered a committee, an Indian agent, a commission, a board, or a court to examine and determine that question on its behalf, and as the determination of this question of citizenship was a purely legislative and administrative function, and not a judicial one, Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made

to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation. A striking and persuasive analogy to the power of the legislative department of the government to determine this question of citizenship and to dispose of the lands of the tribes is found in its jurisdiction to dispose of the public lands of the United States. Congress is vested with lawful authority to dispose of these lands. It has authorized the Land Department of the United States to decide who are entitled to them under the general pre-emption, homestead, and other acts provided for their disposition. But the legislative department of the United States may at any time before one who has occupied and improved land with a view to its pre-emption has completed all the preliminaries, entered and paid for the land he seeks to acquire, lawfully convey it to another, although the Land Department has already decided that the occupant is entitled to it. Occupation, improvement, compliance with the law, and the favorable decisions of the Land Department give rise to valuable and enforceable rights to public land as against other claimants in the absence of subsequent legislation. Nothing short of entry and payment confer upon a settler vested rights against the United States which impair in any respect the plenary power of its legislative department to dispose of the land to another or to withdraw it from sale for the use of the government. Campbell v. Wade, 132 U. S. 34, 38, 10 Sup. Ct. 9, 33 L. Ed. 240; Frisbie v. Whitney, 9 Wall. 187, 192, 19 L. Ed. 668; Yosemite Valley Case, 15 Wall. 77, 78, 21 L. Ed. 82; Hosmer v. Wallace, 97 U. S. 575, 581, 24 L. Ed. 1130; Gonzales v. French, 164 U. S. 338, 344, 17 Sup. Ct. 102, 41 L. Ed. 458; Grisar v. McDowell, 73 U. S. 363, 18 L. Ed. 863; Trenouth v. San Francisco, 100 U. S. 251, 25 L. Ed. 626; La Abra Silver Min. Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223; Emblen v. Lincoln Land Co., 42 C. C. A. 499, 503, 102 Fed. 559, 563. In the case last cited the complainant had instituted a contest in the Land Department in the year 1888 against an entryman, Weed, to secure a cancellation of his entry, and to obtain for the contestant the right to enter the land which is granted by section 2, c. 89, 21 Stat. 141, to any person who procures the avoidance of a previous entry. After a long series of adverse decisions the Secretary of the Interior finally, in 1894, set aside the rulings which had been made, and directed the local land officers to hear the case anew. The complainant had paid fees to the land officers, had conducted his contest for six years, had finally secured an avoidance of the decisions against him, and was pressing the case to a hearing before the local land officers where a time had been set for the trial, when Congress passed an act to the effect that the entry of Weed was confirmed and that a patent should be issued to him forthwith. This court decided in accordance with the opinion of the Supreme Court in the cases cited above that the contestant had acquired no vested rights against the United States

and its legislation, and that the act of Congress which granted the land to another was neither unconstitutional nor invalid. The Act July 1, 1902, c. 1362, 32 Stat. 641, which created the citizenship court and authorized it to review the judgment of the United States court in the Indian Territory of March 8, 1898, in favor of the defendant, was of the same nature. It was but a modification or an amendment of, or an addition to, the method prescribed by the legislative department of the government for the determination of the question whether or not the defendant Hill was a citizen of the Choctaw Nation by its acts of June 10, 1896 (29 Stat. 340, c. 398), and July 1, 1898 (30 Stat. 591, c. 545). When it was passed, the Dawes Commission, to whom Congress had delegated the power to distribute the lands of the tribes, had not allotted the land in dispute to the defendant. He had, therefore, acquired no vested right in it as against subsequent legislation of the United States because, until such an allotment was made, all the proceedings determinative of citizenship and of distribution which derived their force and effect from the legislative power of the United States alone were necessarily subject to the further exercise of that authority.

The fact that the effect of the act of July 1, 1902, has been to avoid final judgments of the United States courts in the Indian Territory, which had been affirmed by the Supreme Court, has not been disregarded. In the rendition of those judgments, however, those courts were not exercising any of the judicial power of the United States conferred by the third article of the Constitution. They were not constitutional, but legislative courts of the United States, exercising a jurisdiction conferred upon them by Congress by virtue of the sovereignty of the nation and of section 3 of article 4 of the Constitution, which empowers Congress to dispose of, and make all needful rules and regulations respecting the territory belonging to the United States. American Ins. Co. v. Canter, 1 Pet. 511, 546, 7 L. Ed. 242; Benner v. Porter, 9 How. 235, 242, 243, 13 L. Ed. 119; Hornbuckle v. Toombs, 18 Wall. 648, 655, 21 L. Ed. 966; Good v. Martin, 95 U. S. 90, 98, 24 L. Ed. 341; Clinton v. Englebrecht, 13 Wall. 434, 447, 20 L. Ed. 659. In the case last cited Chief Justice Chase, speaking of the courts of the then territory of Utah, said: "There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the territory of Utah." Now, as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question who were citizens of the Indian tribes was purely legislative and administrative, and the entire question still remained subject to congressional action, the legislative department had the same power at any time before allotments were made and the rights of allottees became vested to disregard or to authorize a review of the decisions of these courts by other tribunals that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee, if it had conferred this power upon them. The decisions of the Supreme Court in Stephens v. Cherokee Nation, 174 U. S. 445, 488, 19 Sup. Ct. 722, 43 L. Ed. 1041, and

Cherokee Nation v. Hitchcock, 187 U. S. 294, 306, 23 Sup. Ct. 115, 47 L. Ed. 183, adequately sustain this conclusion. In the former case that court expressly decided that the defendant and others who had secured judgments of admission to citizenship under the act of June 10, 1896, which were final under the legislation in existence when they were rendered, had no vested rights therein or in the lands or property of the tribes to which these judgments would have entitled them, and that the subsequent act of July 1, 1898, which gave to the tribes appeals to the Supreme Court from these judgments, was constitutional, and declared that:

"The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion of any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

Earlier decisions of that court are to the effect that the legislative department of the Government has ample power by subsequent enactment to grant a new trial or a review by a suitable tribunal of judgments final under the laws in force when they were rendered. Sampeyreac v. U. S., 7 Pet. 222, 235, 8 L. Ed. 665; Freeborn v. Smith, 2 Wall. 160, 17 L. Ed. 922; Garrison v. New York, 21 Wall. 196, 204, 22 L. Ed. 612; Freeland v. Williams, 131 U. S. 405, 412, 9 Sup. Ct. 763, 33 L. Ed. 193; Essex Public Road Board v. Skinkle, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446. In Sampeyreac v. U. S., 7 Pet. 222, 235, 8 L. Ed. 665, a decree of a court which established a title to land was rendered on November 24, 1827. After this decree had become final under existing laws an innocent purchaser bought the established title. On May 8, 1830, Congress passed an act which authorized the claimants defeated by the original decree, which had then been final for more than two years, to maintain a bill of review to set it aside. Such a bill was exhibited, a decree was rendered thereon which avoided the original decree and took the property from the innocent purchaser, and the Supreme Court sustained the act of Congress which allowed this review and the decree which followed it. There can be no doubt under these decisions that Congress had plenary power to authorize a review of the final judgments of the courts in the Indian Territory and of the Supreme Court in these citizenship cases. The contention that the act of 1902 is unconstitutional because it is class legislation is answered by the decision of the Supreme Court in the Stephens Case which sustained the act of July 1, 1898, which was of the same character. The suggestion that the citizenship court was a commission, and not a judicial tribunal, is immaterial, because the power of the legislative department of the government to authorize the review of the judgments of citizenship by a commission, a committee, or an agent was as complete as it was to authorize that review by a court. It had plenary authority to review the judgments itself or to create or select a tribunal to its liking for the purpose. In view of the considerations and authorities to which reference has now been made, our conclusions are: The power conferred upon the Dawes Commission and the United States courts in the Indian Ter-

ritory by the act of June 10, 1896, and upon the Supreme Court by the act of July 1, 1898, to determine who were citizens of the Choctaw and Chickasaw Nations, was legislative and not judicial, and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation. Claimants of citizenship who secured judgments in their favor which were final under the acts of 1896 and 1898 when they were rendered and took possession of, and demanded suitable tracts of, land as their allotments, before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before the lands were allotted to them. The judgments of citizenship rendered by the courts were conclusive upon the parties to them in the absence of subsequent legislation; but, though final when rendered, they were voidable and reviewable by subsequent acts of Congress passed before allotments of land were made under them. The act of July 1, 1902, whereby a citizenship court was created and empowered to review the final judgments of the courts of the United States under the act of June 10, 1896, which had been affirmed by the Supreme Court under the act of July 1, 1898, was constitutional and impregnable to the attacks of the successful litigants, who had not secured allotments of land before its passage.

Finally counsel for defendant insist that he is not bound by the decree of the citizenship court (1) because he was not one of the 10 persons named as defendants therein, but as Congress had plenary power to directly reverse the judgments of citizenship, or to determine in what way they should be reversed, its enactment that the 10 persons should stand as the representatives of all others similarly situated was not ineffective; (2) because there was no proof in the citizenship court, and there is no finding in the decree, that he was one of the persons similarly situated with the 10 defendants named, but the decree avoids all the judgments of the courts in the Indian Territory, whereby in cases appealed from the decisions of the Dawes Commission under the act of June 10, 1896, any of the defendants named or any of the persons simliarly situated was adjudged a citizen of the Choctaw or Chickasaw Nation, and the answer of the defendant in this action that upon such an appeal he secured a judgment of one of those courts that he was a citizen of the Choctaw Nation sufficiently discloses the fact that he was similarly situated with the 10 defendants named in the decree of the citizenship court and brings him clearly within its terms; (3) because the act of 1902 required that notice of the pendency in the citizenship court of the suit there brought and of the time for answering the bill should be published for four weeks in two newspapers generally circulating in the Choctaw and Chickasaw Nations 30 days before the time for answering the bill expired, and the decree does not recite or adjudge that this notice was published (32 Stat. 647), but the 10 defendants are named in the title of the decree as defendants "for themselves and as representatives of all persons similarly situated, claiming to be mem-

bers of the Choctaw and Chickasaw Nations, by virtue of alleged decrees of the United States Court for the Central and Southern Districts of the Indian Territory sitting respectively at South McAlester and Ardmore, and commonly known as Court Claimants." The decree recites: "The court finds that due and legal notice of the pendency and prayer of this suit has been given to the defendants herein in conformity of law," and it adjudges that the judgments in favor of those similarly situated as well as the judgments in favor of the 10 defendants named and in favor of other defendants who appeared be annulled.

Counsel concede that the recital in the decree that the notice had been given "in conformity of law" is sufficient, in the absence of any inconsistent record or evidence, to raise the presumption of the legal publication of the notice and of the jurisdiction of the court over the persons of all who are affected by the decree (Applegate v. Lexington, etc., Min. Co., 117 U. S. 255, 269, 6 Sup. Ct. 742, 29 L. Ed. 892; Foster v. Givens, 14 C. C. A. 625, 632, 67 Fed. 684, 691; Beattie v. Wilkinson (C. C.) 36 Fed. 646; Rumfelt v. O'Brien, 57 Mo. 569, 572; Harris v. Lester, 80 Ill. 307, 315; Mulvey v. Gibbons, 87 Ill. 367, 380; 17 Am. & Eng. Enc. of Law 1082), were it not for the fact that this recital is limited by the words "the defendants herein," but they insist that these words refer to the 10 defendants whose names are written in the title of the decree, and to them alone. Such a construction, however, is inconsistent with the decree against those similarly situated which could have been lawfully rendered only in case the publication of the notice had been made, and the words "the defendants herein" must, therefore, be given a broader interpretation, and must include those who were similarly situated as well as those whose names were written in the title of the decree.

The defendant pleaded the decree of the citizenship court in his answer and took upon himself the burden of showing by adequate averments why it did not estop him from asserting that he was a citizen of the Choctaw Nation. He alleged, it is true, that he was not similarly situated with the defendants named in that decree, but he failed to set forth any difference between his situation and that of the 10 defendants there named, while his answer disclosed the fact that he had secured a like judgment upon a similar appeal. He alleged, it is true, that he was not a party to the suit in the citizenship court, and that no notice was ever served upon him therein, but he failed to allege that the notice of the pendency of that action was not published in the manner directed by the act of Congress. These averments were insufficient to withdraw the defendant from the estoppel of the decree, and the judgments of the courts in the Indian Territory against him in the action now under consideration must be affirmed.

It is so ordered.

McINERNEY v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. February 26, 1906.)

No. 584.

1. STATUTES—RULES OF CONSTRUCTION—CRIMINAL STATUTE.
The rule that a criminal or penal statute must be strictly construed does not mean that its language must be given the narrowest interpretation, but contemplates a reasonable construction in aid of the purposes of the act, and courts should adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature.
[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 322, 323.]

2. RECORDS—DEFINITION AS USED IN CRIMINAL STATUTE—RECORDS OF COURT.
In Rev. St. § 5403 [U. S. Comp. St. 1901, p. 3656], which makes it a criminal offense to steal or destroy "any record, paper or proceeding of a court of justice," or "any paper or document or record filed or deposited in any public office or with any judicial or public officer," the words "record" and "document" are not limited in their meaning to the technical common-law records of courts as enrolled, or to technical documents, but are used in the common and ordinary sense, and include all and every part, not only of such technical records or documents, but of any paper filed and which becomes a part of the records of the court or office, broadly speaking, and is treated as a record of what it contains.

3. SAME—FEDERAL STATUTE—STEALING OR DESTROYING.
The original application of an alien for naturalization filed in a court of the United States, together with the affidavits, certificates and record of proceedings thereon, preserved in the office of the clerk, bound in one of a series of books kept for the purpose, and which are evidence of the rights of the applicant as a citizen, constitute a record of the court within the meaning of Rev. St. § 5403 [U. S. Comp. St. 1901, p. 3656], and the stealing or destruction of any part thereof is a criminal offense thereunder.

4. SAME—PROSECUTION—DEFENSE.
It is not a defense to a prosecution under Rev. St. § 5403 [U. S. Comp. St. 1901, p. 3656], for stealing or destroying a record of a court that such record was technically imperfect or incorrectly kept.

5. CRIMINAL LAW—EVIDENCE—PUBLIC RECORD.
A verified copy of a ship's manifest containing a list of its alien immigrant passengers, and giving their names, nationality, last residence, and destination, delivered to the inspection officers of a port of the United States as a report, under the requirement of Act March 3, 1891, c. 551, § 8, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1298], and preserved in the immigration office, is a public record, and when produced by the proper custodian is admissible as evidence of the facts stated therein.

6. SAME—IDENTITY OF PERSON—EVIDENCE.
On the question of the identity of a defendant on trial and an alien immigrant who arrived in this country on a certain vessel, descriptive matter relating to the immigrant stated in the report of the vessel's commanding officer to the immigration officers, giving his name, age, nationality, place of birth, and port of arrival in this country, corresponding closely in each particular with the facts relating to defendant as shown by other evidence, is admissible as circumstantial evidence, its weight to be determined by the jury.

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

Harvey H. Pratt (Henry F. Hurlburt and Isaac F. Paul, on the brief), for plaintiff in error.

William H. Lewis, Asst. U. S. Atty. (Melvin O. Adams, U. S. Atty., on the brief).

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

ALDRICH, District Judge. The defendant was indicted under section 5403 of the Revised Statutes [U. S. Comp. St. 1901, p. 3656], which was enacted for the purpose of protecting records, papers, and proceedings of courts of justice, and papers, documents, and records filed or deposited in the public offices of the federal government.

The defendant was charged in four counts. In the first count it was alleged that there was in the office of the Circuit Court of the United States for the District of Massachusetts a certain public record of a court of justice of the United States, which was known as the "record of the citizenship of one James McInerney," and that the defendant unlawfully took it and carried it away with intent to steal.

The second count sets out that there was a certain document in the clerk's office, the document then and there being a record of the naturalization and admission to citizenship of one James McInerney, which the defendant unlawfully took and carried away with intent to steal.

The third count charges the willful and unlawful destruction of the record described in the first count; and the fourth count charges the willful and unlawful destruction of the document described in the second count.

Without setting out the assignments of error in detail, it may be said that they relate largely to the question whether the thing described in the indictment and in the proofs as taken and destroyed was a record, or a document which was a record within the meaning of the statutes.

It is quite apparent that Congress, in this sweeping statute, did not intend to limit the act in its operation to a record of a judicial proceeding, as enrolled in its entirety. It cannot be possible that it was only intended to protect an entire record, and that the statute should have no force against an offender who mutilates or destroys a part of a record, or against one who destroys documents or papers which constitute a part of the original record or files in a judicial proceeding, or against one who destroys papers or documents or detached records filed or deposited in the public offices of the federal government. If the statute were to be so narrowly and so strictly interpreted, the evident purpose of the lawmaking power would be defeated in a very substantial degree. We assume, therefore, that it was not only intended to declare it to be an offense to willfully destroy an entire record, but as well to make it an offense to steal or destroy any part thereof, or any document or paper filed or deposited in the offices of the clerks of the United States courts in the course of judicial procedure, or any paper, document, or record

filed or deposited in any of the public offices of the federal government; the purpose being to preserve them as evidence relating to things which concern the public and the government.

Such being the manifest purpose, it only becomes necessary to consider whether the thing alleged to have been taken and destroyed was within the fair meaning of the statute, and whether the thing was described with sufficient legal accuracy in the indictment, and whether there was any substantial variance between the proofs and the allegations.

The thing is described in one set of counts as a public record of a court of justice, as a record of naturalization and admission to citizenship, and as a record contained in a book numbered and lodged in the clerk's office. In the other set of counts it is described as a document filed and deposited in a public office, and as being a record of naturalization and admission to citizenship, and as a document contained in a book numbered 256 of the records of naturalization proceedings. What was taken and destroyed, according to the proofs, was two sheets, or four pages, which contained the original application of James McInerney for naturalization, with the certificate of the clerk that the oath was administered to the petitioner before the court, on which was the impression of the official stamp of the United States Circuit Court for the District of Massachusetts, indicating the date on which the application was filed. The sheets also contained the affidavits of the witnesses and the certificate of the clerk or a deputy that the affidavits were sworn to by the witnesses in the presence of the court, together with the date; also the oath of allegiance administered to the applicant upon his admission to citizenship; the certificate of the clerk that the oath was taken and that the applicant was admitted to become a citizen of the United States; and a certificate that the court ordered a record to be made thereof accordingly. The sheets also contained an impression of the official stamp of the Circuit Court, recording the date on which the case was decided. These sheets or documents had been bound into a large volume kept in the vaults connected with the office of the clerk, with several hundred similar volumes. There was inscribed on the back of the volume, in prominent letters and figures, the following: "RECORD OF NATURALIZATION. Vol. 256. NOV. 20, 1894 to JAN. 10, 1895. UNITED STATES CIRCUIT COURT." There was also bound into this volume an index to the cases which it contained. In the index is the name of McInerney, James, with figures referring to page 144, which page, according to the evidence, had reference to the naturalization case to which the index referred, and that page, together with everything following it which related to the case of James McInerney, was cut from the volume. These sheets or pages bound in such volume contained all the existing record of the naturalization of James McInerney, and, according to the evidence, everything about the case was taken and destroyed, except the index name and reference to the page.

The evidence tends to show that under a practice or a system which has been in vogue for a long time, the papers, documents, and

the proceedings in naturalization cases are not enrolled or extended upon the records as is done in adversary civil and criminal proceedings, but in instances where the applicant is admitted to citizenship the original papers and documents, together with the certificates, are bound into volumes which are preserved in the custody of the clerk as the only record of naturalization cases. Such a record, of course, is not strictly a common-law record, which means an enrollment of the documents in a record extended by the necessary incidental formalities. It is, however, a muniment of the applicant's title to citizenship, and though the papers and documents are an original rather than an enrolled record, in view of their association with a judicial act, and in view of their established judicial recognition, they are so far a record of the events involved as to be evidence of citizenship in proceedings, which put in question the applicant's right to exercise the privileges and have the protection of an American citizen at home, and so far a record as to be evidence in situations which involve the question whether he shall be protected by the United States government as an American citizen abroad; and thus it was clearly something which should not have been destroyed or stolen from the records or files of the courts. This being so, and such being its weight by reason of its fixed connection with an actual investigation and judicial act, which in a judicial proceeding established a right, it was a record within the fair meaning of the statute.

The word "record," when used in the sense of a record in a judicial proceeding, has been described as "a precise statement of the suit from its commencement to its termination, including the conclusion of law thereon, drawn up by the proper officer for the purpose of perpetuating the exact state of facts." Lord Coke says, "Records are memorials or remembrances on rolls of parchment." Clearly enough the word "record," used either by courts or in statutes, in connection with the idea of a thing which shall be conclusive upon questions of law and fact in adversary proceedings, would mean a formally extended record; because, in order to be conclusive as between adversary parties, it must necessarily be complete, and the word used in such a connection means a copy of the papers from beginning to end spread upon the record books. But in a statute like the one in question, intended to protect government archives, the view is entirely different, because the word is used in a popular, or at least in a more general, sense. The purpose of the statute was not to describe a record which shall conclude rights, but records to be protected from destruction, and the purpose changes entirely the point of view, and consequently the sense of the words employed.

It being a penal statute, however, it is, of course, subject to the rule of strict construction, but such general rule contemplates a reasonable construction in aid of the purposes of the act. Lewis' Sutherland Statutory Construction, §§ 528-534. It does not mean the narrowest interpretation (Sutherland, § 529), but that courts should follow the true intent of the Legislature and adopt that sense

of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature. United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740; United States v. Hartwell, 6 Wall. 385, 395, 396, 18 L. Ed. 830; United States v. American Sureties Co. (Sup. Ct.; Jan. 2, 1906) 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. ——.

Unless there is something in a statute to indicate otherwise, common-law words would ordinarily be accepted as used in the common-law sense, and technical words in the technical sense; but words in common use, when adopted in a statute, are to be accepted more liberally and in accordance with their common signification, when such purpose is apparent. Sutherland, § 358. The common and ordinary use of the words "record" and "document" obviously makes them include in their popular acceptation more than common-law records or technical documents.

As a matter of common knowledge, many papers and documents filed in course of judicial procedure are commonly known as a part of the record, though not spread upon the rolls; and if, from the nature of the situation, or from a long-continued and recognized practice, an original paper or document, though not spread upon the records, is treated as a record of what it contains, it would be a record or a document which was a record within the meaning of the statute, though not technically complete, or technically a record or a document.

The words "any record," as used in the statute, are broad enough, under reasonable construction, to include any part of a record. Two lines, or one line even, from a page of a record of a thousand pages, would be a record of the facts stated in the one or two lines, and would therefore be a record within the meaning of the statutory words "any record." The test of criminality cannot turn upon the question whether an offender succeeds in getting two-thirds of the record, instead of the whole, nor can immunity be made to rest upon the point that the record taken and destroyed was not technically complete, or that documents or papers filed or deposited in public offices, as a part of the government archives, were not technically complete in all respects. To illustrate the scope of the words "any record" used in the statute with reference to the public offices, the report of a commanding general as to the operations of an army, or of a naval commander, are undoubtedly, within their meaning, records of the operations in question, though they are never spread upon record books proper, and though they are not a record in any common-law sense. An unsigned memorandum in the handwriting of such an officer, deposited or filed in the proper office, would clearly enough in the sense of the statute be so far a record of the events to which it relates as to render a person responsible who takes it from its public place and destroys it. So it would be with respect to the reports of the commandant at West Point or Annapolis in which the doings there and the status of the various persons and things are preserved; or the report of the head of the Weather Bureau. None of these things are extended as a record proper, but

they contain, none the less, a record of the events which they perpetuate, and the record resides in the original in the sense of this statute. Suppose an officer in charge of a geographic exploration and survey should, in addition to a general report, lodge in the proper public office a diary covering comprehensively and in detail the events of a year, though unsigned, and though neither a record, a document, or a paper, in a technical sense; it would in the ordinary and popular sense be a record of important events, and as such it would be a record entitled to protection within the meaning of the statute. The same is true of historic papers, deposited in the public offices. They are records of events and entitled to statutory protection, if the legislative branch of the government uses the word "record" in that sense.

The statement of the case which we are now considering is designated in our system of practice as the "record." Such is true of all transcripts which, under federal procedure, come from the lower courts to the appellate courts, and which, though not extended, and never a record in the technical common-law sense, would unquestionably be a record in a proceeding of a court of justice within the sense of the terms used in the statute under consideration.

In a statute like this there is no more occasion for a narrow construction of the words "record," "paper," or "proceeding," when used in connection with the courts or the clerk's office, than exists with reference to the words "paper," "document," or "record" when used in connection with the phrase "any public office," and a construction of its terms which would make the guilt of an offender who steals or destroys a muniment or record of a right like the one in question depend upon whether the thing alleged and proved was a technical common-law record, or a technical common-law document, or whether it was critically complete by way of enrollment, would wholly destroy the usefulness of a salutary law. It would be a curious condition of things, in view of this statute, if a man, who gets access to the clerk's office, takes down a volume authoritatively designated as "Circuit Court Records," and stealthily cuts out and destroys pages which contain the official certificate of the clerk and the impression of the official stamp used in connection with court proceedings, and which contain all the existing record of a naturalization case, shall have immunity from criminal responsibility and escape liability under a judicial construction of the statute which limits its operation to technically complete and perfect common-law law records. Such a condition and such a construction would overthrow the intention of the lawmaking power, and would offend the moral sense and the intelligence of the whole country.

The case of United States v. De Groat (D. C.) 30 Fed. 764, which involved an indictment under the statute in question, though turning upon another point, assumed that papers and documents were records.

In our view a citation of authorities is quite unnecessary, and it may perhaps be said that there are no authorities directly in point to the question which we are considering, but it has been held in numerous cases, which have an analogous bearing upon the situation

here, that original papers and documents are a part of the record. In that class are Gagliardo v. Crippen, 22 Cal. 362, where, under a statute, affidavits were held to be part of the record; so in Cord v. Southwell, 15 Wis. 211, in respect to a stipulation between parties as to an order of sale; so in Lemonds v. French, 4 G. Greene (Iowa) 123, as to motions, notices, and the rulings of the court under a code; likewise the findings of a court in Smith v. Lewis, 20 Wis. 350; a bill of exceptions in Mead v. Walker, Id. 518; findings of fact in Sutter v. Streit, 21 Mo. 157; findings of fact and conclusion signed by a judge and filed in Button v. Ferguson, 11 Ind. 314; a submission and an award which becomes the basis of the judgment in Buntain v. Curtis, 27 Ill. 374; an opinion of the trial court as to facts in Gregg v. Spencer, 96 Iowa, 501, 65 N. W. 411, and in Cummins v. Woodruff, 5 Ark. 116, that a writing obligatory brought into a case by oyer became a part of the record.

The original papers filed or deposited in the clerk's office and existing in a detached condition have often been accepted as embodying the record of the suit, and some authorities hold that the originals are evidence even after the formal record has been made up. In Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459, which was a case in the criminal class, detached original papers, not carried forward into the record books, were received as evidence upon the trial against the objection that they did not constitute the record, and they were admitted upon the distinct ground stated in the charge to the jury that the papers were the record in the cause, and this was sustained by the Supreme Court as applicable to both civil and criminal cases in situations where no formal record has been made. See, also, Sharp v. Lumley, 34 Cal. 611, 614; State v. Bartlett, 47 Me. 388, 401; Day v. Moore, 13 Gray (Mass.) 522; Allis v. Beadle, 1 Tyler (Vt.) 179; Buffington v. Cook, 39 Ala. 64; Watts v. Clegg, 48 Ala. 561; Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368.

Holding the view that the statute should be accepted as one intended to cover judicial records, without regard to whether they are technically records, or whether they are technically complete, and basing such view upon the idea that the words of the statute were used in a broader and more liberal sense than that which would only include formal records in all respects regular and complete, we need not deal with the third assignment of error, which directs itself against the manner in which the naturalization papers and the certificates and stamped impressions were made and the manner in which they were made up into volumes, further than to say that a construction of the statute which would permit a defendant to justify a destruction of public records and documents upon the ground that they were open to technical criticism would at once reduce the statute in question to an absurdity. Sustaining such a view would be equivalent to saying, if public records or documents are open to criticism on the ground of irregularity, so far as statutory protection is concerned, they may be stolen or destroyed.

The only remaining questions relate to the evidence tending to show when the defendant came to this country. This evidence was

introduced by the government for the purpose of showing motive; the claim being that the defendant came so late that he could not have been legally naturalized at the time he was admitted to citizenship, and that the motive for his destruction of the record of naturalization resided in the idea of avoiding the danger of an exposure of a fraudulent act in connection with his naturalization.

The questions on this phase of the case arise in respect to the manifest of the steamer Cythia, which arrived in Boston Harbor in May, 1892. The manifest, upon which appeared the name of James McInerney, with certain descriptive matter, was admitted in evidence to show motive, and it is urged in effect, first, that the statute did not require the report to be in writing or that it be kept, and that the paper was not a record of a character to be admissible as evidence of the fact that any McInerney arrived in this country upon the steamer Cythia; and, second, that the proofs did not identify the defendant as the McInerney named in the paper.

We will first consider the question of the admissibility of the manifest. It is urged that the manifest in question was not required to be kept, and therefore had no force after it had performed its function of notifying the immigration office as to the number and character of the aliens seeking admission to the United States. This point was decided against that view in Evanston v. Gunn, 99 U. S. 660, 666, 25 L. Ed. 306, where it is said that the admissibility of records kept by public officers does not depend upon a statute requiring them to be kept. It is also urged that a written report was not required by statute, and as to this we think it entirely clear, in view of the character of what was to be reported, including name and general descriptive matter in respect to every alien passenger, that the act intended a written report. The official verification contemplated and imperatively required by the statute would be altogether impossible and out of the question upon a verbal report of the names and descriptive matter of 500 or 1,000 alien passengers.

It would seem to be settled upon authority that a manifest, or a report, like the one in question, made by a designated officer under the positive requirements of a statute regulating the manner in which such officer shall discharge a quasi public duty, delivered to a proper officer of the government which confers the authority and imposes the duty, and produced by a proper custodian from the proper government office, so far partakes of the character of a public document as to become evidence of the facts which it contains and which it is by law required to set out.

Section 8, c. 551, Acts March 3, 1891, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1298], declares:

"That upon the arrival by water at any place within the United States of any alien immigrant, it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they come, to report the name, nationality, last residence and destination of every such alien before any of them are landed, to the proper inspection officers."

And it would seem that under such requirement there was delivered to the immigration office at Boston a copy of the ship's mani-

fest, which was made out by the purser and verified by the oath of the captain.

The admissibility of a paper of a public character would not depend upon its strict regularity. If made by authority and under positive law, and in accordance with its substantial requirements, it would be sufficient.

We perceive no substantial difference between the requirements of the statute here and those of the English statute, under which, upon very forcible reasoning, it was held in Richardson v. Mellish, 2 Bing. 229, that the list of passengers returned by the captain under the authority of the English act was admissible evidence as against third parties. The principle of the English case was apparently adopted with approval by the Supreme Court of the United States in Buckley v. United States, 4 How. 251, 258, 11 L. Ed. 961.

In the case of Evanston v. Gunn, 99 U. S. 660, 666, 25 L. Ed. 306, the record was kept by a person employed in the signal service of the United States, but the Supreme Court did not base its admissibility so much upon official capacity as upon the idea that the record was made by a person whose public duty it was to record truly the facts stated, and upon the idea that it was of a public character, and kept for public purposes.

It must be borne in mind that the statute in question relates to the public good, and its object is, under positive law, to preserve data with reference to immigration. The general proposition is sometimes made in the books, and it has some support upon the authorities, that, whenever a person is by law required to make a report or return of his acts, the report is a public record. We need not accept this general and extreme proposition, because it must be subject to some qualifications, and the admissibility of a given document must, after all, largely depend upon its character and the nature of the facts to which it relates. Here, however, there was a positive statutory designation of the commanding officer and the agents of the vessel, and the unquestionable purpose of the act requiring a ship's manifest to contain a list of alien passengers with certain descriptive matter was to preserve record data for the protection of the government and as an aid in the enforcement of its laws in the interests of the public good, and it therefore goes without saying that such public consideration and such authoritative requirement clothes the quasi public document or record with a force and sanctity which it would not otherwise possess.

Neither the English case nor the American cases make the admissibility of the document depend so much upon the strict official capacity of the person making the report, as upon the nature of the act and upon the idea that it was an act done in discharge of a duty of a public character under the authority and under the requirements of the law.

Certain entries in a ship's logbook bear close analogy to the statutorily required entries upon a ship's manifest or alien list. Both Greenleaf and Wigmore treat certain required logbook entries as admissible against a ship whose master made the entries, and against

the party about whom the law requires the entry to be made. Such limited rule of admissibility is based, apparently, not upon any express statutory provision that the entry shall be evidence, nor upon general principles, but upon the quasi public nature of the act involved in the entry, and the requirement of the law that the personal entry shall be made. This limited rule of admissibility is quite sufficient for the purposes of the analogy. Wigmore suggests, however, that the further argument may be made that, although a merchant ship's log is not kept under an official duty, it is at least kept under a duty imposed by law, and therefore ought to be admissible upon principle. Such suggestion doubtless means that something can be said in favor of the general admissibility of such a document, but that view we need not consider in this case. 1 Greenl. Ev. § 495, and notes; Wigmore on Ev. § 1641, and notes.

It appears that manifests like this, after being verified by the United States Immigration Inspectors, who go on board and call off the names of persons and examine them, and check off answers and questions, are bound in book form, according to the practice of the immigration office, and the one in question was produced at the trial from that office, and the conclusion is that it was admissible for the purpose of showing the collateral fact that some person by the name of James McInerney arrived in Boston upon the steamer Cythia in May, 1892, and if showing by way of description that he was male, and 20 years of age, of Irish nationality, that his last residence was Ireland, that his destination was Massachusetts, and that his occupation was that of farm laborer.

The further position is that, if the manifest would be admissible in a proper case as a record, the facts which it contained should not have been read to the jury, because, as it is claimed, they were in no way connected with the James McInerney on trial. If they were not connected in such a manner as to make them material on the question of motive, it results unquestionably that the manifest was incompetent, because wholly irrelevant and immaterial. This is upon the ground that there must be identity of person. In other words, it must appear that the person on trial was in fact the person named in the manifest.

This view, as to the necessity of identity of person, was accepted by Judge Lowell to its fullest extent, and the jury was told that the evidence contained in the manifest was only addressed to the question of motive, and was of no weight or value whatever, unless they should find that the James McInerney who came to this country in 1892 was the same man as the defendant. The instructions were very full and complete upon this branch of the case.

The idea of identity necessarily involves a question in the nature of a question of fact. The evidence directed to a question of identity might be so strong as to clearly make the connection, it might be so weak as to clearly fail in that respect, and in such case the collateral fact would be excluded upon a ruling of law; but, where the relevancy and the materiality of collateral facts depend upon their being connected with the main proposition or ultimate fact, the connection may be established in the same way that any other question of fact may

be established—that is to say, by circumstantial evidence—and whenever the circumstances reasonably tend to establish a connection which would make a collateral fact material, if the connection is established, the trial judge is necessarily in a position where he must submit the question to the jury under proper instructions. Where a proposition is sought to be established by circumstantial evidence, the individual circumstances standing independently are immaterial, and, as recently pointed out in Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127, must necessarily be admitted piecemeal, and, if the connection fails, then the individual circumstances have no value and under proper instructions will do no harm. If the circumstances so far operate as to create a reasonable question whether the collateral fact is connected, that question, like any other question of fact, must be submitted to the jury under suitable instructions; and it was upon this view that the District Court, under proper cautions, permitted the jury to consider provisionally the collateral facts contained in the manifest, under instructions that, if they should find that the person on trial was the man named in the manifest, they might consider the date of arrival in this country upon the question of motive for destroying the record of his naturalization, and upon that question only, and, if they should find he was not the man, then the manifest and all it contained was wholly immaterial.

Therefore it only remains to inquire whether the circumstantial evidence so far tended to establish connection between the McInerney of the manifest and the McInerney on trial as to warrant submitting the question of identity of person to the jury. According to Greenleaf and Wigmore (Greenl. vol. 1, § 43a; Wigmore, § 2529, and notes) concordance in name alone is always some evidence of identity of person, but we may assume for the purposes of this case that evidence alone of identity in name is not sufficient to justify submitting to the jury the question of personal identity, and that it is necessary to have something more in the nature of evidence to warrant a verdict. Still, as already said, a question like this is, after all, more a question of fact than a question of law, and we need not refer to the numberless authorities with respect to questions of identity arising out of marriages, births, convictions of crime, estoppels, wills, and settlements of estates, and in connection with other subjects of legal controversy, further than to say that oddness of the name, size of the district where the name exists, length of time, sameness in age, nationality, birthplace, sex, occupation, marks, and similarity in features have been recognized in the various cases as circumstantial evidence of more or less weight tending to establish identity of person. In this case there was, in addition to the evidence which results from the sameness and the oddness in name, evidence tending to show that the defendant's age corresponded with the age of the McInerney named in the manifest, that the nationality and birthplace were the same, and that the defendant resides in the city or place named in the manifest as the city or place of destination. There was also evidence tending to show that the defendant has resided in Boston since about the time of the date named in the manifest. Quite independent of the idea of

presumptions which are talked about in the books as resulting from identity of name and identity of descriptions and conditions, we think the description of the defendant as to age, birthplace, nationality, time and place of arrival, and residence, so closely fitted the age, birthplace, nationality, destination, and time and place of arrival of the person described in the manifest as not only to justify, but to require the presiding judge to submit to the jury the question of identity of person.

Under the instructions given the jury may have found that the person named in the manifest and the defendant were one and the same, and may have been influenced upon the main fact by the collateral fact made relevant and material by such finding; while, on the contrary, the jury may have found that they were not the same, and may have found the defendant guilty upon the evidence directed to the main question, entirely uninfluenced by the collateral facts directed to the question of motive made quite immaterial and wholly unprejudicial by the finding that the person named in the manifest and the one on trial were not the same. In either event it would be a fair trial, and, there being substantial evidence tending to show identity of person, the question became one which could not be ruled under the law either way, and the plan adopted by the District Court was the only one reasonably permissible, and involved, perhaps, the only kind of a trial of which the case was susceptible under the circumstances.

The judgment of the District Court is affirmed.

WINTERS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

No. 1,243.

1. INDIANS—TREATIES—RESERVATIONS—WATER FOR IRRIGATION.

Act May 1, 1888, c. 213, 25 Stat. 114, art. 2, reduced the size of the Montana Indian reservation under an agreement providing for Congressional donations in order to enable the Indians to become self-supporting as a pastoral and agricultural people. By the treaty the Indians ceded and relinquished their rights to certain lands not then reserved; the reservation being described as beginning at a point in the middle of the main channel of Milk river opposite the mouth of Snake creek, thence south, to a point, thence east, thence, in a northerly direction, in a direct line, to a point in the middle channel of Milk river, thence up the Milk river, in the middle of the main channel thereof, to the place of beginning, etc. *Held* that, the land reserved to the Indians being barren and worthless for agricultural purposes without irrigation, the treaty so confirmed should be construed as reserving for the use and benefit of the Indians residing on the reservation a portion of the waters of the Milk river for the irrigation of the reservation lands.

2. WATERS AND WATER COURSES—APPROPRIATION OF WATER—DESERT LAND LAW—PUBLIC RIGHTS.

A portion of the waters of Milk river having been impliedly reserved for the benefit of Indians cultivating the Ft. Belknap Indian reservation, by the treaties with such Indians, grantees of public lands outside

of the reservation could not acquire the exclusive right to appropriate all the waters of the river for irrigation under the desert land act (Act Cong. March 3, 1877, c. 107, 19 Stat. 377, as amended by Act Cong. March 3, 1891, c. 561, § 2, 26 Stat. 1096), authorizing appropriation by such owners of water for irrigation "subject to existing rights."

3. SAME—WATERS SUBJECT TO APPROPRIATION.

Desert land act (Act Cong. March 3, 1877, c. 107, 19 Stat. 377, as amended by Act Cong. March 3, 1891, c. 561, 26 Stat. 1096), authorizing the appropriation of waters of holders of land acquired under such acts, applies only to waters of the United States.

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

This is an appeal taken from an order secured by appellee (complainant in the court below) enjoining appellants (defendants in the court below) from interfering in any manner with the use of 5,000 inches of the waters of Milk river in the state of Montana. The order was made by the court upon a hearing under a rule to show cause why the preliminary injunction should not be granted. The suit involves the right of the appellee, and of the Indians residing upon the Ft. Belknap Indian reservation, to the use of the waters of Milk river for useful and beneficial purposes. This Indian reservation was established by the treaty or convention between the government of the United States and the Indians May 1, 1888 (25 Stat. 113–133, c. 213). Appellee's complaint is quite lengthy, as are also the affidavits and statements presented by the appellants at the hearing. We shall endeavor to condense the facts derived from the pleadings and evidence, and make a general reference to the statutes and treaties bearing upon the issues raised herein. The Indian reservation comprises an area of about 1,400 square miles, embracing about 1,000,000 acres of land, the greater portion of which is grazing land, "well adapted to stock raising." Act June 10, 1896, c. 398, 29 Stat. 351. There are, however, some portions thereof that are suitable for agriculture, and of these portions "approximately about 30,000 acres are susceptible of irrigation with the waters of Milk river." There is but little water to be found upon the reservation itself, and this scarcity of water "renders the pursuit of agriculture difficult and uncertain." 29 Stat. 351, c. 398. The center of Milk river is the northern boundary line of the reserve throughout its entire width, and this stream is the only source of supply for the various uses of the government and the Indians at the agency, and for irrigation purposes generally on the reserve. Since 1889 and 1890 a portion of the waters of the stream have been continuously used by the government and the Indians for household, domestic, and irrigating purposes, at and near the agency proper, and this is the only source of supply from which to satisfy their requirements and necessities at that place. Since the year 1898 water has been taken from Milk river by means of a canal and used on the reservation for the purpose of irrigating the cultivable lands susceptible of irrigation with the waters of that stream. As alleged in the complaint, "approximately 5,000 acres of land are being irrigated upon said reservation for the purpose of producing thereon crops of hay, grass, grain, and vegetables with the waters diverted by means of said canal and lateral ditches distributing said waters from said canal over the lands." This canal has a carrying capacity of at least 5,000 inches of water, and such amount of water is required for the present needs and requirements of the government and the Indians, for household, domestic, agricultural, and irrigating purposes on said reserve. Besides, stock raising, principally horses and cattle, has always been and is now extensively carried on by the Indians everywhere on the reserve. "The main reliance of these Indians for self-support is to be found in cattle raising." 29 Stat. 351, c. 398. And the stock ranging and feeding in the northern portion of the reserve all along the channel of the stream, from the eastern to the western limits of the reserve, must depend principally upon Milk river for drinking water. At the time of the institution of this suit no water reached any part of the reservation, the same having been diverted by the appellants.

Prior to the enactment of any law recognizing the right of appropriation to the waters on the public lands all of the country within the state of Montana was Indian country. By the provisions of article 4 of the treaty of October 17, 1855, proclaimed April 25, 1856, there was established and reserved to the Ft. Belknap Indians, and other Indian tribes, as and for their home and abiding place, nearly all that part of the state lying north of the Mussel Shell river, and extending from the crest of the main range of the Rocky Mountains eastward, approximately to what is now the western boundary line of the Ft. Peck Indian reservation. Revision of Indian Treaties, p. 7, 11 Stat. 658. By the terms and provisions of this treaty the Ft. Belknap Indians reserved to themselves the "uninterrupted privileges of hunting, fishing, and gathering fruit, grazing animals, curing meat, and dressing robes." Article 3 of Treaty, 11 Stat. 657. The territory which was so set apart and reserved to them at that time embraced the channel and the waters of Milk river from its source to its mouth lying within the confines of the United States. This continued to be the abode of these Indians until 1874, at which time their territory was reduced so as to embrace nearly all that part of Montana lying to the north of the Missouri river, and extending from the Rocky Mountains eastward to the Dakota boundary line, including Milk river. Act of April 15, 1874, c. 96, 18 Stat. 28. The tract so set apart remained Indian country and the Indian reservation of these Indians until 1888, at which time the present Ft. Belknap Indian reservation was carved out of the larger reserve established in 1874 as their "permanent home," with the center of Milk river as the northern boundary line of the reservation, and which is now its northern boundary line. The diversion of the waters by appellants is admitted by them, but they claim the right to divert the waters of Milk river on the ground that the waters of the stream in question were legally and properly appropriated by them and each of them for a beneficial and useful purpose, under the laws of the state of Montana authorizing the appropriation of the waters of the streams within that state for household, domestic, agricultural, irrigating, and other proper purposes as the same are sanctioned, recognized, and confirmed by the federal statutes. Their rights to the water are based upon the appropriation of the waters, and the rights relied upon and asserted by them are those, and those only, that inure to appropriators of water under state and federal laws.

The proofs show: That the individual appellants are owners of different quantities of land acquired by them under the desert land laws of the United States. That their title to a large portion of the lands was obtained from the government of the United States under said laws. Others had settled upon and applied to enter the land claimed by them under the desert land laws. Some of them had appropriated different quantities of water from the West Fork of Milk river, and others from the North Fork of Milk river, and all claim that at the time the waters were appropriated and diverted by them the lands along the bank of said stream above the point of said diversions were unappropriated public lands. Large amounts of money, exceeding over $100,000, had been expended by them in diverting the water and in making other improvements on their lands. The acquisition of their lands under the desert land laws, and appropriations of water, were made during the years 1895, 1900, and 1903. That in all said acts they relied upon the land laws of the United States, and upon the rights granted to appropriators of water, for the purpose of reclaiming desert lands; made entries under the land laws of the United States of the lands held by them, respectively, and diverted and appropriated the waters of the West Fork and North Fork of Milk river, outside of the limits of the Indian reservation, and the appropriations were made to be used upon lands which were thrown open to settlement upon the extinguishment of the rights of the Indians thereto. All of the lands owned or claimed by appellants, as well as the land owned by appellee and occupied by the Indians, under the treaty with the government, are dry and arid, and crops cannot be grown thereon without sufficient water to irrigate the same. Unless water is obtained, the lands and homes of the respective parties would be rendered valueless and useless.

There are four assignments of error: "(1) The said Circuit Court erred in holding that by the treaty made and entered into the 1st day of May, 1888, between the United States and the Indians residing upon the Ft. Belknap Indian reservation, there was reserved to the said Indians the right to the use of the waters of Milk river to an extent reasonably necessary to irrigate the lands included in the reserve created by the said treaty, and that by the said treaty there was reserved to the said Indians the right to the use of said waters at all. (2) The said Circuit Court erred in holding that the reservation of the waters of Milk river, if any, contained in the treaty of May 1, 1888, entered into by the United States, to the Indians residing upon the Ft. Belknap reservation, was binding upon respondents or any of them so as to affect the rights of the respondents to the use of the waters of the tributaries of said Milk river based upon acts of appropriation done and had in pursuance to the laws of the United States, the laws of the state of Montana and decisions of its courts, and the customs of the country. (3) The said Circuit Court erred in holding that the rights of the Indians living upon said reservation to the use of the waters of Milk river were superior to the rights of the respondents or either of them, for the reason that the proof showed affirmatively and without contradiction that the respondents and each of them had diverted, appropriated, and applied to a useful purpose the waters of the said river or its tributaries, according to the laws of the United States, the laws of the state of Montana and decisions of its courts, and customs of the country to the extent claimed by them, and there was no proof showing that there had ever been an appropriation of the said waters according to the said laws, decisions, and customs of the said waters or any thereof according to the said laws, decisions, and customs by the said Indians, or on their behalf. (4) The said Circuit Court erred in holding that the Indians residing upon said reservation, or the United States for their use and benefit, were entitled as against these respondents or either of them to the prior right to the use of 5,000 inches of the waters of Milk river, or to the prior right to the use of the said waters at all."

B. Platt Carpenter, E. C. Day, Stephen Carpenter, James A. Walsh, C. C. Newman, and R. E. O'Keefe, for appellants.

Carl Rasch, U. S. Atty., and Edward E. Cushman, Special Asst. Atty. Gen.

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

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The first, and in our opinion the most important, question to be determined in this case is in relation to the construction and true interpretation of the treaty of May 1, 1888, between the government of the United States and the Indian tribes therein mentioned. What rights, if any, did the Indians obtain by virtue of their consent to the terms of the treaty as ratified? The situation of the Indians and the rights held by them under the prior treaties must be considered. What were the inducements which caused them to give up their abiding places under the original conditions which existed, and to cede and relinquish to the government many of the rights and privileges which they had previously enjoyed? Their former homes and abiding places, their hunting grounds, and their rights of fishing in the streams and lands over which they roamed, were not voluntarily abandoned, were not surrendered to the government without consideration, or without an object or purpose on their part. The territory over

which they previously had occupancy and dominion was very large. They were evidently induced by the commissioners representing the government to relinquish the greater portion of the vast territory over which they claimed control and had possession by the promise of the government to aid them with money, and to furnish them with stock and farming implements whereby they could better their condition in life. The "act to ratify and confirm an agreement" with the several tribes of Indians in Montana, "and for other purposes" (Act May 1, 1888, c. 213, 25 Stat. 113, et seq.), of itself clearly specifies the causes which induced the Indians to make the change. "Whereas the reservation set apart by the act of Congress, approved April 15, 1874, for the use and occupancy" of the Indians named in the act, "is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their present or prospective wants, and whereas the said Indians are desirous of disposing of so much thereof as they do not require, in order to obtain the means and enable them to become self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization," the agreements were entered into. It was for that purpose, and other reasons mentioned in the different articles of the treaty, that the Indians ceded and relinquished to the United States "all their right, title and interest in and to all the lands embraced within the aforesaid * * * reservations, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes." 25 Stat. 114, c. 213, art. 2. "In consideration of the foregoing cession and relinquishment, the United States hereby agrees to advance and expend annually, for the period of ten years after the ratification of this agreement," sums of money amounting to $430,000, "in the purchase of cows, bulls and other stock, goods, clothing, subsistence, agricultural and mechanical implements * * * in assisting the Indians to build houses and inclose their farms, and in any other respect to promote their civilization, comfort and improvement; provided, that in the employment of farmers, artisans and laborers, preference shall in all cases be given to Indians residing on the reservation who are well qualified for such position." 25 Stat. 114, c. 213, art. 3. "In order to encourage habits of industry, and reward labor, it is further understood and agreed, that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence and agricultural implements, as provided for in article 3, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits, as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, as shall best promote the objects specified."

In connection with the provisions and terms of the articles of the treaty to which we have specifically referred, attention is called to the boundaries of the Ft. Belknap reservation:

"Beginning at a point in the middle of the main channel of Milk river opposite the mouth of Snake creek, thence due south to a point * * * thence due east * * * thence following the southern crest of said mountains; * * * thence in a northerly direction in a direct line to a point in the middle of the main channel of Milk river opposite the mouth of Peoples creek; thence up Milk river, in the middle of the main channel thereof, to the place of beginning."

Now we have the basis from which to determine whether or not the Indians were, by the terms of the treaty, given any right on the reserve, which they accepted, to the flowing waters of Milk river from which to irrigate their lands, so as to enable them to cultivate the soil on the lands of the government set apart to them for the purposes mentioned in the treaty. The Indians are not the owners of the land included in the reservation. They are, however, occupants of the land which was by the government set apart and reserved for their occupation and use. The title to the lands is still in the government. The contention of appellants is that when Congress, under the treaty, declared the land to which the rights of the Indians had been extinguished to be a part of the public domain, the water of the river and other sources, unless expressly reserved, became subject to appropriation, under the terms of the Act Cong. March 3, 1877, c. 107, 19 Stat. 377, as amended March 3, 1891 (26 Stat. 1096, c. 561), and that the government did not reserve any right to the waters of Milk river which it or the Indians can assert against appellants, who appropriated the waters on the public domain, or to any of the water that flows through or past lands owned by the government.

To quote the language of counsel:

"The government, having the absolute title and right to dispose of all its lands, including the lands within the Ft. Belknap Indian reservation, had authority to grant the right of appropriating water upon those lands and upon the reservation. No reservation or restriction having been made, the government cannot now, after these defendants have accepted the grant, acquired vested rights and expended a large amount of money in improving their lands, enjoin them from using the waters which they have appropriated."

We are of opinion that, when all the facts, circumstances, conditions, and surroundings of the Indians at the time the treaty was entered into are considered, it cannot judicially be said that no portion of the waters of Milk river was reserved by the terms of the treaty for the use and benefit of the Indians residing upon the reservation. Such a construction would be in violation of the true intent and meaning of the terms of the treaty. We must presume that the government and the Indians, in agreeing to the terms of the treaty, acted in the utmost good faith toward each other; that they both understood its meaning, purpose, and object; that they knew that "the soil could not be cultivated" without the use of water to "irrigate the same." Why was the northern boundary of the reservation located "in the middle of Milk river" unless it was for the purpose of reserving the right to the Indians to the use of said water for irrigation, as well as for other purposes?

It is admitted by appellants that "the irrigation and cultivation of the Indian lands is a policy of the Indian department." The Indians

in their untutored and uneducated minds might not have known the exact meaning of the word "irrigation" had it been used in the treaty, but in their wild, and to some extent uncivilized, condition, they knew the use of forests, of lands, and of water. If they were to graze cattle and cultivate the soil, they knew it could not be done successfully without the use of water. They knew, as well as the officers of the government, where the boundaries of their reservation were, and that their rights, under the terms of the treaty, extended to the middle of the channel of Milk river, and believed they had as much right to the water as to the land included in the boundaries for their permanent homes for the uses and purposes of the agreement made with the government. The signing of the treaty was not an idle ceremony. The absence of the words "to irrigate their lands" did not abrogate and destroy their rights as guarantied by the terms of the treaty. We are of opinion that it was the intention of the treaty to reserve sufficient waters of Milk river, as was said by the court below, "to insure to the Indians the means wherewith to irrigate their farms," and that it was so understood by the respective parties to the treaty at the time it was signed.

It is true that in the treaty of June 10, 1896, c. 398, 29 Stat. 351, reference is made in article 5 to a scarcity of water which renders the pursuit of agriculture "difficult and uncertain," yet it will be observed that article 2 of that treaty appropriates certain sums of money for divers purposes, among others, "to enclose and irrigate their farms, and in such other ways as may best promote their civilization and improvement." In arriving at this conclusion we have followed the rules that should govern the courts in the construction of treaties made by the government with the Indians.

In Jones v. Meehan, 175 U. S. 1, 11, 20 Sup. Ct. 1, 5, 44 L. Ed. 49, the court said:

"In construing any treaty between the United States and an Indian tribe, it must always * * * be borne in mind that the negotiations for the treaty are conducted on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483; The Kansas Indians, 5 Wall. 737, 760, 18 L. Ed. 667; Choctaw Nation v. United States, 119 U. S. 1, 27, 28, 7 Sup. Ct. 75, 30 L. Ed. 306."

To accept the contention of appellants' counsel would certainly be, as was said by Mr. Justice McKenna in United States v. Winans, 198 U. S. 371, 380, 25 Sup. Ct. 662, 664, 49 L. Ed. 1089, "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more. And, we have said, we will construe a treaty with the Indians as 'that unlet-

tered people,' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' "

It is undoubtedly true, as claimed by appellants, that the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie. It was so held in Hardin v. Jordan, 140 U. S. 371, 384, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. See, also, Whitaker v. McBride, 197 U. S. 510, 512, 25 Sup. Ct. 530, 49 L. Ed. 857, and authorities there cited. It is also true, as appellants claim, that the desert land acts upon which they rely recognize the doctrine of appropriation of water under state laws, but this right of appropriation can only be acquired "subject to existing rights." The language of the proviso in the act of 1877 is:

"That the right to the use of water by the person so conducting the same, on or to any tract of desert land * * * shall depend upon bona fide prior appropriation * * * necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

The appropriations by appellants from the tributaries of Milk river were made with notice of, and subject to, the "existing rights" of the government and of the Indians on the reservation. Kinney on Irrigation, § 133. In Story v. Woolverton (Mont.) 78 Pac. 589, where the government had abandoned a military reservation and passed an act granting to the state of Montana a portion thereof, and there subsequently arose a question of water rights between the parties to the suit, the court, in discussing the statutory requirement governing the acquisition of water rights by appropriations made by individuals, said:

"Prior to the time of settlement upon the lands in question, and prior to the appropriation of the waters of Bear creek by any one, both the land and the water were the property of the government. When the government established the reservation, it owned both the land included therein and all the water running in the various nearby streams to which it had not yielded title. It was therefore unnecessary for the government to 'appropriate' the water. It owned it already. All it had to do was to take it and use it."

It necessarily follows from the conclusions we have reached as to the proper interpretation of the treaty that the appellants did not acquire any exclusive or superior right to all the waters of Milk river by virtue of the appropriation of said waters under Desert Land Act March 3, 1877, c. 107, 19 Stat. 377, as amended by Act March 3, 1891, 26 Stat. 1096, c. 561, 1 Supp. Rev. St. 137. The law is well settled that the doctrine of appropriation under said statutes, which is recognized and protected by section 2339 of the Revised Statutes [U. S. Comp. St. 1901, p. 1437], applies only to public lands and waters of the United States. Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 81

Am. St. Rep. 408; Cruse v. M'Cauley (C. C.) 96 Fed. 369, 373, 374. And it is equally well settled that, when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and that no subsequent law or sale should be construed to embrace or operate upon them.

In Kinney on Irrigation, § 124, the author said:

"The term 'public domain,' in its broadest sense, comprehends all lands and waters in the possession or ownership of the United States, and including lands owned by the several states, as distinguished from lands possessed by private individuals or corporations. The term 'public lands' only embodies such lands as are subject to the sale or other disposition by the United States under general laws. It is a well-settled principle that land once reserved by the government or appropriated for any special purpose ceases to be a part of the public lands, and in all grants or proclamations declaring public lands open to settlement the portion already reserved is always excepted, though the exception is not specifically mentioned."

In the application of these principles to military reservations, see Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264. In Leavenworth R. R. Co. v. United States, 92 U. S. 733, 742, 745, 747, 23 L. Ed. 634, the court, in discussing the question whether certain lands granted to the railroad company conveyed lands which had previously been reserved for the Indians, said:

"As long ago as the Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. Ed. 25, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and recently, in United States v. Cook, 19 Wall. 591, 22 L. Ed. 210, that right was declared to be as sacred as the title of the United States to the fee. * * * With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. * * * We are not without authority that the general words of this grant do not include an Indian reservation."

After quoting from Wilcox v. Jackson, supra, the court said that the rule therein announced "applies with more force to Indian than to military reservations. The latter are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose. * * * The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein, and had title thereto. In one sense they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians. Every tract set apart for special uses is reserved to the government, to enable it to enforce them." In United States v. Carpenter, 111 U. S. 347, 349, 4 Sup. Ct. 435, 436, 28 L. Ed. 451, where the court held that the location of land scrip upon lands reserved for Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, Mr. Justice Field, in delivering the opinion of the court, said:

"It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians. This purpose and the

stipulation of the United States could not be defeated by the action of any officers of the Land Department."

In Missouri, etc., Ry. Co. v. Roberts, 152 U. S. 114, 118, 14 Sup. Ct. 496, 498, 38 L. Ed. 377, the court, in discussing the general question, said:

"It has always been held that the occupancy of lands set apart by statute or treaty with them [the Indians] for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands. And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands."

In United States v. Rio Grande Irrigation Co., 174 U. S. 690, 702, 19 Sup. Ct. 770, 774, 43 L. Ed. 1136, the court, in considering the congressional legislation which recognizes and sanctions the right to appropriate water, and defines the operative effect of this legislation, and limits and confines it to the public lands, among other things, said:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. [Quoting the language of Chancellor Kent, 3 Kent, Com. § 439.] While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common-law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. * * * Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs to each state, yet two limitations must be recognized: First. That, in the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property. Second. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

These rules are distinctly recognized and approved in the subsequent case of Gutierres v. Albuquerque Land Co., 188 U. S. 545, 554, 23 Sup. Ct. 338, 47 L. Ed. 588.

The views which we have expressed are conclusive upon the questions herein involved, and render it unnecessary for us to review the statutes and decisions of the courts of Montana upon the questions pertaining to the rights of appropriation, as distinguished from the rules of the common law as to riparian rights.

In conclusion, we are of opinion that the court below did not err in holding that, "when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk river, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees."

The order appealed from is affirmed, with costs.

EMPLOYERS' LIABILITY ASSUR. CORP., LIMITED, OF LONDON, ENGLAND, v. MORROW.

(Circuit Court of Appeals, Sixth Circuit. February 23, 1906.)

No. 1,468.

1. INSURANCE—ACTION ON ACCIDENT POLICY—CONSTRUCTION OF CONTRACT.
A policy of accident insurance for the principal sum of $10,000 provided, by clause C, for the payment of one-half the principal sum in case of an injury resulting in the loss of an arm or leg and on surrender of the policy. Clause E provided for the payment of a fixed weekly indemnity in case of a nonfatal injury resulting in total disability, and clause F for a smaller indemnity in case of a lesser injury; the amount depending on the extent of the disability. Clause G provided that, in case of an injury received while insured was riding as a passenger in any public conveyance, the amount payable under any of the preceding clauses should be doubled. Clause M provided that no indemnity should be paid in excess of the value of the insured's time, and that if he carried concurrent insurance "making an aggregate weekly indemnity in excess of the money value of his time, then (except in case of a claim consequent on the death of the assured or loss of the sight of both eyes or the loss of two entire limbs), this corporation shall be liable for only such proportion of this insurance for weekly indemnity, fixed indemnity or otherwise, as such money value of his time shall bear to the aggregate of the weekly indemnity of the entire insurance so held by him." Plaintiff, while traveling as a passenger upon a public conveyance, sustained an accidental injury through which he suffered the loss of an arm, being at the time the holder of a policy in another company similar in terms, except as to clause M. *Held*, that he was entitled to recover the sum of $10,000 under clauses C and G without regard to the value of his time, and that clause M had no application to the case, but applied only to cases where weekly indemnity, "fixed or otherwise," become payable under clause E or F.

2. CONTRACTS—CONSTRUCTION—INCONSISTENT CLAUSES.
It is a settled rule of construction that, if two clauses of a contract are repugnant and cannot stand together, the first will stand and the last be rejected, and especially should the rule be applied where the later provision, if given effect, would in certain contingencies completely alter the principal terms of the agreement which has previously been clearly set out.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 744.]

3. SAME—PROVISOS.
The ordinary office of an exception or proviso in a contract or law is to take special cases out of a general class or to guard against a misinterpretation, and where the exception is of something which would not without it have been included the exception must be regarded as having been introduced merely out of excess of caution, and has no important bearing on the construction of the provision in which it is found. In such case it will not operate to include in the general class other matters of the same class as those excepted.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 765.]

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

Walter Stokes and E. W. Strong, for plaintiff in error.
James C. Bradford, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an action upon a contract of insurance against accident. Under the general liability clause the American corporation insured the defendant in error, Dr. William Morrow, "against bodily injuries within the meaning of this policy, caused by external, violent and accidental means during the period covered by this policy, subject and according to the agreements and conditions herein contained, which are to be considered as conditions precedent, in the principal sum of ten thousand dollars." Among the so-called agreements and conditions referred to in the general liability clause set out, which are supposed to be applicable in the present controversy, are clauses C, E, G, and M, which are as follows:

"(C) If such injuries alone within ninety days result in the loss by actual separation, of one entire hand or one entire foot, the corporation will pay one-half the principal sum aforesaid, on surrender of this policy.

"(E) If such injuries shall not be fatal and are not as described in clause B, C, or D, but shall alone result in the assured being immediately and wholly disabled, and he shall thereby be prevented from transacting any and every kind of business pertaining to his occupation, then so long as the assured shall be so disabled, not exceeding two hundred consecutive weeks in respect of any one accident, the corporation will pay the sum of fifty and 00-100 dollars per week.

"(G) If such injuries alone are sustained while riding as a passenger in or upon a public conveyance propelled by steam, electricity or cable, or while being a passenger within an elevated car provided for passenger service only, then the amount payable under clauses A, B, C, D, E, or F, shall be doubled, provided that no payment so made for weekly indemnity shall be in excess of the money value of the assured's time, and provided also that the addition of five per cent. named in clause A shall not be calculated on double the principal sum assured.

"(M) If the assured is injured in any occupation or exposure classed by this corporation as more hazardous than that herein given, his insurance and weekly indemnity shall be only for such amounts as the premium paid by him will purchase at the rate fixed for such increased hazard. No claim for indemnity in excess of the money value of the assured's time shall be valid. If the assured carries insurance, either in this or other companies, or associations, or both, making an aggregate weekly indemnity in excess of the money value of his time, then (except in the case of a claim consequent on the death of the assured or loss of the sight of both eyes or the loss of two entire limbs), this corporation shall be liable for only such proportion of this insurance for weekly indemnity, fixed indemnity or otherwise, as such money value of his time shall bear to the aggregate of the weekly indemnity of the entire insurance so held by him."

The case was submitted to the jury upon an agreed statement of facts. The only facts having any bearing upon the interpretation of the contract are these: (1) Dr. William Morrow, the plaintiff below, while traveling as a passenger upon a public conveyance, sustained an injury through violence by which he suffered the loss of an arm within 90 days. He made full proof of loss as required, but payment was refused. He was at the time the holder of the policy in suit and of another of like terms, except that the second had no clause similar to clause M, in the Maryland Casualty Company. (2) His weekly income at the time of the accident was $75 from his occupation, which was that of a real estate agent. Upon the agreed statement of facts the court instructed the jury to return a verdict for the plaintiff for $10,000, with interest from the time the payment

was due and owing under the contract. The principal sum for which the American association was liable was $10,000. For the loss of an arm they were liable to pay one-half the principal sum under clause C; but, if the loss, as in this case, occurred while traveling as a passenger in a public conveyance, the agreement was, under clause G, to pay double the amount due under other circumstances.

Thus far the contract was plain, so plain that there was no room for controverting a liability for a principal sum of $10,000. But the insistence of the insurer was that the principal sum thus confessedly payable under the general liability claim and clauses C and G of the agreements and conditions should be cut down from $10,000 to $3,750 through the operation of clause M. For convenience we again set out this clause, as the case must turn upon its meaning:

"If the assured is injured in any occupation or exposure classed by this corporation as more hazardous than that herein given, his insurance and weekly indemnity shall be only for such amounts as the premium paid by him will purchase at the rate fived for such increased hazard. No claim for indemnity in excess of the money value of the assured's time shall be valid. If the assured carries insurance, either in this or other companies, or associations, or both, making an aggregate weekly indemnity in excess of the money value of his time, then (except in the case of a claim consequent on the death of the assured or loss of the sight of both eyes or the loss of two entire limbs), this corporation shall be liable for only such proportion of this insurance for weekly indemnity, fixed indemnity or otherwise, as such money value of his time shall bear to the aggregate of the weekly indemnity of the entire insurance so held by him."

The construction of this clause insisted upon by the plaintiff in error is best shown by the request made for an instruction, which was in these words:

"From the agreed statement of facts in this case it appears (1) that the money value of plaintiff's time, or his income, was $75 per week; (2) that under this policy in suit plaintiff was entitled to receive from this defendant $100 per week as indemnity; (3) that under the policy held by the plaintiff in the Maryland Casualty Company was entitled to receive from said company the sum of $100 per week; (4) that the total weekly indemnity to be received by the plaintiff from both companies was $200 per week. The court therefore instructs you that, inasmuch as the money value of plaintiff's time was but 37½ per cent. of the aggregate weekly indemnity to be received from both companies, the plaintiff in this action, if he recover at all, is entitled to recover as a principal sum only 37½ per cent. of $10,000, or $3,750."

This was denied and the action of the court in so refusing to interpret clause M presents the single question to be decided. No question of weekly indemnity for a disability, either total or partial, arises under this contract and the facts of this case. Under clause E of the contract the insurer agreed to pay, in case of an injury not fatal and not resulting in the loss of one or more eyes, or one or more limbs, but producing total disability, the sum of $50 per week, so long as the assured shall be so disabled not exceeding 100 consecutive weeks. If the disability of the insured from his injury is not complete, and is not an injury of the character for which a lump sum is payable under other clauses, then the insurer agrees, under clause F, to pay a weekly indemnity not exceeding 50 per cent. of the sum stipulated in clause E, during continuance of such partial disability,

not exceeding 26 weeks. Under clause G the amounts payable as weekly indemnity under clause E or F are to be doubled, subject to this important provision, namely, "that no payment so made for weekly indemnity shall be in excess of the money value of the assured's time." But no right to receive any weekly indemnity whatever exists for the loss of an arm. For such a loss the contract is that a lump sum of $5,000 shall be paid, unless the loss occurred while the assured was a passenger upon a public conveyance. In that event, the express agreement, contract, or covenant, is to pay the assured the sum of $10,000.

To defeat this plain, indisputable result, the assurance corporation relies upon clause M, and contends that under that provision the lump sum payable for such a loss is only that proportion of the principal sum otherwise payable which the actual money value of the assured's time bears to the aggregate maximum weekly indemnity payable, in some circumstances, under this and all concurrent accident insurance. Thus it is said that the maximum weekly indemnity payable under the assured's contract with the Maryland Casualty Company was $100, and that the weekly indemnity payable under this policy is $100. The aggregate weekly indemnity under both policies was therefore $200 per week, while the weekly salary or income of the assured was only $75. Thus it is said that the lump sum payable is $^{75}/_{200}$ of $10,000, the principal sum otherwise payable, which would be $3,750.

In short, the amount recoverable by a plaintiff for the loss of an arm would be in an inverse ratio to the amount of insurance he carried. To illustrate: But for his policy in the Maryland Company, he would, under this interpretation, be entitled to recover three-fourths of the principal sum, or $7,500, that being the proportion of $10,000 which $75, the value of his time, bears to $100, the maximum weekly indemnity which he might recover if he had been totally disabled so as to bring himself under clauses E and G, instead of clauses C and G, as was the fact. If he had been unfortunate enough to have taken out 10 policies, each contracting to pay him $10,000 for the loss of an arm while a railway passenger, the aggregate of his weekly indemnities would be $1,000, while the actual value of his time would be $75. Then he would recover from the company $^{75}/_{1000}$ of $10,000 or $750. In case the other 9 contracts had similar clauses to clause M in this one, the aggregate of his recovery from all 10 companies would be $7,500, or three-fourths of the principal sum he had reason to believe was due under each contract.

This proviso, if applicable at all, when the contract provides for the payment of a principal sum for a specific injury, such as the loss of an arm, leg, or eye, is novel in such contracts. It has no analogy to the contributory clauses found in fire insurance policies, which are so framed as to secure to the insured one full compensation or indemnity for his loss, when that is less than the aggregate of his insurance, but apportions that single compensation among the concurrent insurers in proportion to their several contracts. Neither is there any analogy between the loss by fire of specific property and

the loss by accident of an arm or other limb. In the first case, property has a market value, and when that market value is paid the assured is indemnified. A bodily injury has no market price. If it results in a mere disability to continue the assured's avocation, the value of the assured's time during such disability furnishes a definite standard for a contract of indemnification. Upon that theory the contract in suit is framed. For a total disability, not resulting in the loss of a limb or eye, the measure of indemnity is the value of the assured's time during the disability, not exceeding a fixed number of weeks. But, in very positive terms, it is provided, in more than one clause, that under no circumstances is the disability indemnity to exceed the money value of the assured's time. In case the disability is not total, but partial, the indemnity cannot exceed one-half of that recoverable for a total disability. But the contract recognizes that for a death by accident, or the loss of limbs, or an eye, there is no market standard of value and accordingly provides in most explicit terms for the payment of an agreed sum to be paid in full discharge of the liability under the policy.

How, then, can a subsequent provision stand which altogether changes the measure of such recovery for such an injury from an agreed, definite, fixed amount, by substituting for that a sum to be ascertained by the ratio of his weekly wages to the weekly indemnity contracted to be paid only for a disability not resulting in the loss of a limb? But if the contract to pay a definite or fixed sum for the loss of an arm is to be abandoned for a sum ascertained by a measure of the kind suggested, then which "weekly indemnity" payable under this policy, or the other concurrent policy, are we to take as furnishing that factor in the problem?

Counsel for the assurance corporation assumes that the maximum weekly indemnity payable under any circumstances is to be taken. But why take that as a factor rather than the minimum provided by clause F? This assured has no claim for any kind of weekly indemnity. If he had, there might be some room for supposing that the maximum weekly indemnity payable to him was to be taken as a factor; the result in such case being to confine the assured to a weekly indemnity equal to his weekly income, each concurrent policy paying a proportion thus ascertained. That no assured having a claim under clauses E or F was to receive a weekly indemnity in excess of his weekly income is provided in both clause G, as well as in clause M, where it again said that "no claim for indemnity in excess of the money value of the assured's time shall be valid." There is no more reason for saying that the "aggregate of the weekly indemnity of the entire insurance so held by him" is to be made up by taking the maximum weekly indemnity payable under some circumstances than there is for taking the minimum weekly indemnities payable under other circumstances. Thus, under clause E, the weekly indemnity is fixed at $50 per week. Under clause F the weekly indemnity is not to exceed $25 per week, and may be less in proportion to the extent of the disability. The same scale of indemnities holds good under the other concurrent insurance. Now, if we

take the greatest weekly indemnity payable under clause F, we will have a less aggregate weekly indemnity than the money value of the assured's time. If we take the minimum indemnities, will the rule work the other way, and increase the lump sum otherwise payable by reason of the fact that the money value of the assured's time is in excess of the aggregate of his weekly indemnities? As the assured has no claim for any kind of weekly disability indemnity, there would seem to be less reason for taking maximum indemnities as a factor than minimum, inasmuch as the burden is strongly upon the insurer to show a plain purpose to cut down the sum otherwise plainly due.

But, if the clause is to be so construed as to make the lump sum recoverable for the loss of an arm in the inverse proportion to the amount of such accident insurance carried by the assured, it is plainly repugnant to the prior covenants of the contract explicitly agreeing to pay $10,000 for the loss of an arm while riding as a passenger upon a public conveyance. It is trifling with the substance of things to say that two such antagonistic clauses can stand together, or that the later is a mere modification of the other. If the agreement in the prior clause is antagonistic to the agreement in the later clause, one must yield to the other. But it is a well-settled principle of construction that if two clauses are repugnant, and cannot stand together, the first will stand and the last will be rejected. Bean v. Ætna Life Ins. Co. (Tenn.) 78 S. W. 104; Wis. Marine & Fire Ins. Co. Bank v. Wilkin, 95 Wis. 111, 118, 69 N. W. 354, 60 Am. St. Rep. 86; Williams v. Hathway, L. R. 6 Ch. Div. 544; Straus v. Wanemaker, 175 Pa. 213, 34 Atl. 648. We are the more disposed to apply this principle to a contract such as this becauses the instrument is not drawn systematically and terms are employed which signify a considerable degree of carelessness. In such case it is more easy to conclude that the earlier parts of the instrument which most plainly set out the contract between the parties should prevail over a vague subsequent provision which would completely alter the principal terms of the agreement if applied to the case of the loss of an arm.

But we do not at all agree to the interpretation which counsel for the assurance incorporation places upon the clause. Upon the contrary, we think, if any meaning can be attached to it, that it was intended to relate or apply only to the weekly or fixed indemnities payable under clauses E and F. Limited thus, the purpose that the assured shall not receive such indemnities in excess of his weekly income is carried on by providing that the sums payable to him under the present contract "for weekly indemnity, fixed indemnity, or otherwise" shall be measured by the proportion which his weekly income bears to the aggregate sums payable to him as such weekly indemnity under this and other concurrent insurance, thus guarding against a payment under all concurrent contracts of any greater proportion by this company than the assured's weekly wages bear to the aggregate of all of his contracts. The words "weekly indemnity, fixed indemnity or otherwise" most reasonably refer to the different kinds of indemnities provided by clauses E and F, which deal only with claims for disabilities not resulting in death or the loss of limb or

eye. The provision in clause E agreeing to pay an indemnity of $50 per week may well be described as a "fixed indemnity" as compared to that payable under clause F, which cannot exceed one-half of the fixed sum under clause E, and may be less than half, for it is to be settled with respect to the extent of the disablement from pursuing the assured's avocation. Thus construed, clause M operates not to reduce an assured's indemnity below the amount he has expressly contracted for, but confines him to a recovery of a weekly indemnity, whether fixed or otherwise, corresponding to his weekly income, and limits the liability of the insurer to its proportion of that indemnity. Thus, if an assured should sustain an injury while riding as a passenger which produced a total disability, he would be entitled to receive a weekly payment of $100 under clauses E and G, if his weekly income was equal to that sum. If not, the weekly indemnity payable under clauses E and G would be a sum equal to his weekly income.

But under the operation of clause M, if he had another policy entitling him to a similar weekly indemnity, he would receive from the plaintiff in error, $^{75}/_{100}$ of the weekly indemnity of $100 otherwise payable to him, or $37.50, which would be precisely one-half of his weekly wages or income. From the concurrent policy, if it contained a like contributory clause, he would receive a like sum. Under both he would get a weekly payment equal to his weekly wages, and this would be in strict accord with his agreement under each policy. This would bring the clause within the principle upon which fire insurance contributory clauses operate. There would be from the different companies a sharing in one full indemnification for a disability; the thing indemnified being loss of time valued at the weekly income of the assured at the time. Thus applied, the assured's payments on account of a disability would not be in an inverse proportion to the aggregate of his concurrent insurance. That extraordinary result only comes about when we substitute a principal sum payable in lump for a specific loss for the maximum weekly indemnity payable under the clause of the agreement applicable to a claim for weekly indemnity only. Against this, and in favor of the construction which would make this provision repugnant to the explicit prior covenants of the contracts, is the single argument growing out of the exception interjected in brackets into the belly of the clause, in these words:

"Except in the case of a claim consequent on the death of the assured or loss of the sight of both eyes or of the loss of two entire limbs."

If this exception had been omitted, the provision could not possibly have applied to the cases mentioned in the exception. The exception did not, therefore, operate to take out of the proviso something which, but for the exception, would have been included. Its presence, therefore, cannot under such circumstances bring within the proviso a claim which would not have been within the proviso if the exception had been omitted. The ordinary office of an exception or proviso is to take special cases out of a general class or to guard against misinterpretation. Experience shows, however, that they quite frequently are introduced from excessive caution, in such cases

operating only to bring confusion. There is no general rule requiring that every other claim or subject of the same general class as those excepted out shall be regarded as embraced in the general words of the contract or law unless the general language of the writing leaves it doubtful whether the matters named in the exception would have otherwise been within the general terms of the law. Sedgwick, Stat. Construction, § 222. In Tinkham v. Tapscott, 17 N. Y. 141, 152, the court refused to enlarge the scope of a law by bringing within it certain things of the class of those excluded by exception. The court held that the exception applied to matters which would not have been within the general language of the law and the exception was introduced from excess of caution. The rule applicable was thus stated by Justice Denio:

"The correct statement of this rule of construction is that, where it would be equivocal upon the general language whether a particular thing was embraced, the exception of another thing of a similar kind will show that the first was intended to be included."

We therefore reach the conclusion that the intrusion of an exception which did not operate to exclude from the contract something otherwise included has no important bearing upon the construction of the clause in which it is found. There is room for construing clause M as an independent provision relating only to injuries occurring in occupations or exposures classed as more hazardous than those described in the policy. We need not consider this, for we are satisfied that it does not apply to injuries resulting from a loss of an arm any more than it does to a death loss or of two limbs or two eyes, injuries which the parties through excess of caution excluded by an exception from the general language of the provision.

There was no error in instructing the jury that the contract bears interest from the date when the money due plaintiff was due and payable. The Tennessee statute upon the subject of interest applies to such policies. Shannon's Code Tenn. § 3494; Brady v. Clark, 12 Lea (Tenn.) 326; Knights of Pythias v. Allen, 104 Tenn. 623, 58 S. W. 241.

Judgment affirmed.

COLUMBUS, H. V. & T. RY. CO. et al. v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1906.)

No. 1,455.

1. CONTRACTS—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES IN EXECUTION.

Where two railroad companies, in a succession of contracts in pari materia, all relating to the joint use of terminal property, all of which originally belonged to one company, but which was subsequently added to by the other, in fixing a basis for the division between them of the cost of maintenance, etc., used the terms "wheelage" and "car and engine mileage" indiscriminately, but, in the execution of the contracts from the first, based such a division on wheelage, that construction will be adopted by the courts in determining their rights thereunder.

2. RAILROADS—CONTRACTS FOR TERMINAL FACILITIES.

Two railroad companies entered into a contract for the joint use of a terminal property owned by one, and which was reached only over a short track owned by such company, the use of which was included. The contract provided that, if the business should require it, additional property should be acquired by one or both and included in the joint use so provided for. Subsequently additional property was purchased by the other company, and a new contract was made reciting its purchase in accordance with such provision, and readjusting the rentals and expenses for maintenance accordingly. Still later a further renewal and readjustment was made to meet new conditions. In all provision was made for dividing the cost of maintenance, etc., of the property owned by each on a wheelage basis, or on the basis of the "car and engine mileage use of said property" by the other. *Held*, that such contracts contemplated the joint use of all the property as a whole, and that wheelage was to be computed on all cars and engines passing to such property over the short line, regardless of whether such particular cars or engines actually went upon and used the part of the property which was owned by the other company, especially in view of the fact that the parties acted upon such construction for many years before any question was raised.

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

A. C. Dustin, for appellants.

E. J. Marshall, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This appeal brings before us proceedings had in the court below upon an intervention of the Pennsylvania Company in a suit brought by the Central Trust Company of New York against the appellant railway company to foreclose a mortgage upon its property, in which Monsarrat had been appointed receiver. By leave of the court the Pennsylvania Company filed its petition, and, later on, a second petition, praying for a decree charging the property of the appellant railway company with the future obligations of two contracts made with the petitioner, the first by one of the constituents of that appellant, which is a consolidation of several pre-existing companies, and the other by the appellant, the first dated November 9, 1876, and the second January 1, 1887, relating to the joint use by the parties of certain railway terminal properties at Toledo, and praying also for an accounting upon the matters of the first of those contracts. The appellants filed a joint answer and cross-petition, and subsequently a second joint answer and cross-petition, in which they asked for the protection of the contracts, and for a decree against the Pennsylvania Company under the contract of January 1, 1887. The issues having been made up, the matters involved in the controversy were referred to a master to take testimony and report. Upon the coming in of the master's report, the court dismissed the petition of the Pennsylvania Company, as well as the cross-petition of the appellant railway company. From that decree the railway company and its receiver appeal. There is but a single ultimate question presented by the appeal, and that is one which requires a construction of a paragraph of the contract of January 1, 1887. The earlier

contract of November 9, 1876, and another relating to the same subject and between the same parties, bearing date May 10, 1880, are to be referred to only for the purpose of settling the meaning of the paragraph of the contract of January 1, 1887, above mentioned.

The facts at the bottom of the controversy are these: The Pennsylvania Company, in 1876, held a lease of, and soon thereafter became the owner of, the properties of the Toledo & Woodville Railroad Co., which included a railroad extending from Walbridge five miles in a northwesterly direction into the city of Toledo, where it ended in a rectangular tract of land of some 12 acres, which was used as the terminal of its freight and passenger business. While in the use of these properties as part of its railroad, the Pennsylvania Company on the 9th of November, 1876, entered into an agreement with the Columbus & Toledo Railroad Company, a constituent of the appellant, and which was then building a railroad northerly toward the city of Toledo, for the joint use and occupation of the short piece of trackage in from Walbridge and the terminal facilities afforded on the 12-acre tract. This contract provided for the payment to the Pennsylvania Company by the Columbus & Toledo Railroad Company of a fixed charge of $21,000 per annum, payable in monthly installments, evidently intended as one-half of the annual interest upon the value of the properties appropriated to the joint use of the parties. Then, in respect to the cost of maintenance, of which the Pennsylvania Company retained the direction, it was stipulated that the Columbus & Toledo Railroad Company should bear a proportionate part, "based upon the proportion which the car and engine mileage of that party shall bear to the whole car and engine mileage * * * over the said part of the Toledo & Woodville Railroad between Walbridge and the city of Toledo." The contract suggested that the needs of their joint use might require the acquisition of more space, in which event the parties would purchase jointly, or, if that should not be resolved upon, then either might buy, and, when bought, the property should be appropriated to the joint use upon the conditions of the original appropriation. Upon the making of this contract and the connection of its line at Walbridge by the Columbus & Toledo Railroad Company, the Pennsylvania Company stationed and continued a watch at Walbridge, who kept count of the several cars and engines of the two companies, passing that place to and from the terminal station at Toledo. The monthly bills for maintenance rendered by, and paid to, the Pennsylvania Company were based upon the count of cars and engines thus kept at Walbridge, and this mode of charging and settling for maintenance was practiced by the parties for about 20 years. Finding more room was needed at the terminal, the Columbus & Toledo Railroad Company proposed to the Pennsylvania Company to jointly purchase another 12-acre tract of the same shape lying east of the other; Magnolia street running north and south between. The Pennsylvania Company not acceding to this, the Columbus & Toledo Railroad Company purchased it, and it was thereupon appropriated to the joint use; the Pennsylvania Company assuming the direction of the maintenance thereof. The Columbus & Toledo

Railroad Company built a dock along one side of the tract it had purchased, for the purpose of facilitating the transfer of freight between it and carriers on the Great Lakes. The Pennsylvania Company desired to extend the joint use so as to include the dock, and on May 10, 1880, the parties made a further agreement, whereby the Columbus & Toledo Railroad Company granted in terms to the Pennsylvania Company the privilege of joint use of the tract it had purchased and included the dock. In consideration the Pennsylvania Company agreed to pay a proportion of the interest upon the cost of the tract and the dock improvements, estimated at $226,949, to be determined by "the car and engine mileage use of said property, * * * to be computed on the same basis and in the same manner, as is provided for expenses of maintenance of that part of the second party's railway between Walbridge and Toledo, occupied jointly by the parties hereto under contract dated November 9, 1876"; and further agreed that, "in addition to the said wheelage proportion of interest upon cost as above provided, the said second party shall pay semiannually to the first party its said wheelage proportion of the current taxes and assessments, * * * said wheelage proportioned to be calculated over the same period of time as taxes cover." It is seen that the "said wheelage proportion" refers to an antecedent, wherein the same thing is called "car and engine mileage use," and that in turn refers to the basis of proportion in the contract of 1876 as being identical. We refer to this contract for the purpose not only of showing the indiscriminate use of the two expressions to mean the same thing, but more particularly to show what understanding they continued to have, and with reference to the matters about which they had contracted. The business went on in this way. But in time some of the individual property of each of the parties had been fixed upon the premises owned by the other, which did not belong to the kind employed in maintenance merely, but were of a permanent character; and it was thought desirable that each should become the owner of all of such property as was located on its own land.

Finally, on January 1, 1887, they entered into the contract now in question. This contract begins by reciting that by the agreement of November 9, 1876, the parties stipulated for the "right of joint use of the main and side tracks, engine house, passenger and freight stations and other terminal facilities of the first party (the Pennsylvania Company) at Toledo, and between Toledo and Walbridge," and provided "that in case the business of the parties should require an increase of facilities, the same should be provided," etc., and that in pursuance of that agreement the parties have from time to time built additional tracks and made other improvements upon the properties in question, at a cost of $89,519 to the first party, and at a cost (including the purchase of its tract of land) to the second party of $226,947, and that the first party was granted the right of joint use of the properties of the second party on the wheelage basis by the contract of May 10, 1880; and further reciting that it was deemed for the mutual interest of the parties that each should be the absolute owner of the structures made upon its own land at joint expense.

Then, by the first paragraph, title to the structures was mutually transferred to the respective owners of the land. By the second, the rental to be mutually paid was fixed at a stipulated rate of interest upon the estimated cost of their respective properties. The third and fifth paragraphs (which, with what has already been recited, are all of the contract material to the present controversy) were as follows:

"Third. The amount of capital account of the second party, increased as aforesaid, is hereby declared and agreed to be two hundred and forty-seven thousand forty-six dollars and seventy-one cents (247,046.71) on which interest computed at the rate of seven per cent. per annum is seventeen thousand two hundred and ninety-three dollars and twenty-seven cents ($17,293.27); of which last named sum the first party will pay monthly to the second party such proportion as shall be determined by the car and engine mileage use of said property made by said first party, the same to be computed on the same basis and in the same manner as is provided for expenses of maintenance of that part of the first party's railway between Walbridge and Toledo, occupied jointly by the parties hereto under said agreement of November 9, 1876. In addition to the above, the first party will also pay to the second party its wheelage proportion of current taxes and assessments, which may be lawfully paid by the second party on said real estate and improvements; said wheelage proportion to be calculated over the same period as the taxes cover, and payments thereof to be semi-annual."

"Fifth. The second party shall have charge of the repairs and maintenance of the tracks and improvements on its own property, and the first party will pay monthly to the second party its wheelage proportion of the cost of such repairs and maintenance."

This agreement is a reconstruction of the original contract of November 9, 1876, adjusted to the changes brought about by the addition of other property and improvements. The basis on which rentals had been calculated had all the while continued substantially the same, and the basis of the contribution of the parties to the cost of maintenance has remained the same in each of their several contracts.

What is especially significant is the fact that no account was kept of the cars and engine of the Pennsylvania Company which used the tracks and facilities of the Columbus & Toledo Company, or of those of the appellant; the only account kept being, as already stated, of such of its cars and engines as used any part of the terminals by whomsoever owned. But in 1897 the Pennsylvania Company, being advised that the contract of November 9, 1887, contemplated payment of the cost of maintenance by the parties on the basis of the mileage of their several cars and engines passing between Walbridge and Toledo, and using the property of the other owner, and that the Pennsylvania Company was therefore not to be charged on account of cars and engines passing over its own property, but not over the property of the appellant, refused to go on with the previous practice of counting all its cars and engines passing in and out over the railroad between Walbridge and Toledo, but continued to pay for all cars which passed over the property of the appellant, upon the understanding that the payment of the balance of the bills should remain for future adjustment or judicial determination. For the period here involved, these balances amount in the total to $49,356.69, with interest from the time when they severally became due.

The counsel on both sides agree that the whole controversy turns upon the construction which should be given to the third paragraph of the last contract. Counsel for the appellant contends that the basis of the apportionment of the cost of maintenance is the number of cars and engines which pass over the short piece of railroad into the terminal, or out of the latter over the piece of railroad; and that it is not material whether such cars or engines pass into the property owned by the appellant. Counsel for the appellee contends that the basis is the mileage which the cars and engines severally run, and that this means run upon a route some part of which belongs to the other party; and that, as we gather, the use of the word "mileage" indicates a purpose to connect the mileage with the property over which it is accomplished. But his principal contention is that, although the contention of the appellants in respect to the construction of the contract of November 9, 1876, may possibly be held right, and that it was rightly performed by the manner in which the proper proportions of cost of maintenance was ascertained and settled, yet, upon the acquisition of the eastern tract by the Columbus & Toledo Railroad Company, new conditions were brought about, so that, while that company would always be obliged to use the Pennsylvania Company's premises in coming in or going out, the Pennsylvania Company would not always, or perhaps generally, use the premises of the other company at all.

We think the counsel for the appellants lay too much stress upon the wording of the stipulations of the contracts in respect to the basis of apportionment of the cost of maintenance, whether it be one of mileage or of wheelage. But the solution of that question has some bearing upon the question of the amount due, though it could not largely affect it. We are satisfied that the parties all along intended the proportions to be settled upon the basis of wheelage; that is, by the number of cars using the facilities provided for the joint use of the parties. This not so clearly upon the unaided construction of the language of the contract of 1876, to which the contract of 1887 refers, for that, when applied to its subject-matter, raises grave doubt of its meaning, but because of the construction, which the parties during so many years of operation under the contract, put upon it. This is a very safe guide in cases of doubt in finding the intention of parties. Their concurrent action in taking up the execution of their contract, while their minds were still conscious of the understanding they had when making it and pursuing its execution without question, may, with confidence, be relied upon as indicating what they meant when they made it. This is a familiar rule of construction. We may cite a case which has a two-fold application to the present, in that it also states the rule applicable when the parties have made successive contracts in pari materia—the case of Chicago v. Sheldon, 9 Wall. 54, 19 L. Ed. 594, where Mr. Justice Nelson said that in an executory contract where "its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one. There is another consideration in the case entitled to

weight in the interpretation of this contract, and that is the language of the contract made between the city and the company in 1864. This ordinance is in pari materia with the one of 1859, and helps to explain any ambiguity in it."

The rule referred to was thus phrased by Judge Sanborn, in delivering the opinion of the Circuit Court of Appeals for the Eighth Circuit, in Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138:

"The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious error."

A case where a contract for the joint use and maintenance of a piece of railroad was construed by the acts of the parties in carrying it out in Chicago G. W. Ry. Co. v. Northern Pac. Ry. Co., 101 Fed. 792, 42 C. C. A. 25.

To the same effect is the statement of the rule in our recent decision in Luhrig Coal Co. v. Jones & Adams (C. C. A.) 141 Fed. 617.

But the really decisive question is whether, in apportioning the cost of maintenance of the property for the joint use, the parties intended to have regard to, and rest their apportionment upon, the use by the respective parties of the particular parts of the premises which they severally owned; or whether, in respect of use, they regarded all parts of the property, whensoever acquired and by whomsover owned, as one whole, so that the use by one party of any part of it counted, whether the part used was actually owned by it or not. And we cannot doubt that the latter is what the parties intended. The language of all the contracts points to this, and the conduct of the parties conforms to it. The acquisition of the second 12-acre tract by the Columbus & Toledo Railroad Company was contemplated by the contract of 1876 as one which the parties anticipated might be necessary for their joint use. The contract of 1887 recites that provision was made in the contract of 1876 "that in case the business of the parties should require an increase of facilities, the same should be furnished in manner therein provided"; and that, "in pursuance of said agreement and of arrangements made from time to time in accordance therewith, * * * the second party [this appellant] bought a large amount of real estate in Toledo * * * of which the first party was granted the joint use * * * by said agreement of May 10, 1880." And the only object the parties had in mentioning it in the contract of 1876 was that it was to be acquired for joint use, for neither party would have occasion to contract about the use of property which the other should independently acquire and separately use, much less to stipulate about the rental of it, the supervision of it, and the sharing of the cost of maintenance. An important circumstance is that the rentals paid by each party for the use of the property of the other is constant and is in no wise affected by the extent of the use they actually make of it.

Counsel for the appellee say in their brief that "the provision in the

contract of 1880 for the division of expense of the Hocking Valley tract was contained in item second of said contract as follows"—quoting that item in full. If by that it is intended to say that that was the only "division of expense" for that tract, as it would seem, it is a mistake. The second item fixed the division of the rental and of "the taxes and assessments." The sixth paragraph was this:

"6. The second party shall have charge of the repairs and maintenance of the tracks on said property, and the first party will pay monthly, to the second party, its wheelage proportion of the cost of such repairs and maintenance, and under this item shall be included the wages of any employés who may be needed in the transaction of the joint business on said property. But the second party shall in no way be charged with the maintenance of the docks on said property, or the fixtures and appurtenances thereto."

By the terms of this agreement the charge of the maintenance of the tracks, which the Pennsylvania Company had exercised on the land owned by it, was extended over the new acquisition. In short, the purchase by the Columbus & Toledo Railroad Company dropped into the place provided for it by the agreement of 1876, and the terms upon which it was appropriated to the common use were, so far as concerned the cost of maintenance, the same as had been provided in the original; and, it may be added, were also the same as in the later contract of 1887. In effect, the business of the two companies was in substance the same as if they had jointly leased from a stranger, instead of from each other, the properties they put to their joint use.

Some minor questions growing out of the extent of the recent use of the properties by the parties are mentioned in the brief of counsel for the appellee, but they are not put in controversy on the present record, and we refrain from considering them.

It is agreed by counsel that the adoption of these views leads to the reversal of the decree and the substitution of a decree in favor of the appellant for the sum of $49,356.69, with interest on the monthly balances of which that sum is composed from the time when they should have been paid.

The decree, in so far as it declares the basis of contribution by the parties to the cost of maintenance to be the number of each car and engine passing on or off the property of the Pennsylvania Company, but which have not used the property of the appellant, and dismisses the cross-petition of the appellant, is reversed, with instructions to render a decree for the appellant for the sum of $49,356.69, with interest as above indicated.

UNITED STATES v. OREGON & C. R. CO.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

No. 1,213.

PUBLIC LANDS—CONSTRUCTION OF RAILROAD—GRANT—"PUBLIC LANDS" DEFINED.

The grant made by the United States by Act July 25, 1866, c. 242, 14 Stat. 239, to aid in the construction of a railroad and telegraph line, from the Central Pacific Railroad in California to Portland in Oregon, of "every alternate section of public land, not mineral," within 20 miles on each side of said railroad line, with a provision for selection of lands in lieu of any of those within such primary limits, which should be found to have been occupied by homestead or pre-emption settlers or in any manner disposed of within 10 miles beyond such limits, was a grant in præsenti, and did not embrace land which was at the time of the passage of the act subject to a live homestead entry, although such entry was relinquished prior to the filing of the map of definite location and survey of any part of its road by the railroad company; such land not having been "public land," within the meaning of the grant.

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

See 133 Fed. 953.

This suit, which was one in equity, was brought to obtain a decree canceling a patent theretofore issued by the government to the Oregon & California Railroad Company, of certain lands within the primary limits of the grant made by Congress on the 25th day of July, 1866, by its act entitled: "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon." 14 Stat. 239, c. 242. The cause was submitted to the court below upon an agreed statement of facts, and, having resulted in a judgment for the defendant to the suit, is brought here for review by the government.

The stipulation of the parties is as follows:

"It is stipulated and agreed as follows:

"Item 1. The act of Congress approved July 25, 1866, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' as printed in volume 14 of the United States Statutes at Large, on pages 239 and following, is admitted in evidence.

"Item 2. The Oregon Central Railroad Company is a corporation duly incorporated and organized on April 22, 1867, by and in virtue of the laws of the state of Oregon.

"Item 3. That the Legislature of the state of Oregon, by its joint resolution adopted October 20, 1868, duly designated the said Oregon Central Railroad Company as the company entitled to receive the lands granted in Oregon, and the benefits and privileges conferred by the act of Congress referred to in item 1 hereof; and prior to the year 1869 the said company duly became entitled to all the benefits, privileges, and grants in the state of Oregon, mentioned in or offered by the said act of Congress.

"Item 4. The act of Congress approved June 25, 1868, entitled 'an act to amend an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,"' as printed in volume 15 of the United States Statutes at Large, on page 80, is admitted in evidence.

"Item 5. The act of Congress approved April 10, 1869, entitled 'An act to amend an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon," approved July twenty-five, eighteen hundred and

sixty-six,' as printed in volume 16 of the United States Statutes at Large, on page 47, is admitted in evidence.

"Item 6. That on or about July 1, 1869, the said Oregon Central Railroad Company duly filed in the Department of the Interior its assent to the act of Congress referred to in item 1 hereof.

"Item 7. On October 29, 1869, the said Oregon Central Railroad Company filed in the office of the Secretary of the Interior, and on January 29, 1870, the Secretary of the Interior duly accepted and approved, a map of the definite location and survey of the first section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from Portland to a point at or near Jefferson, and comprised not less than 60 continuous miles from the northern terminus thereof.

"Item 8. On March 26, 1870, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on March 29, 1870, duly accepted and approved, maps of the definite location and survey of the second section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said point at or near Jefferson, to a point on the south line of township 27 south, range 6 west, Willamette meridian, and comprised not less than 120 continuous miles of railroad from Jefferson; on January 7, 1871, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on March 2, 1871, duly accepted and approved, a map of the definite location and survey of the third section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said point on the south line of township 27 south, range 6 west, to a point in section 30, in township 30 south, range 5 west; on April 6, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on April 8, 1882, duly accepted and approved, an amended map of the definite location and survey of the said third section of railroad, which amended line of railroad extended from station 1,154 in section 28, township 29 south, range 5 west, to station 1,320+50, in section 6, township 30 south, range 5 west; on April 6, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on April 8, 1882, duly accepted and approved, a map of the definite location and survey of the fourth section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said station 1,320+50 in section 6, township 30 south, range 5 west, to station 2,376+50 in township 31 south, range 7 west; on August 24, 1882, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on September 7, 1882, duly accepted and approved, a map of the definite location and survey of the fifth section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said station 2,376+50 in township 31 south, range 7 west, to the north line of section 33, township 34 south, range 6 west; on June 6, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the sixth section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said north line of section 33, township 34 south, range 6 west, to the east line of section 21, township 36 south, range 3 west; on July 3, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on July 6, 1883, duly accepted and approved, a map of the definite location and survey of the seventh section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said east line of section 21, township 36 south, range 3 west, to the south line of section 32, township 37 south, range 1 west; on September 4, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the eighth section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the south line of section 32, township 37 south, range 1 west, to the east line of section 25, township 39 south, range 1

west; on August 1, 1883, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the ninth section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said point on the east line of section 25, township 39 south, range 1 east, to the north line of section 30, township 40 south, range 2 east; and on August 18, 1884, the defendant filed in the office of the Secretary of the Interior, and the Secretary of the Interior on that day duly accepted and approved, a map of the definite location and survey of the tenth section of the railroad in Oregon provided for by the said act of July 25, 1866, which section of railroad extended from the said point on the north line of section 30, township 40 south, range 2 east, to the southern line of the state of Oregon, in section 13, township 41 south, range 1 east.

"Item 9. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, withdrew all odd-numbered sections of land within 30 miles on each side of the line of railroad shown on the maps set forth and described in item 8 hereof, from sale or location, preemption or homestead entry, on the following dates: Opposite, and coterminous with, the said first section of railroad, on January 31, 1870; opposite, and coterminous with, the said second section of railroad, on April 7, 1870; opposite, and coterminous with, the said third section of railroad, on March 31, 1871; opposite, and coterminous with, the said amended section of railroad, on July 5, 1883; opposite, and coterminous with, the said fourth section of railroad, on July 5, 1883; opposite, and coterminous with, the said fifth section of railroad, on July 5, 1883; opposite, and coterminous with, the said sixth section of railroad, on July 5, 1883; opposite, and coterminous with, the said seventh section of railroad, on September 3, 1883; opposite, and coterminous with, the said eighth section of railroad, on October 27, 1883; opposite, and coterminous with, the said ninth section of railroad, on October 27, 1883; and opposite, and coterminous with, the said tenth section of railroad, on December 19, 1884. And the said withdrawals by the commissioner have, each and all, remained in full force and effect from the date thereof continuously, to and including the present time, except in so far as, if at all, they have been affected by an order by the Secretary of the Interior, made on August 15, 1887, declaring said withdrawals revoked as to the odd-numbered sections within the indemnity limits of the grant made by the said act of July 25, 1866.

"Item 10. The entire railroad contemplated and provided for by the said act of July 25, 1866, along the line shown on the maps set forth and described in item 8 hereof, was constructed in several sections and fully equipped in all respects as required by the said act of July 25, 1866, by the said Oregon Central Railroad Company and this defendant; and commissioners, duly appointed by the President of the United States for that purpose, duly examined the said railroad as completed and equipped in the several sections aforesaid, and duly reported to the President of the United States, under oath, that each of said sections of railroad had been completed and equipped in all respects as required by the said act of Congress, and that the same was and were ready for the service contemplated by the said act, which reports were duly accepted and approved by the President of the United States. The said reports were so made, accepted, and approved, on the following dates: The first 20 miles, commencing at Portland, report made on December 31, 1869, accepted and approved on January 29, 1870; the second 20 miles, report made on September 28, 1870, accepted and approved on February 28, 1871; third 20 miles and fourth 20 miles, report made on December 10, 1870, accepted and approved on February 28, 1871; fifth 20 miles, report made on August 11, (1871), accepted and approved on March 11, 1872; sixth 20 miles, report made on January 13, 1872, accepted and approved on March 11, 1872; seventh, eighth, and ninth sections, including the last 78 miles of the said railroad from Portland to Roseburg, report made on July 10, 1878, accepted and approved July 11, 1878; from Roseburg to the south boundary line of Oregon, in several sections, reports

made and approved as the railroad was completed and examined in sections, during the years 1878 to 1899.

"Item 11. The E. ½ of S. W. ¼ and W. ½ of S. E. ¼ of section 21, township 1 south, range 3 east, Willamette meridian, are parts of an odd-numbered section of unoffered land within the primary limits of the grant made by the said act of July 25, 1866, and are opposite and coterminous with that section of the defendant's railroad, the map of definite location and survey of which was filed with the Secretary of the Interior on October 29, 1869, and approved by the Secretary of the Interior on January 29, 1870. (a) On March 3, 1865, one Michael Kelley filed his homestead claim No. 256, in the proper land office of the United States, for the said land, and on November 21, 1867, he (the said Michael Kelley) filed in the same land office his relinquishment unto the United States of the land and homestead claim, which homestead filing and the relinquishment thereof have ever since remained of record in the said land office; but final proof or payment was never tendered nor made under or in pursuance of the said filing. (b) On June 18, 1877, the proper officers of the United States issued a patent, in due form, purporting to convey the said land unto the defendant as part and portion of the lands granted by the said act of July 25, 1866, which patent was duly and properly issued, unless the homestead filing of Michael Kelley, hereinbefore set forth, excepted the said land from the lands granted by the said act of July 25, 1866. (c) On February 28, 1891, by deed bearing that date, the defendant sold and conveyed the N. E. ¼ of S. W.¼ and N. W. ¼ of S. E. ¼ of the said section 21, unto Andrew D. Gibbs, for the sum of $267.20 in hand paid; on February 4, 1895, by deed bearing that date, the defendant sold and conveyed the S. E. ¼ of S. W. ¼ of the said section 21, unto Mrs. S. E. Sumner Kline, for the sum of $200 in hand paid; and on February 28, 1891, by deed bearing that date, the defendant sold and conveyed the S. W. ¼ of the S. E. ¼ of the said section 21, unto A. Walter Scott, for the sum of $200 in hand paid. That each of the said purchases and sales were made in good faith, for full value of the land, without notice to the said purchasers, or any of them, other than such presumptive notice as is given by law, of the existence of the said homestead filing, or record thereof.

"Item 12. The grant made by the said act of July 25, 1866, is in course of adjustment by the Secretary of the Interior, and the proper officers of the United States, but has not been finally adjusted; and, including all the lands described in the bill of complaint herein, the defendant has not received the full quantity of land promised in the grant by the said act of July 25, 1866.

"Item 13. It is further agreed that this stipulation is, and shall always be deemed, conclusive evidence, for the purposes of this suit, of the truth of all the matters and things in it stipulated and agreed to be true as fully and effectually as if each and all of such matters and things were or had been conclusively proven by the introduction and the testimony of witnesses; but each party reserves the right to introduce further and additional testimony and evidence.

"Dated and signed on October 6, 1902.

"John H. Hall,
"United States Attorney for Oregon.
"Wm. D. Fenton and
"Wm. Singer, Jr.,
"Attorneys for the Defendant.
"H. M. Hoyt,
"Acting U. S. Attorney General."

Francis J. Heney, U. S. Atty.

William D. Fenton, and William Singer, Jr., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

It will be seen from the foregoing statement that Kelley filed his homestead claim to the land in question in the proper land office on the 2d day of March, 1865, and did not file his relinquishment thereof until November 21, 1867. The question in the case is not whether Congress had the power, during the life of that claim, to make other disposition of the land, for such power on its part, at any time prior to the time when, under the provisions of the homestead law, Kelley's right should become absolute, may readily be conceded. The real question here is: Did Congress undertake to exercise such power by its act of July 25, 1866? the granting clause of which is as follows:

"Sec. 2. And be it further enacted, that there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the States, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant, shall not be sold for less than double the minimum price of public lands when sold: Provided, that bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: And provided, also, that settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

What Congress granted by that act, and all that the appellee could acquire thereby, were certain sections of the "public land." If the quarter section in question was then public land, the judgment of the court below was right, for it is agreed by the parties that it is embraced within the primary limits of the grant under which the appellee claims, and was freed of the homestead claim by Kelley's relinquishment thereof before the time of the definite location of the appellee's road. Northern Pacific Railway v. De Lacey, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111. The grant in question is one in præsenti, and embraced only such lands as were "public land" at the time of the grant. That is manifest from the positive and affirmative words of the grant above quoted; and that it did not embrace any land to which there was then a valid homestead claim is further shown by the concluding provision of section 2 declaring:

"That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

The agreed statement of facts shows that at the time of this grant by Congress there was on file in the proper land office an existing homestead claim thereto by Kelley, which could have ripened into a perfect title in him to the extent of any 80 acres thereof, by his compliance with the provisions of law in relation thereto.

In speaking of the act of Congress of July 2, 1864, c. 217, 13 Stat. 365, granting to the Northern Pacific Railroad Company certain sections of public land within certain defined limits, this court said, in the case of Amacker v. Northern Pacific Railroad Company, 15 U. S. App. 279, 282, 58 Fed. 850, 851, 7 C. C. A. 518, 541:

"The character of the grant to the company is well defined. It is one in præsenti, but, as was said in St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U. S. 1, 5, 11 Sup. Ct. 389, 390, 35 L. Ed. 77: 'The grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved.' In considering, therefore, what lands ultimately passed by the grant, there are two periods principally to be regarded; one the date of the granting act, the other the filing of the map of definite location of the road. Lands to which claims had attached at either period do not pass, though they were free from the claim at the other period. In Bardon v. Northern Pacific Railroad Company, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806, a pre-emption claim existed at the date of the granting act, which, however, had been abandoned before the map of definite location was filed. It was held that it was not included in the grant. See, also, Hastings & Dakota Railroad Company v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363. In Kansas Pacific Railway Company v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122, a homestead entry was made after the date of the grant, but before the filing of the map of definite location, and it was held that the land was excepted from the grant."

The land in controversy in the case of Northern Pacific Railroad Company v. De Lacey, 174 U. S. 622, 19 Sup. Ct. 791, 43 L. Ed. 1111, was within the primary limits of both the grant made by Congress to the Northern Pacific Railroad Company July 2, 1864 (13 Stat. 365, c. 217) and the grant made by the joint resolution of May 31, 1870 (16 Stat. 378). The grant in the act of July 2, 1864, was of "every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office," etc. In that case it was contended that the land there in question was excepted from both of those grants because one John Flett had, on the 9th day of April, 1869, filed

in the local land office a statement declaring his intention to purchase the land under the laws of the United States authorizing the pre-emption of unoffered land, which claim remained uncanceled at the time of the definite location of the company's line of road. The Supreme Court held that, inasmuch as that claim of Flett filed on the 9th day of April, 1869, in the local land office, was alive at the time of the adoption of the resolution of May 31, 1870, the land was excepted from the operation of the grant contained in that resolution, but that, inasmuch as the right of Flett, under whom De Lacey claimed, was a right of pre-emption only, which ceased at the expiration of 30 months from the filing of his statement on the 9th day of April, 1869, in the local land office, because of the failure to make proof and payment within the time required by statute, there was no existing claim to the land at the time of the definite location of the company's line of road, which was March 26, 1884, and therefore the land passed to the company under the grant of July 2, 1864; but the court said:

"If there had been a pre-emption claim at the time of the passage of the act of 1864, the land would not have passed under that grant." 174 U. S. 626, 19 Sup. Ct. 793, 43 L. Ed. 1111.

In view of the facts of that case, we do not think we would be justified in treating this utterance of the Supreme Court as obiter dictum, as the appellee contends that we should do. Giving it effect, and applying it to the facts of the present case, it is plain that the land in question was not embraced by the grant under which the appellee claims. Besides, we think the clause last quoted is in precise accord with the numerous decisions of the same court to the effect that no land is "public land," within the meaning of such grants, to which there is at the time of the making thereof a live claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not ceased to be an existing claim. Cases supra, and Whitney v. Taylor, 158 U. S. 85, 94, 15 Sup. Ct. 796, 39 L. Ed. 906; Doolan v. Carr, 125 U. S. 618, 638, 8 Sup. Ct. 1228, 31 L. Ed. 844; Monroe Cattle Co. v. Becker, 147 U. S. 57, 13 Sup. Ct. 217, 37 L. Ed. 72; Leavenworth, etc., R. R. v. United States, 92 U. S. 733, 23 L. Ed. 634; Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264.

The judgment is reversed, and the cause remanded to the court below, with directions to enter judgment for the complainant as prayed for.

RUMBLE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

No. 1,144.

1. INDICTMENT—MOTION TO QUASH—MISJOINDER OF COUNTS.
It is not error for a court to deny a motion to quash an indictment because of a misjoinder of counts, where the district attorney elects to proceed on one count and enters a nolle prosequi as to the others.

2. POST OFFICE—USE OF MAILS TO DEFRAUD—INDICTMENT.
An indictment under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], for using the mails to defraud, is not demurrable because the letter set out therein and charged to have been mailed by defendant in carrying out his alleged scheme to defraud does not contain any of the representations which the indictment charges that it was defendant's scheme to make in letters sent through the mails; all that is necessary to constitute the offense being that the letter should have been mailed pursuant to the scheme to defraud and as a step in its execution.

[Ed. Note.—Nonmailable matter—Frauds and counterfeiting, see note to Timmons v. United States, 30 C. C. A. 86.]

3. SAME—CRIMINAL PROSECUTION—EVIDENCE.
In a prosecution under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], for using the mails to defraud, averments in the indictment of fraudulent representations made by the defendant by the use of the mails, made to characterize his alleged scheme to defraud, may be proved by the introduction in evidence of letters or circulars mailed by defendant other than the one set out in the indictment, and for that purpose a circular printed and sent out through the mails by an agent of defendant is admissible in evidence, where it is shown that it was known to and approved by defendant, that it contained copies of letters written by him, and that statements and representations therein made were based on those made by him to the agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 85.]

4. SAME—LETTERS.
A letter written to defendant before the close of the transactions charged in the indictment, although not answered by him, was admissible in evidence, where it was shown that it was part of a larger correspondence between the parties, and taken in connection with such correspondence and the other evidence tended to show that representations charged in the indictment to have been made by defendant were false, and known by him to be so.

5. SAME—RELEVANCY.
Where a circular issued by an agent of the defendant in a criminal case containing false statements and representations was introduced in evidence on proof that it was submitted to and approved by defendant, and the agent testified that some of such statements were based on statements made to him by defendant, and that others were based on his own investigations, questions in cross-examination designed to show which of the statements were made by defendant were immaterial and irrelevant, and their exclusion was not prejudicial error.

6. SAME—COMPETENCY.
Where, on the trial of a defendant for using the mails to defraud, a witness testified that his father and himself purchased mining stock from defendant through correspondence sent by mail, that his father was 85 years old, and that the witness acted for him in the transaction, and conducted the entire correspondence, it was not error to permit him to testify that both his father and himself were induced to purchase the stock by representations made in letters received from defendant through the mails.

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

The plaintiff in error (defendant in the court below) was indicted under section 5480 of the Revised Statutes, as amended March 2, 1889 (25 Stat. 873. c. 393, § 1 [U. S. Comp. St. 1901, p. 3696]). This section, as far as applicable to this case, reads as follows: "If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the postoffice establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any postoffice, branch postoffice, or street or hotel letter-box of the United States, to be sent or delivered by the said postoffice establishment, or shall take or receive any such therefrom, such person so misusing the postoffice establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device." The indictment, as found by the grand jury, charged the plaintiff in error with three separate offenses, contained in three separate counts. The plaintiff in error moved to quash the indictment and each count thereof, among other things, upon the ground that the alleged offense charged in the first count was consummated March 29. 1901, that the alleged offense charged in the second count was completed March 24, 1903, and that the alleged offense charged in the third count was consummated October 7, 1903, and that no two of said three alleged offenses were consummated in the same six calendar months, and on the ground of misjoinder of counts. The court upon the hearing of this motion ordered "that the motion to quash the indictment herein will be granted unless the government elects to proceed upon one count of the indictment." To this order the plaintiff in error duly excepted. Thereupon the United States Attorney elected to proceed upon the third count, and entered a nolle prosequi as to the first and second counts.

The third count of the indictment in substance charges that on the 1st day of January, 1901, at the city and county of San Francisco, in the state and Northern district of California, defendant had then and there devised a scheme and artifice to defraud one Frank T. Terry, of Milwaukee, Wis., Dix W. Smith, and John Bull, Jr., of Elmira, N. Y., composing the firm of Smith & Bull, and divers other persons; that this scheme to defraud was to be carried on and effected with the parties named, and with other persons whose names are unknown, by means of the post-office establishment of the United States, by inciting those persons to open a correspondence through the post-office establishment with the said George W. Rumble; that this use and misuse of the post-office establishment of the United States was a part of said scheme and artifice to defraud.

The scheme which is charged against the defendant in the indictment is substantially this: That the defendant devised and intended that he would write and send through the post-office establishment of the United States certain letters to the said Frank T. Terry, Dix W. Smith, John Bull, Jr., and divers other persons whose names are unknown, representing himself to be the secretary and general manager of the Sunset Mining Company, a corporation organized and incorporated under the laws of the state of California, and having a capital stock of $10,000,000, divided into 10,000,000 shares of the par value of $1 per share; that the Sunset Mining Company did a general mining and mine promoting business and owned 12 gold mines in

the counties of Butte, Shasta, and Siskiyou, Cal.; that as money makers these mines were rated among the best in the state of California, not excepting any mother lode property; that some of these mines were the "Amo," the "Amo Hydraulic," and the "Old Glory"; that, in addition to these mines, the Sunset Mining Company owned a gold dredge, styled "Modern Electric Dredge," which was being operated by the Sunset Mining Company in Butte county; that there had been found by the Sunset Mining Company in one portion of the alleged property known as the "Amo" mines, in addition to the free gold, thousands of tons of black, gold-bearing sand which assayed $500 to $800 per ton; that the defendant, Rumble, further devised that he should represent in his letters to these parties that all of the mining properties before mentioned were being actively and successfully worked by the said Sunset Mining Company, and were producing large quantities of gold and other precious metals; that by reason of the operations of these alleged mining properties by the Sunset Mining Company the company each month received large profits; that the net proceeds from such operations were so large that the Sunset Mining Company was able to and did declare and pay out of the surplus of said net proceeds a monthly cash dividend of 2 per cent. upon the par value of each share of the issued capital stock of the said Sunset Mining Company; that the defendant, Rumble, devised that he should falsely represent that if the said Frank T. Terry, the said Dix W. Smith, and John Bull, Jr., of the firm of Smith & Bull, and divers other persons, would purchase shares of the capital stock of the Sunset Mining Company, they, and each of them, would receive each and every month thereafter, out of the net proceeds derived from the working of the various alleged mining properties of the Sunset Mining Company, a dividend of 2 per cent. upon the par value of each of the shares so purchased by them, or any of them; that the defendant, Rumble, devised and intended that he should falsely and fraudulently represent to the above-named persons, and each of them, that the Sunset Mining Company had paid a monthly dividend of 2 per cent. every month since the month of February, 1894, out of the net proceeds of mining operations conducted by it; that during the year 1902 the gross proceeds derived by the Sunset Mining Company from its operation of the mine known as the "Old Glory" amounted to $62,784.50, while the expenses of such operations during the same year amounted to only $14,400.56; that the dividends paid during the said year to stockholders of the Sunset Mining Company out of the net proceeds derived from the mining operations conducted by said company in the "Old Glory" mine during that year amounted to $22,812.56; that, by reason of the proceeds derived from the mining operations in the "Old Glory" mine during the year 1902, the Sunset Mining Company obtained a surplus over and above the operating expenses and dividends of $25,571.49, and that the proceeds from the sale of treasury stock, together with the aforesaid surplus from the "Old Glory" mine, were used to acquire and equip other properties; that the defendant devised that he should falsely and fraudulently represent the value of the "Old Glory" mine to be $500,000, and that the value of the other properties belonging to the Sunset Mining Company was $500,000, and that the resources of the Sunset Mining Company, over and above all liabilities, on the 2d day of February, 1903, were $898,250.00; that the defendant, Rumble, made each of the representations aforesaid, to the parties named, by means of the post-office establishment of the United States of America, for the purpose of inducing them, and each of them, to purchase shares of the capital stock of the Sunset Mining Company; that the representations were false and fraudulent, and that the defendant at all the times mentioned in the indictment intended to convert to his own use any and all moneys which these persons might pay to the Sunset Mining Company in exchange for shares of the capital stock of said company and thereby defraud them; that at the time of opening the communication and the correspondence with these parties through the post-office establishment of the United States, and at the time of devising the scheme and artifice to defraud as aforesaid, the defendant, Rumble, well knew that all of the representations contained in the said letters were false and fraudulent; that in furtherance of the scheme and artifice to defraud,

to be effected as alleged in the indictment, the defendant did on the 7th day of October, 1903, at Oroville, in the state and Northern district of California, willfully, unlawfully, knowingly, and feloniously place and cause to be placed and deposited in the said post-office establishment of the United States as aforesaid, to be sent and delivered by said post-office establishment of the United States, a certain letter inclosed in a sealed envelope and stamped with a postage stamp of the United States, and addressed to Smith & Bull, Realty Building, Elmira, New York.

This letter is in the words and figures as follows, to wit:

"First Incorporated 1889. Chronicle Building, Suite 57 and 58.

[Pictorial Representation of Great Seal of California.]

"General Gold Mining.

"Operating and Promoting Both in United States and Europe.

"Mines: Butte, Shasta and Siskiyou Counties, California.

"Have Paid Monthly Dividends Consecutively Since February, 1894.

"Officers:

Ira A. Pease, President and Superintendent of Mines.
G. W. Rumble, General Manager and Secretary.
Frank Rogers, Consulting Director, Retired Miner.
Henry Armstrong, Consulting Director, Mining Engineer.
Haden Whitney, Banker, Chestnut and 13th Sts., Philadelphia, Pa.

"Sunset Mining Co. of California.

"California, U. S. A., Oct. 7, 1903.
"Wednesday,
"Oroville,
"Old Glory Mine.

"Messrs. Smith & Bull—Gentlemen: Referring to yours sept 28, which has reached me here, the mine is not working owing to labor troubles which I think was brought about by Mr. Aubury. who has done & is doing everything his ingenuity can devise to injure both yours truly & the S. M. Co. I have complained of him many times to the governer who being a politician of the same creed, pays no attention to the matter. The Oct. 1. dividends had to be skipped the first in 9 years. I am spending most of my time at the mine when I can get time on my return to S. F. I think I can satisfy you on all points.

"Truly yours, G. W. Rumble."

To the third count the plaintiff in error interposed a demurrer upon the ground that said count does not state facts sufficient to constitute an offense under the statute, in this: that it does not set forth any letter deposited or mailed by the defendant through said post-office establishment containing any of the representations alleged in said count, and that said count fails to show that the defendant deposited in the post-office establishment of the United States any letter containing any of said alleged representations.

This demurrer was overruled by the court, and the plaintiff in error excepted. He then entered his plea of not guilty, and thereafter was tried before a jury, and found guilty of the offense as charged in the third count. The plaintiff in error moved that the judgment be arrested upon substantially the same grounds as set forth in the demurrer, which motion was overruled, and exception taken thereto.

There are divers assignments of error committed by the court in the admission of evidence, and numerous objections to the charge of the court and in its refusal to give instructions requested by the plaintiff in error.

W. H. H. Hart and Aylett R. Cotton, 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.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

1. The court did not err in denying the motion to quash the indictment; the United States Attorney having elected to proceed upon the third count and entered a nolle prosequi as to the other counts. The clause in the statute which permits the indictment to charge three offenses "when committed within the same six calendar months" only applies to the procedure in which the attorney shall prepare the indictment. It does not relate to the creation of the offense. The offense is created and perfectly described before this clause is inserted. It is evident that the plaintiff in error was not deprived of any essential right by the ruling of the court. In United States v. Nye (C. C.) 4 Fed. 888, 893, the court said:

"In all cases where there has been an improper number of offenses joined in an indictment, the court undoubtedly may, in its discretion, quash the indictment; but it is always addressed to the sound discretion of the court in a case of that character. It may, in its discretion, quash the indictment, or it may permit the prosecutor to nolle certain counts, or it may compel the prosecutor to elect which one he will proceed upon, so that the defendant shall in no sense be prejudiced in his defense."

2. Did the court err in overruling the demurrer to the third count of the indictment? The principal objections urged thereto are set out in the statement of facts. In Stokes v. United States, 157 U. S. 187, 188, 15 Sup. Ct. 617, 618, 39 L. Ed. 667, the court said:

"We agree with the defendant that three matters of fact must be charged in the indictment and established by the evidence: (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme by opening or intending to open correspondence with some other persons through the post-office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom."

The contention of the plaintiff in error is that a letter which does not contain any of the representations which the count charges the scheme was to make in letters to be sent through the post office by the defendant could not be, in the language of the section, "in and for executing" such a scheme or artifice or attempting so to do, and could not be the third matter of fact which it is stated in Stokes v. United States, supra, must be charged in the indictment and established by the evidence to constitute an offense under that section. Neither that authority nor any others cited by plaintiff in error hold that, in order to bring the case within the provisions of the statute, the letter contained in the indictment must be such a one as would necessarily be effective in the execution of the scheme to defraud.

In United States v. Hoeflinger (D. C.) 33 Fed. 469, 471, it was claimed by the defendant that the indictment was defective because it was not alleged that the statements contained in the letter were false. The court held that this point was not well taken, and said:

"The offense described in the indictment consists in placing a letter in the mail in execution of a fraudulent scheme, previously devised, which is intended to be carried out through the agency of the post-office establishment. It is not essential that the letter written in aid of the scheme shall contain false statements. It can make no difference, therefore, as a matter of averment, whether the letter contained false statements or otherwise. The important question is whether a fraudulent scheme was concocted of the nature described in the indictment, and whether the letter in question was mailed in furtherance of that scheme."

In United States v. Loring (D. C.) 91 Fed. 881, 886, it was held that it is not necessary that the contents of letters charged to have been placed in a post office in pursuance of a scheme to defraud should show the fraudulent character of the scheme. In Durland v. United States, 161 U. S. 306, 315, 16 Sup. Ct. 508, 512, 40 L. Ed. 709, the court said:

"We do not wish to be understood as intimating that, in order to constitute the offense, it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor."

These authorities show that the indictment comes within the rule announced in the Stokes Case, upon which the plaintiff in error relies. But another complete answer upon this point will be found in the fact that the letter under discussion does contain one or more representations which are alleged in the indictment to be fraudulent.

The court did not err in overruling the demurrer. The conclusion we have reached also sustains the action of the court in refusing to grant the motion made in arrest of judgment upon the same grounds as set forth in the demurrer.

3. A careful reading of the entire testimony clearly shows that the plaintiff in error is guilty of the offense charged in the third count of the indictment, and it therefore necessarily follows that unless the court erred in the admission of the testimony which was objected to, in overruling objections to the testimony of witnesses, in charging the jury, or in refusing to give instructions asked for by the plaintiff in error, the verdict of the jury and judgment of the court must be sustained. Did the court err in admitting certain letters and circulars in evidence? There are numerous specific assignments of error upon these points, a majority of which have been separately and specifically discussed in the briefs of the respective counsel. It would serve no useful purpose to pursue the same lines in this opinion. We shall endeavor, however, in a general way to cover the objections made, and to state briefly the principles applicable thereto.

An objection is made to each of certain letters offered and admitted in evidence, upon the ground that "there is no charge in the third count of the indictment that the defendant ever mailed this letter, nor a charge that letters were mailed by the defendant, other than the letter a copy of which is contained in said count." It is admitted by the plaintiff in error that the letters may have been admissible to

show the intent as to whether he did or did not devise the alleged scheme, but it is claimed that they were not admissible as evidence of the making of representations by the plaintiff in error through the mail; and in their argument counsel say the objection "was to prevent the letters being considered as evidence of any representations." It will be observed that no such objection was specifically made; but, had it been made, it would not have furnished any valid reason for excluding that part of the letter. In all cases where a charge is made that the defendant made certain representations which are alleged to be fraudulent the government should be permitted to prove the fact that the representations were made either by the oral statements of the defendant or by letters written by him, or by circulars, pamphlets, or publications sent by him through the United States mails. It need not be shown that the oral declarations or interviews had with, or information personally obtained from, the defendant, were sent through the mails. As was said by the court in Kellogg v. United States, 126 Fed. 323, 326, 61 C. C. A. 229, 232:

"The scheme testified to was so dependent upon the mails for its success, and the evidence showed such a wholesale use of them, that an intelligent mind could reach no other conclusion than that such use was from the beginning contemplated by the persons who concocted the scheme. The circumstance that some of the communications between the swindlers and their victims were exchanged without the use of the mails at interviews with so-called 'agents' is wholly immaterial."

In Balliet v. United States, 129 Fed. 689, 693, 64 C. C. A. 201, 205, there is an extended discussion upon points directly applicable to this case. The court said:

"The letters and telegrams in question were principally written by the defendant himself. They show that he exercised absolute control over the affairs of the White Swan Mines Company, Limited, whose stock he was engaged in selling. They further showed the manner in which he conducted the business of that company, and the use that he made of the money which he received from the sale of its stock. Some of the letters also contained representations that were made by the defendant for the evident purpose of inducing the sale of its stock. The other exhibits consisted principally of reports made by the defendant to stockholders of the White Swan Mines Company, Limited, and articles which the defendant had composed and caused to be published in certain newspapers and periodicals. * * * In a word, the articles in question [like the letters in evidence in this case] were well calculated to excite the cupidity as well as to deceive credulous and ignorant people, thereby inducing them to invest their means in purchasing the stock which the defendant was engaged in selling. The testimony in the case also shows that the defendant had been exceedingly industrious in giving a wide circulation to these articles. * * * The case proceeded upon the theory that fraud was the gist of the offense charged in the indictment, and that it must be made to appear that the defendant's purpose from the beginning was to sell a worthless stock by means of false representations, or a stock which was less valuable than it was represented to be, and to appropriate the proceeds, or a part thereof, to his own use. This being so, we are of opinion that all of the exhibits above mentioned were properly received in evidence to develop the defendant's purpose. The jury were entitled to consider all of the defendant's acts and declarations in connection with the exploitation of the White Swan Mines, both before and after the letters mentioned in the indictment were deposited in the mail, for the purpose of determining with what intent the defendant had acted. In no other way could his purpose be established. Besides, the exhibits in question con-

tained so much of exaggeration, and were put forth in such a form, as though they contained well-authenticated items of news, and with such a reckless disregard of the truth as would fairly justify the inference that they were intended to deceive, and were acts done in furtherance of a scheme to defraud by means of the mail. We think the trial court would have erred had it excluded the several exhibits."

The authorities heretofore cited show that it was not necessary to set forth in the indictment all the letters written by the defendant. All the statute requires is that a letter in furtherance of the scheme should have been deposited in the mail. It is optional on the part of the pleader to include more if he so desires; but it is not incumbent upon him to do so in order to permit him to introduce them in evidence. In the present case the indictment fully states facts sufficient to enable the defendant to make preparation for his trial. It was wholly unnecessary to set out in the indictment the evidence which the prosecution intended to introduce in support of the charges made in the indictment. As was said in Stokes v. United States, supra:

"It is difficult to see, nor do the defendants suggest, what other allegations were necessary to define the offense with greater clearness or certainty, and it is impossible that they could have been misled as to the nature of the charge against them. The rules of criminal pleading do not require the indictment to set forth the evidence."

In addition to the points already discussed, special objection is made to exhibit 17, which is a printed circular prepared by Smith & Bull, who were induced to become agents for the sale of stock that the plaintiff was endeavoring to sell. It was prepared, signed, and distributed by Smith & Bull through the mails, and it is claimed that this circular was wholly irrelevant and inadmissible, and that the plaintiff in error could not be bound by any matter therein contained.

It may be admitted, for the purpose of this opinion, that, if the circular had been issued and circulated without the knowledge and consent of the plaintiff in error, he would not be bound thereby. Let us see what the facts are and what the law is, and remember that in the letters, written or printed, and sent through the mails by the plaintiff in error, he was trying to entrap the unwary and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such. The evidence of Mr. Bull given at the trial shows clearly that some of the information contained in the circular was derived from letters and circulars forwarded to the firm of Smith & Bull by the plaintiff in error, and from talks had personally with him. The circular itself discloses a number of printed communications over the signature of the plaintiff in error, which Mr. Bull testified were copied verbatim from original communications received from the plaintiff in error. The entire testimony shows that the plaintiff in error knew what was set out in the circular, that it was submitted to him, and that he examined it, indorsed, and approved it. In one of his letters he said, "Your new circular is thoroughly convincing to any one who is responsible, and is the best one I ever saw." The circular was therefore properly received in evidence.

In Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 215, 48 Am. Dec. 596, the court, in discussing the question whether or not certain letters not written by the party were admissible, said:

"So far as these letters might have been shown by other proof to have been acted upon or sanctioned by the defendants, so far they would have been competent evidence."

It appears from the record that there was but one circular issued by Smith & Bull. The witness Bull in his testimony said:

"There was never but one statement issued over the firm name, and anything that is in there in the way of telegrams or letters was added to it afterwards. There was simply one statement issued by the firm."

The court first ruled that the circular would be admitted up to a certain page. Upon further testimony being given, and knowledge of the plaintiff in error being shown as to the added parts, the court admitted the entire exhibit. In this we see no error.

The plaintiff in error claims that the court erred in admitting in evidence the following letter:

"Oct. 29, 2. G. W. Rumble, Chronicle Bldg.—Dear Sir: Replying to yours of the 10th would say, we now have an opportunity to sell the 'Amo' mine for $1,500.00. If you want it at that price you can have it. * * *

"Very respectfully, Geo. H. Fuller."

The objection urged to this letter, in addition to others previously disposed of, is that it is not a letter written by the defendant, and is therefore wholly irrelevant and immaterial to the subject-matter under consideration. It will be conceded that a letter written to the defendant, which was not answered by him, would not be admissible in evidence as tending to show an implied admission on his part of the truth of the statements contained in the letter.

In Packer v. United States, 106 Fed. 906, 910, 46 C. C. A. 35, 39, the court said:

"It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements; it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter."

But in the case under consideration, like the circular issued by Smith & Bull, the letter does not stand by itself. Mr. Fuller was a witness at the trial, and from his testimony it appears that prior to the time the letter in question was written there had been considerable correspondence between Rumble and himself as to the value of the Amo mine, of which Mr. Fuller was the president. From Fuller's testimony the fact appears that the Sunset Mining Company never had any interest whatever in the Amo mine; that Rumble at one time had an option thereon to purchase it, but gave it up and ceased work; that Rumble had stated to him that he had received from the working of the mine $214.95 and had expended $9,580.90. In a letter written by Rumble to this witness June 8, 1900, he said: "I have recently had two assays made of 'Amo' stuff; one was black sand which assayed 500 per ton." In another letter, dated August 22, 1901, Rumble said:

"After having tested the ground of the 'Amo' in every conceivable place and manner, I have come to the conclusion that it would be a losing deal to continue further work on it. * * * I have recently secured an option to

purchase Foster's entire property, also the property adjoining Foster's and the 'Amo,' which, together with the 'Amo' and what I have, would make about 1,000 acres. * * * Should I buy them all, I would make it into a sheep ranch and go to raising alfalfa on portions of it where it can be irrigated."

The letter under consideration purports to be a reply to a letter previously written by Rumble on October 10th, which letter was not offered in evidence, but it was stated by the witness that it had no reference to any sale of the stock of the Sunset Mining Company.

In the light of the facts disclosed by the testimony of Mr. Fuller, it is manifest that the plaintiff in error could not possibly have been misled to his prejudice. The facts of this case are in many respects different from those presented in Packer v. United States, supra, upon which the plaintiff in error relies. Here the letter was not written by one who claimed to have been defrauded, nor was it written after the transaction on which the charge against the plaintiff in error was based had closed.

The opinion in the Packer Case quotes with approval the language of the court, which we have heretofore cited, in Commonwealth v. Eastman, supra, and, among other things, says:

"The correspondence between Moody and the accused while the transactions evidencing the scheme to defraud were taking place was competent, because the letters were verbal acts constituting a part of the res gestæ. It was also competent because the letters from the accused were admissions of fact contained in them, and a response to the letters of Moody and the latter were necessary to a correct understanding of the scope and effect of the admissions."

All the letters tended to show the falsity of the alleged representations charged in the indictment to have been made by Rumble.

One other objection to the admissibility of another letter, Exhibit No. 55, will be noticed. This letter reads as follows:

"C. J. Haile, Fruit Grower. Vacaville, Cal., Nov. 18, 1901.

"Mr. F. E. Stone, Newkirk, Oklahoma, Ty.—Dear Sir: Owing to the recent death of my husband, I desire to realize on my Sunset Mining Co. stock, which pays 2% per month cash dividends. The company's price for their stock is now $1.50 per share. They inform me that it will be very much higher within the next twelve months. My stock cost me $1.00 per share. Enclosed I send you one of their circulars, which I got at their office yesterday. I can have the stock transferred to your name.

"Respectfully, Mrs. C. J. Haile."

The objection to this letter was that it was not shown that the defendant knew of its being written or sent, or had any connection with it. This objection would have been good if the objections raised were sustained by the facts. But the record shows that prior to the time this objection was made the witness was asked: "At whose dictation was this letter written? A. At Mr. Rumble's." She further testified that the plaintiff in error had envelopes and letter heads with the words, "C. J. Haile, Fruit Grower," similar to the one in evidence, printed on them. The following questions were then asked and answered:

"Q. Did you send out this letter with this circular attached to it at Mr. Rumble's request? A. Yes, sir. Q. Through the United States mail? A. Yes, sir."

In the light of what has been previously said, further comment is unnecessary.

4. Did the court err in overruling the objections to the testimony of the witnesses? There are many assignments of error upon these points. Several of them relate to the testimony of the witness Bull, and most of them are governed by the principles heretofore announced. It is claimed that the court erred in refusing to permit counsel to interrogate the witness upon cross-examination as to how much of what is contained in the circular issued by Smith & Bull said witness gained from his own investigations when at the Old Glory mine. The objection of the government that this was not in cross-examination was sustained by the court. It is true that this witness had stated in his examination in chief that the circular issued by his firm was based upon his own investigations, and also upon the representations made to him by the plaintiff in error, and that the government did not undertake to prove how much of it he gained by investigation and how much by information, and it was upon this ground that the court held the question not proper on cross-examination.

The real objection to the question is that it was wholly irrelevant and immaterial to enter into the field of metaphysics and endeavor to scale up the quantum of information he received from the plaintiff in error, or from other parties. The controlling point was that he received some of the information contained in this circular directly from the plaintiff in error, and that the circular as a whole was indorsed, sanctioned, and approved by the plaintiff in error.

With reference to the other objections to the testimony, it is only necessary to say that no error occurred in allowing this witness to state that he had sent a good many thousands of the circular in question through the mails, and that his firm had sold in the neighborhood of 4,000 shares of the Sunset stock at $2 per share, amounting in all to about $8,000. An examination of the indictment, in connection with the testimony, shows that these matters were material and relevant to the issues involved in this case.

It is argued that the court erred in permitting one P. S. Moore to answer the following question:

"Q. State whether or not the communications and correspondence which you and your father received through the United States post-office establishment induced you and your father to invest your money in the Sunset Mining Company's stock. State whether or not that is the fact? A. Yes, sir; that is the fact."

The contention of the plaintiff in error is that this witness cannot testify as to what induced his father to act. The record shows that his father was 85 years of age, and that he was disabled from attending the trial. The witness testified:

"Q. Now, Mr. Moore, I will ask you whether or not you personally attended to all of your father's business in reference to correspondence with Mr. Rumble and the Sunset Mining Company, and everything connected

with those affairs? A. I did. Q. You have personal knowledge of all of his connections with those matters? A. Yes, sir."

We are of opinion that the court did not err in admitting the testimony objected to.

5. The court did not err in refusing to give the several instructions requested by the plaintiff in error. The instructions in their entirety were intended to limit the jury to the consideration of only one letter, to wit, the letter set out in the third count of the indictment. This point was raised upon the sufficiency of the indictment, the admission of the circular prepared and circulated by Smith & Bull, and to certain letters. The instructions asked for were properly refused.

6. The objections to portions of the charge of the court are without merit, and have been heretofore disposed of. From an examination of the entire charge, it fully appears that the rights of the defendant were carefully explained to the jury in every particular, and the charge was in all respects proper, fair, and just.

The judgment of the District Court is affirmed.

UNITED STATES et al. v. JACKSON.

SAME v. McKERRACHER.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

Nos. 1,251, 1,253.

1. STATUTES—CONSTRUCTION—RULES GOVERNING.
   In construing a statute of the United States, the courts should search out and follow the true intent of Congress, and adopt the sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and object of the legislation.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 259, 262.]

2. SAME—CONFLICTING PROVISIONS.
   When one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 284.]

3. SAME.
   When words occur in a statute which can be given no effect consistent with the plain intent of the statute, they must be rejected as without meaning.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 266.]

4. SAME.
   It is a well-settled rule of construction that, where there is an irreconcilable conflict between different parts of the same act, the last in the order of arrangement will control.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 284.]

5. SAME—RETROSPECTIVE CONSTRUCTION.
   A statute is never to be construed retrospectively, unless the language of the act shall render such construction indispensable.
   [Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 344.]

6. PRISONS—ALLOWANCE FOR GOOD TIME—FEDERAL STATUTE.

Act June 21, 1902, c. 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1905, p. 731] provides, in section 1, that "each prisoner who has been, or shall hereafter be, convicted of any offense against the laws of the United States, and is confined" in execution of the judgment, shall be entitled to an allowance of good time as therein specified. Section 3 (32 Stat. 398 [U. S. Comp. St. Supp. 1905, p. 731]) expressly provides that the act "shall apply only to sentences imposed by courts subsequent to the time when this act takes effect," and that prisoners sentenced prior to such time shall be entitled to the commutation theretofore allowed under existing laws. *Held*, that the language of the first section was very probably intended to make the act applicable to cases of prisoners convicted before it became operative, but not sentenced until afterward; but that, in any event, the third section, being the later and also the more specific, must govern, and the act did not apply to prisoners sentenced before it took effect.

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

For opinion below, see 140 Fed. 266.

Jesse A. Frye, U. S. Atty., Alfred E. Gardner, Asst. U. S. Atty. (Edward E. Cushman, Special Asst. to Atty. Gen., of counsel), for appellants.

Richard Saxe Jones and Wm. H. Brinker, for appellee Jackson.

J. B. Metcalfe and John S. Jurey, for appellee McKerracher.

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

HAWLEY, District Judge. These appeals present the same question and will be considered together. The appellees were prisoners confined in the United States penitentiary on McNeil's Island in the state of Washington, and petitioned the court below for a writ of habeas corpus, claiming that under the laws of the United States they had fully served their time, and were entitled to be discharged. Appellee Jackson was convicted in the District Court of Alaska of the crime of attempting to commit murder, and on the 6th day of January, 1899, was sentenced to a period of 10 years in said penitentiary. He arrived at the penitentiary January 13, 1899. Appellee McKerracher was convicted for a violation of the national banking laws in the United States court at Seattle, Wash., and on the 14th day of January, 1902, was sentenced to the penitentiary for a period of five years. He arrived at the penitentiary on January 15, 1902. Both of the appellees fully complied with the rules of the penitentiary during their imprisonment therein. The court issued the writ and held that under the act of Congress passed June 21, 1902 (chapter 1140, 32 Stat. 397 [U. S. Comp. St. Supp. 1905, p. 731]), the petitioners had fully served the time for which they were sentenced, and ordered them discharged. From these orders the appeals herein are taken.

This law reads as follows:

"An act to regulate commutation for good conduct for United States Prisoners. * * * That each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of

any state or territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail: Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated.

"Sec. 2. That in the case of convicts in any United States penitentiary, the Attorney General shall have the power to restore to any such convict who has heretofore or may hereafter forfeit any good time by violating any existing law or prison regulation such portion of lost good time as may be proper, in his judgment, upon recommendations and evidence submitted to him by the warden in charge. Restoration, in the case of United States convicts confined in state and territorial institutions, shall be regulated in accordance with the rules governing such institutions, respectively.

"Sec. 3. That this act shall take effect and be in force from and after thirty days from the date of its approval, and shall apply only to sentences imposed by courts subsequent to the time that this act takes effect, as hereinbefore provided. Prisoners serving under any sentence imposed prior to such time shall be entitled and receive the commutation heretofore allowed under existing laws. Such existing laws are hereby repealed as to all sentences imposed subsequent to the time when this act takes effect."

Did the court err in its construction of this act, and in discharging appellees from the custody of the marshal? The vital question to be decided is whether the act in its entirety applies to all federal prisoners, to those convicted and sentenced before the passage of the act, as well as to those convicted and sentenced after its passage. Is there an irreconcilable conflict between sections 1 and 3 of the act, and, if so, which section must prevail?

The fundamental rule in the construction of statutes is to ascertain the intention of the lawmakers. It is only in statutes of doubftul meaning that courts are authorized to indulge conjectures as to the intention of the Legislature, or to look to consequences in the construction of the law. When the meaning is plain the act must be carried into effect. Another canon of construction is that every part of a statute must be viewed in connection with the whole, so as to make all the parts harmonious, if practicable, and to give a sensible and intelligible effect to each; nor should it ever be presumed that the Legislature meant that any part of a statute should be without meaning or without force and effect. The act itself must be presumed to speak the will of Congress, and this is to be ascertained, if it can be, from the language used. It is the duty of the courts to examine the language of the act and ascertain its object and purpose. We are of opinion that from the whole act it is manifest that Congress intended that its provisions should apply to the future, not to the past.

The question as to the proper construction of this act has been decided in four cases. The Circuit Court of New York, in Re Walters, 128 Fed. 792, held that the act did not apply to prisoners sentenced before the enactment of the law. The District Court of Vermont, in

Re Farrar, 133 Fed. 254, held that the first section of the act was controlling, and that it applied to all prisoners, whether sentenced before or after the enactment of the law. An appeal was taken to the Circuit Court of Appeals for the Second Circuit, and that court reversed the order made by Judge Wheeler, and held that the act did not apply to prisoners sentenced before its passage. United States v. Farrar, 139 Fed. 260.

In the present cases Judge Hanford held that the act did apply to the appellees, who had been convicted and sentenced prior to the passage of the act, and ordered the prisoners discharged. In so ruling we think the learned judge erred.

Appellants claim that the words "has been or" and "is," as used in the first section, were inserted upon the theory that there would probably be prisoners convicted before the act became operative, but not sentenced until after the act took effect, and that these words were used so as to prevent any uncertainty as to the applicability of the law to such prisoners. It frequently happens from various causes that considerable time elapses between the conviction and the sentence, and it is not unreasonable to presume, in the light afforded by the entire section, that these words were intended to apply to such cases. Of course, if this construction is given to the words, it would make the entire act harmonious. Courts should search out and follow the true intent of Congress, and adopt "the sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and object of the legislation." United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740; United States v. One Raft of Timber (C. C.) 13 Fed. 796; The Lizzie Henderson (D. C.) 20 Fed. 524, 529; United States v. Ellis (D. C.) 51 Fed. 808, 810; United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080; Stephens v. Cherokee Nation, 174 U. S. 445, 480, 19 Sup. Ct. 722, 43 L. Ed. 1041.

Appellees claim that there is an irreconcilable conflict between sections 1 and 3. It will be observed that, if the words "has been or" and "is" were eliminated from section 1, the statute in all its sections would be absolutely clear and entirely harmonious. By a literal construction of those words, section 1 might, if standing by itself, be construed to apply to all prisoners who had been convicted and sentenced prior to the passage of the act, as well as to the prisoners convicted and sentenced after its passage. And if that was the intention of Congress, there was no necessity of inserting the third section. It would be entirely useless. Sections 1 and 2, standing by themselves, would be perfect and complete. They would represent the views contended for by appellees, and to give force and effect to these views section 3 would have to be entirely ignored. This would lead to an utter absurdity under the rules of construction which have been heretofore stated. Congress, in enacting section 1, clearly intended to define and fix the deductions from sentences for compliance with the rules of the prison and good behavior of prisoners. This was the main object and intent of the section, but incidental thereto the words "has been or" and "is" were used, which constitute the conflict in the sections. Section 2 of the act simply directs how good time lost by

the prisoner for failing to comply with the prison rules may be restored. Section 3 fixes the time when the act shall go into effect, and specifies the prisoners who will be entitled to the benefits of the act, and also the class of prisoners to whom the act shall not apply. This being true, how can it be said that Congress intended that no force or meaning whatever should be given to this section?

"This act shall take effect and be in force from and after thirty days from the date of its approval, and shall apply only to sentences imposed by courts subsequent to the time that this act takes effect." This language is clear, direct, and positive. There is no uncertainty about it. Again: "Prisoners serving under any sentence imposed prior to such time shall be entitled and receive the commutation heretofore allowed under existing laws." This is equally clear, plain, and positive, and the entire section expresses the real intention of Congress. It shows in positive terms that it was not intended by Congress that it should be retrospective; that it applied to the future, and not to the past. This is a congressional act and must be interpreted according to the intention of Congress, apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of Congress. Wilkinson v. Leland, 27 U. S. 627, 7 L. Ed. 542; Oates v. National Bank, 100 U. S. 239, 244, 25 L. Ed. 580. When words occur in the statute which can be given no effect consistent with the plain intent of the statute, they must be rejected as without meaning. United States v. Stern, 5 Blatchf. 512, Fed. Cas. No. 16,389; Paxton v. Irrigation Co., 45 Neb. 884, 898, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Hilburn v. St. P. Ry. Co., 23 Mont. 246, 58 Pac. 551, 811; Gould v. Wise, 18 Nev. 253, 262, 3 Pac. 30; Edwards v. D. & R. Co., 13 Colo. 59, 62, 21 Pac. 1011; Henderson v. W. & P. Ry. Co., 81 Mo. 605, 607; Sedg. Con. Stat. (2d Ed.) 201.

As was said by Justice Brewer, in Long v. Culp, 14 Kan. 412, 414:

"It is also a rule of construction that, when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter, must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things." Wellsburg v. Panhandle T. Co. (W. Va.) 48 S. E. 746, 751.

Another well-settled rule of construction applicable to these cases is that, where there is an irreconcilable conflict between different parts of the same act, the last in the order of arrangement will control. Hall v. Equator M. & S. Co., Fed. Cas. No. 5,931; In re Richards, 96 Fed. 935, 939, 37 C. C. A. 634; In re Tune (D. C.) 115 Fed. 906, 911; Brown v. County Commissioners, 21 Pa. 37, 42; Hand v. Stapleton, 135 Ala. 156, 162, 33 South. 689; City of Westport v. Jackson, 69 Mo. App. 148, 153; Sutherland, Con. St. § 220.

One of Puffendorf's rules of construction is that:

"When we meet with a seeming repugnancy in the terms, conjectures are necessary to work out the genuine sense, by reconciling it if possible, to those terms that seem to be repugnant. But if there be a clear, evident repugnancy, the latter vacates the former." Pot. Dwar. Stat. 132.

Another rule is that "where laws are really repugnant, the judges should embrace that which is clear, in preference to that which is obscure." Pot. Dwar. Stat. 133.

In Reynolds v. McArthur, 2 Pet. 417, 434, 7 L. Ed. 470, Chief Justice Marshall, in delivering the opinion of the court, said:

"It is a principle, which has always been held sacred in the United States, that laws by which human action is to be regulated look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable."

We have thus far confined ourselves to the language of the act. Some stress, however, upon the argument by appellees, was laid upon the letter of the Attorney General addressed to the chairman of the judiciary committee of the House, requesting the passage of the act, and it is argued that the object and purpose of the law, as expressed by the Attorney General, supports the views contended for by appellees. This letter is as follows:

"Sir: Under the present practice with regard to the commutation for good conduct allowed United States prisoners, there is no uniformity whatever, and experience has shown the necessity for some modification of the statutes governing this subject. United States convicts confined in United States prisons, as well as in some local institutions, are allowed five days on each month of the term, without regard to its length. If confined in a state institution, however, which has a commutation system of its own, they are subject to the terms of that system. It thus happens that one class of United States convicts can earn but sixty days a year, even if the sentence is for ten years, while others, elsewhere confined, earn a much larger reduction. In order to correct this evil, and to place all United States prisoners on an equal footing in this respect, I submit herewith draft of a bill for an act regulating commutation for good conduct in the case of United States prisoners."

This letter is clear in its terms. It relates to the inequality of sentences under existing laws, and recommends that all federal prisoners should be placed on an equal footing. There is nothing in the letter indicating that it was to be applied to past cases, and the language used, by the ordinary interpretation of words, would be that it was to be applied to the future, and that all convictions and sentences of federal prisoners thereafter should be equal and harmonious in the allowance of the commutations of the sentences for good behavior, without reference to the local laws and institutions in which the prisoners should be confined. There is no expression in this letter in opposition to the views we have expressed. There is nothing in the history of affairs which was presented to Congress, when the statute was passed, that gives any aid in support of the construction for which appellees contend.

In United States v. Byers (D. C.) 127 Fed. 993, 998, will be found a letter written by Attorney General Knox prior to the passage of this act, addressed to the Attorney General of Pennsylvania with reference to the question whether or not the rule of commutation of sentences under the Pennsylvania act of May 11, 1901 (P. L. 166) is a "rule of credit" within the meaning of section 5544 of the Revised Statutes [U. S. Comp. St. 1901, p. 3722]. In the course of this letter it is said:

"The Pennsylvania act suggests another and more serious question—whether any commutation can have any application in our constitutional system to sentences previously imposed. Upon principle and authority, a commutation is, in effect, the exercise of the pardoning power, at least so far as pre-existing sentences are concerned. The power of the legislative department of the government to thus affect the action of the judicial and the prerogative of the executive has been questioned in many states"—citing several authorities.

The court, after quoting this letter in full, said:

"Since the foregoing letter was written, Congress has acted upon the subject, and has passed the act of June 21, 1902 * * * which now applies to all sentences imposed after July 21, 1902."

This expression of the court may be considered dictum. It is not referred to as authority, but tends to show the trend of thought that would naturally arise upon reading the entire act as to the intention of Congress.

It appears from the Congressional records that the question as to whether or not the law should apply to previous sentences was raised. Senator Hoar, chairman of the judiciary committee of the Senate, after the passage of the law, said:

"With the leave of the Senator from California, I should like to make one statement about the bill which has just passed. I received a great many communications from different parts of the country saying that it ought to apply to cases of prisoners sentenced heretofore, and undoubtedly that would be quite desirable, but there was a very serious doubt in the minds of members of the committee of the constitutional power of Congress to pass a bill of that sort which should apply to sentences heretofore imposed. Therefore the committee thought it unwise to include such a provision."

The orders and judgment of the Circuit Court herein appealed from are reversed.

AMERICAN SHEET & TIN PLATE CO. v. PITTSBURGH & L. E. R. CO.
PITTSBURGH & L. E. R. CO. v. AMERICAN SHEET & TIN PLATE CO.

(Circuit Court of Appeals, Third Circuit. January 30, 1906.)

No. 57.

1. TORTS—INJURY TO PROPERTY—INTERFERENCE WITH FIREMEN BY RAILROAD TRAIN.

While railroad trains must be run in a city with reasonable regard to the right of public firemen, as well as private citizens properly so engaged, to enter upon and cross with their apparatus the railroad track in order to put out a fire, a railroad company, in the regular operation of its road, cannot be held liable for loss resulting from what turns out to be an interfering use of its own property, unless it is actually notified or informed of the conditions which made such use an interfering one. To be a ground of liability such interfering use must be a willful one, or due to a failure to exercise due care.

2. SAME—FAILURE TO STOP TRAIN—KNOWLEDGE OF FIRE.

A railroad company cannot be held liable for a loss resulting from a fire in a city at night because one of its freight trains ran between the place from which firemen and others were preparing to run hose across the tracks to the burning building, even though the trainmen were signaled to stop by persons beside the track, where the fire was not visible to them, there was no hose upon the track which they should have seen,

and it is not shown that they heard or understood the signals, or knew or should have known of the existence of a fire.

3. SAME.

The engineer of a freight train on defendant's railroad, entering the city of Pittsburgh at night, stopped his train in compliance with a signal given by a person alongside the track, and was told that a building was on fire a very short distance ahead and that firemen were about to run a hose across the track. He could not quickly nor safely back nor cut his train because of another following close behind, and, after being told the situation, he at once pulled ahead and past the fire as rapidly as possible. It appeared that in doing so he exercised his best judgment, and acted promptly, and there was no evidence that he acted in willful or wanton disregard of the rights of others. *Held*, that the interference with the operations of the firemen by the passing of the train, under such circumstances, did not render defendant liable to the owner of the burning property.

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

Thomas Patterson, for plaintiff.

A. Leo Weil, for defendant.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The case in the court below was an action brought by the American Sheet & Tin Plate Company against the Pittsburgh & Lake Erie Railroad Company, to recover damages to the property of the firm, which was destroyed by fire on the night of January 27, 1904. The case was submitted to the jury, and from the judgment entered upon a verdict in favor of the plaintiff, writs of error were sued out by both plaintiff and defendant. Assignments of error have been filed in both cases, and the same were separately argued before us.

The property known as the Monongahela plant of the Tin Plate Company, was situated on the south side of the city of Pittsburgh, bounded on the north by the Monongahela river, and on the east by South Sixteenth street. The right of way of the defendant railroad company, running east and west, bounds a portion of the property on the south, and extends through a portion of the property, towards Sixteenth street, a portion of the property lying south of the railroad, and having upon it some of the mills of the plaintiff company. The buildings, however, that were burned, were situated upon that portion of the property which lay between the railroad and the river; the distance between the tracks and river being about 300 feet. Near the railroad, south of it, and parallel thereto, was Muriel street, and back of Muriel street, and parallel to it, a square away, was Carson street. Sixteenth street crossed the railroad at right angles, and extended to the river. So, also, did Thirteenth street. The so-called Fifteenth street crossing was a way maintained by the company across the tracks of the railway company, on the line of what was formerly Fifteenth street, but for a long time abandoned as a city street.

On January 27, 1904, at about 10 o'clock in the evening, a fire broke out at the plaintiff's said plant in the oil house thereof, which is located on the portion of plaintiff's property lying between said rail-

road and the river. An alarm of fire was at once sent to the public fire department of the city of Pittsburgh, which responded promptly, so that, in a few minutes thereafter, a fire company of said department arrived at the plant of the company, with their apparatus and hose, at or near the so-called Fifteenth street crossing, and shortly thereafter, another company with their hose arrived at or near the Thirteenth street crossing. The firemen and others at said Fifteenth street crossing, had laid the hose through the "hot mills" of the plaintiff company, on the south side of the railroad, and were preparing to lay it across the track of the company, for the purpose of conveying water to the fire, when a locomotive, with a freight train attached, of the defendant corporation, was seen approaching from the west, below Thirteenth street. There is the testimony of three or four witnesses that they ran toward the approaching train, signaling it to stop, by waving their hands or hats; one witness saying that he seized a lantern from a switch block, and waved that, going towards the approaching train. There is also testimony that some of these signals were given before the engine passed Thirteenth street. There is some conflict of testimony as to how these signals were given, and as to whether the lantern signal was given to the train first approaching, or to one that afterwards followed it, and as to which no complaint is made. However, for the purposes of the case, as we view it, it must be conceded that attempts to signal the train were made in the way described. In the cab of the engine were the engineer, fireman, and head brakeman of the train, which was a long one. These men all testify that they neither heard nor saw any signals, as described by plaintiff's witnesses, saw no fire on plaintiff's premises, and neither heard nor saw anything that would suggest to them that such a fire existed, and that they were absolutely without information in regard thereto. It is in testimony that the engineman of the company that first arrived at the Fifteenth street crossing, inquired of the plaintiff company's employés, where the fire was, and, although they were looking for a fire, as it was their duty to look, they saw nothing to direct them, but a reflection upon the surface of the river. It was in testimony that owing to the glare of the furnaces in the works along the bank of the river, at night, reflections on and illuminations of the surface of the same were of frequent occurrence; that along the right of way of the railroad company, owing to the number of men employed in the various industries of that locality, there were persons constantly passing to and fro, which, together with the noise of the mills, created much confusion along the route occupied by the right of way of the railroad company. Just before the engine arrived at the Fifteenth street crossing, the engineer testifies that he saw for the first time, by the light from the furnace, the door of which had just been opened, a man running alongside of the engine, and signaling him to stop; that he at once applied the emergency brakes, and stopped the train within a few car lengths, but not until the engine, by the momentum of the train, had passed the Fifteenth street crossing. The testimony of the fireman and brakeman corroborates that of the engineer, as to this being the first signal or warning observed by any of them,

and they all testify that they did not then know that the signal was given because of a fire, but supposed that some one had been run over.

After the train was at length stopped in the manner just described, there is conflict of testimony as to what occurred between the engineer, who was in control of the train, and the employés and others who spoke to him in regard to the fire. The night superintendent of the works testifies that he informed the engineer of the existence of the fire and of the necessity of putting the hose across the track, and asked that he would back his train away from the crossing, or cut it and pull out, so as to clear the same; that the engineer did not answer him, but turned around at last and said, "Pull out," ignoring his remonstrance regarding the time required to pull the entire train out, and the danger resulting therefrom. He testifies that from the time the engine stopped until it started again was about 2 or 2½ minutes. On the other hand, the engineer testifies that after he had put on the emergency brake, thinking that some one had been run over, and had stopped the train, he got down to the ground, and there met a man whom he did not know, but who is now identified as Marshall, the night superintendent, who said, "'Back up! back up!' I said 'What is the matter?' He says, 'A fire.' I said, 'I can't back up, but I'll cut, or do whatever you want.' He said, 'If you can't back up, get out of here,' so I got up on the engine, on the right side, and started." He says he started the engine as fast as he could, in order to get out of the way, and ran past a red block, between Twenty-Second and Thirty-Fourth streets, as he knew that if he stopped then his train would still obstruct the crossing at Fifteenth street. He therefore told the fireman to take the engine down to the mouth of the tunnel, and stop; he getting off in order to wait for a white block and then walk up. In this he is fully corroborated by the fireman. He testifies, also, and the fact is not disputed, that another freight train was following close behind, and this seems to have put it out of the question, that he should have backed the train, when requested so to do. He further testifies that when he stopped his engine near the Fifteenth street crossing, he did not see any fire, and there is no evidence that at that time it was flagrant. The fireman, who heard the conversation between the engineer and Marshall, says that the engineer said, "I can't back up until my flag goes out; there is another train following me close," and that he said, "I will cut the train for you," but that Marshall said, "No, that will take too long; go ahead and get out of here"; that he then asked if there was any hose on the track, and he said, "No." The brakeman, who was in the cab and was also present at the conversation between the engineer and Marshall, testifies:

"When I got off the engine, there was a man standing there, and he said, 'Back up! back up!' and about that time the engineer was on the ground. I says, 'we can't back up; there is another train following us close.' The engineer started around the front end of the engine, and I followed him around, and also had a conversation with a man on the right side of the engine, and he wanted us to back up. The engineer said we could not; there was a train following us close, but he would cut the train. He said, 'That will take too long; go ahead and get out of here,' and he got on the engine and went."

Bosler, a disinterested witness, a brakeman of the Allegheny & South Side Railroad, who was present at the time of the fire, saw the defendant's train coming from Thirteenth street, "using steam," and as he was walking up toward the Fifteenth street crossing, he met a fireman, and told him that he "had better flag this engine, or he will come by you"; that "the fireman ran down and caught him about 60 feet this side of Fifteenth street, and flagged him. He got on the Whitehall track, and ran alongside the engine. He did not get in front of the engine. The emergency brake was put on as quick as he was flagged." He walked up around the engine and saw a gentleman with glasses on, superintendent of the Tin Plate Company, and heard him ask the engineer if he could not back up. The engineer told him he could not, as there was a train following him close; that the flagman would not have time to get back. He said, "I will cut them for you." The superintendent said, "That will take too long." "The very words he used, 'Get to hell out of here.' The engineer then said 'Is there any hose laid?' He said 'No,' and the engineer got up on his engine and pulled out."

These are the essential portions of the evidence upon which the court was asked to charge the jury that, under all the evidence, their verdict should be for the defendant; the refusal of which request by the court is assigned for error. It is also the ground for the motion made by defendant's counsel, for judgment, non obstante veredicto, upon the whole record, under authority of an act of the General Assembly of the state of Pennsylvania, approved April 22, 1905, authorizing such a motion, and appeals from the judgment so entered, and the entry of the proper judgment by the appellate courts.

It is not denied that a natural person, or a corporation by its corporate agencies, may so interfere with the rights of another, growing out of the emergency of a fire or conflagration, of or on such other person's property or premises, as to make him or it liable for injury and damage directly resulting from such interference. Actionable interference of this kind is the violation of a fundamental social duty, and is within the definition of a common-law tort. Private property may be entered by the public authorities, or by the person, or his agents, who is owner of a burning property, for the purpose of using reasonable means to save the same or extinguish the fire, and undoubtedly in the case now before us, the plaintiff's employés, as well as the public firemen, had the right to cross the right of way and tracks of the defendant company, for the purpose of leading the hose from the source of supply to the burning buildings. In such a case, the exclusive control of private property is subordinate to the exigencies of public safety and private necessity, and legal sanction is given in such a case to the requirements of morality and social duty. That right, however, is not in question here. The questions with which we are here concerned, are:

(1) Whether the defendant was guilty of conduct, amounting to a tort, in not stopping its train that was traversing its own right of way and tracks, unless informed in some manner that the property in question was burning, and in danger of being destroyed, and that the

train, by proceeding, would interfere with the efforts being made to save the same.

(2) Whether, after the train had been stopped and, so far as the testimony shows, those conducting it were for the first time informed of the existence of the fire, and that it was necessary that the hose should be laid across the track, the defendant can be held responsible as for a tort, because the engineer, in the exercise of his best judgment, under the circumstances, decided to go ahead, and pull the train as quickly as possible past the crossing, instead of either backing it or cutting it.

As to the first question, we have to remark that we accept the broad proposition, which counsel for defendant in error says is the basic principle on which the case was tried in the court below, that trains must be run with reasonable regard to the right of public firemen, as well as private citizens properly so engaged, to enter upon and cross, with their apparatus, a railroad track within the city of Pittsburgh, in order to put out a conflagration. But it is neither sound law nor good morals, that a railroad company, in the regular operation of its road, should be held liable for loss resulting from, what turns out to be, an interfering use of its own property, unless it is actually notified or informed of the conditions which make such use an interfering one. To be a ground of liability, such interfering use must be a willful one. Conflagrations along the right of way of a railroad company are not of such frequent occurrence as to make them, as it were, normal conditions surrounding the running of its trains. Such conditions are exceptional, and actual knowledge of the same must be affirmatively shown before liability can be predicated thereon. Not only must the knowledge be brought home to those in charge of the train, that a fire is in existence near its right of way, but also, that the running of a train past it, or the stopping of one in front of it, will interfere with the work of extinguishment, and increase the public or private danger. Moreover, the use of the property of a railroad company, is a quasi public use, and the proper operation and running of its trains, in the interest of the public and for the promotion of its safety, are required to be conducted with regularity upon prearranged plans and schedules. It would be intolerable and unjust, if railroad companies were compelled, at their peril, to stop trains, whether passenger or freight, every time an unauthorized signal was given them so to do, or even every time those conducting them were aware that a fire existed along their route, whether from personal observation or from information thereof otherwise conveyed, unless there was reason also to know that, by keeping on, they would interfere with means used and efforts made for the extinguishment thereof. They would have no right to run across hose, observed, or which ought to have been observed, lying across the tracks for the purpose of extinguishing a fire, and they must be held to the duty of exercising due care in proceeding, where a fire is visible near their route, or where they have information otherwise that it exists; but in all cases, knowledge of the conditions from which the exigency arises, or facts from which it may be imputed, must be shown before liability for not acting in accordance with such exigency, can attach.

In the case before us, not only is it not shown that those who were in the cab of the engine saw, or could have seen, the fire in question, or that they were otherwise informed of its existence, but it is not affirmatively shown that the signals said to be given as the train approached were seen or heard by those in the engine cab, much less understood by them. It is undisputed that at the time the engine passed between Thirteenth and Fifteenth street crossings no fire was visible or flagrant, so as to attract attention. It had not yet progressed to that stage. But, conceding that the signals made by the waving of hands or hats, ought to have been seen, there was nothing in the situation to connect them with the existence of a fire, and we cannot impute knowledge to those on the engine, not only of the hands being waved along the side of the track, on a dark night, but also knowledge of the intent with which such signals were given. This is the essence of the tort charged, and the presumption of innocence to which the defendant is entitled must be overcome by evidence sufficient for that purpose. That plaintiff understood the only ground upon which liability of the defendant could be predicated, is shown by the averment in the declaration or statement of claim, not only that signals were given, but that the trainmen "saw and understood" said signals. There is no evidence at all, of the truth of this necessary averment of fact, certainly none "of such a character that it would warrant the jury to proceed in finding a verdict" in favor of the plaintiff. It is always the duty of the trial court to decide, "whether, conceding to all the evidence offered the greatest probative force, which, according to the law of evidence, it is entitled to, it is sufficient to justify a verdict." Commissioners, etc., v. Clark, 94 U. S. 284, 24 L. Ed. 59; Pleasants v. Fant, 22 Wall. 121, 22 L. Ed. 780.

The signals testified to were not the authorized railroad signals by which the movements of trains are controlled, and we are not prepared to go so far as to say that defendant is obliged, at its peril, without regard to circumstances, to stop its trains whenever such unauthorized signals are given. We have carefully read the cases on this point referred to by counsel for the plaintiff below. We do not, however, think that any of them controvert the principle which governs our decision in this case; i. e., that it must be shown, that those conducting the train knew, or ought to have known, what the situation was, in order to make the otherwise regular running of the train an unlawful interference with plaintiff's right.

Metallic Comp. Casting Co. v. Pittsburgh R. R. Co., 109 Mass. 277, 12 Am. Rep. 689, cited by counsel for defendant in error, and apparently much relied upon, was tort against a railroad corporation, for negligently severing a hose, which was laid across their track in Somerville, and thereby cutting off the supply of water to a fire which was consuming plaintiff's factory. Chapman, Chief Justice, in stating the facts of the case, says:

"At that time, a freight train came along from the west, and though its managers had sufficient notice and warning, and might have stopped, and had no occasion for haste, they paid no attention to the hose, but carelessly passed over it with their train, and thereby severed it and stopped the water. * * * They did not delay to give time for uncoupling the hose which would have delayed them but a few minutes."

The case then goes off upon the right to lay the hose across the defendant's tracks, which is not here denied, and upon other points not involved in the case at bar.

Inhabitants of Hyde Park v. Gay, 120 Mass. 593, turned upon a peculiar question of Massachusetts law not here involved. The case was tort for running over a discharging fire hose laid across a railroad track. The closing paragraph of the short opinion by Colt, J., shows the special point upon which this case turned:

"To the defendant's objection that the jury was permitted to find for the plaintiff, although the managers of the train were free from any fault, except that of running a train on Sunday, it is sufficient to say that the instructions given, plainly required the jury to find, that the act of running the train on the Lord's Day, was the distinctive and direct cause of the injury complained of, and this is enough to support the action."

In Mott v. Hudson River R. R. Co., 1 Rob. (N. Y.) 585, it appears that a freight train, upon the defendant's tracks when approaching a fire in New York City, was fully informed of the existence of the fire, and slowed down accordingly, but it nevertheless ran over hose laid across the track, in full view and after full warning. In that case, of course, the defendant company was properly held liable.

So in Traction Electric Co. v. McCaskill, Supreme Court of Arkansas, 86 S. W. 997, a fire in a city was burning brightly in the nighttime. The street along which the trolley cars ran, was brilliantly illuminated from the burning building, which was nearby. A hose four or five inches in diameter, in plain sight, was stretched across the track. A car of the appellant company ran over the hose and cut it. The court said:

"There was no reason why the motorman could not have seen it for a long distance. He denies seeing the hose, but tells of watching the fire when he came near it."

This is a clear case where, with full information as to the situation, the defendant's conductor so carelessly ran his car, as to do the damage in question. We are of opinion, therefore, as to the first question, that there is no evidence in this case, sufficient to require the same to be submitted to the jury, that defendant's servants were in any manner informed of the existence of the fire on plaintiff's property, or had any notion, from observation, or otherwise, of a situation which required them to stop, or demanded extra caution on their part, until after the stoppage of the train at or near the Fifteenth street crossing.

This brings us to the second question; that is, whether, after the train had been stopped, there was anything in the conduct of those managing it, to render defendant liable for the loss occasioned by the fire. After what has been already said, it must be taken as true, in considering this question, that those who were on the engine had no information as to the existence of the fire, until after the engine had been stopped in the manner described.

There is no evidence of anything said or done by the engineer, after he was informed of the situation, or those with him, which shows wanton or willful disregard of the rights of the plaintiff, as is charged

in the declaration. The situation depicted by the testimony, was one requiring from the engineer the prompt exercise of his best judgment as to how he should proceed. Conceding, as we must for our purpose, that all the testimony be taken most strongly against the defendant, it results simply in this: That the engineer, after being informed of the fire, and consulting with those interested in its extinguishment, decided that he would neither back nor cut the train, but would pull out as promptly as he could. This decision was arrived at and carried into execution promptly; only 2½ minutes having elapsed, according to the plaintiff's witness, the superintendent of the works, from the stopping of the engine until he had started to go ahead again. His refusal to adopt either of the two other courses said to have been proposed to him by the superintendent, viz., to back his train or to cut it, was not an arbitrary and wanton refusal, but one founded upon reasons, which may well have been, under the circumstances, properly controlling. It is admitted that another freight train was closely following the one in question, and to have backed, would have required the precaution of flagging for a considerable distance from the rear of the last car. The time necessarily required for this operation, might well have appeared to the engineer as long as that required to pull the train past the scene of the fire, besides being an operation involving more or less danger in its execution. To have cut the train at Fifteenth street and at Thirteenth street, would also have involved the flagging of the train, to prevent a collision, as also it would have occupied considerable time, not only in pulling the cars apart at two points, but in disconnecting the air brake system with which the train was equipped. To pursue this course, also involved danger, not only of collision by the following train, but a danger from exposure of the cars, and their freight, left standing upon the track, to a fire which might become a conflagration. Looking at all the evidence, we cannot see but that, under the circumstances, the decision of the engineer to pull out was a wise and prudent one. However that may be, he executed it promptly, and by his conduct in running past a red block signal to the tunnel, he showed an appreciation of the situation, and a desire to avoid, as far as possible, interference with the work of extinguishing the fire. He was confronted by a situation which demanded prompt action, not only with reference to the burning property of the plaintiff, but with reference to the preservation and safeguarding of the valuable property under his charge. Defendant cannot be held liable for the consequences of an honest, though mistaken judgment in such an emergency. There was no "willful and wanton refusal," as necessarily averred in the declaration, to do or to refrain from doing something, the doing of which, or refraining from which, necessarily interfered with plaintiff's use of appropriate means to protect his property. In this case defendant's servants acted promptly in removing the obstruction caused by the train; the only charge being that they might have removed it in a different way, more to the advantage of the plaintiff. It is not clear to us that this is so, but if that were clearly established, we would still be of the

opinion that there was no evidence in the case upon which a jury could have properly proceeded to find a verdict for the plaintiff.

For these reasons, we think the jury should have been instructed to render a verdict in favor of the defendant. Also, that the motion made by defendant's counsel, under authority of the act of the General Assembly of the state of Pennsylvania, of April 22, 1905, for judgment non obstante veredicto upon the whole record, should have been granted. The judgment below is therefore reversed, with directions to the court below to enter judgment in favor of the defendant.

The decision arrived at in this case, renders it unnecessary that we should consider the writ of error sued out by the American Sheet & Tin Plate Company against the Pittsburgh & Lake Erie Railroad Company, and the same is hereby dismissed.

CINCINNATI, N. O. & T. P. RY. CO. v. MORGAN COUNTY, TENN.

(Circuit Court of Appeals, Sixth Circuit. February 24, 1906.)

No. 1,432.

INJUNCTION—LOCATION OF GRADE CROSSING.

A court of equity is without jurisdiction to enjoin a county court of a county of Tennessee, which is vested by statute with discretionary power in the location and construction of highways, from locating a grade highway crossing over the tracks of a railroad at suit of the railroad company, unless a taking of property which is essential to the operation of the railroad or other irreparable injury to the company is shown or that the proposed action will be in violation of some law.

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

Edward Colston and Chas. R. Head, for appellant.

T. A. Wright and J. M. Davis, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill filed to prevent the county of Morgan, one of the counties of Tennessee, from establishing a highway crossing, at grade, over the tracks of the complainant railroad company at or near the village of Oakdale in said county.

At the locus in quo the Emery river and railroad run parallel to each other. To reach the railroad at Oakdale, Emery river has to be crossed, and this had theretofore been done at a ford. Though generally shallow and fordable, Emery river is a mountain stream, and when swollen by unusual rains becomes unfordable. To give a large part of the county more convenient access to the village of Oakdale and to the railroad station at the village, the county contracted for an iron bridge over Emery river. This bridge was in course of erection when it was sought to change the course of the road between Emery river and Oakdale, with a view to a proper approach to the new bridge. The road commissioner for the district and the road committee accordingly reported that the old road crossing Emery river should be so changed as to run from the bridge to the

railroad, which should be crossed at grade. This old road had theretofore gone under the railroad at a point where Mudlick creek is crossed by a railroad bridge, about 100 feet above the proposed crossing at grade. But this crossing had been found at times impassable, because the bed of the creek was the road under the bridge, and the creek was subject to rises which made it at times unsafe to go under the bridge. In such circumstances the public had been in the habit of crossing at grade about 100 feet below the bridge. This old place of crossing is the one the road commissioner has recommended for a permanent crossing. The appellant company appealed from the road commissioner's action to the quarterly court and said report was due to be filed and heard on Monday, January 4, 1904. On January 2d this bill was filed, and, upon its averments, together with certain affidavits, the county court was enjoined from proceeding with the matter. The case came on to be finally heard in the Circuit Court upon the pleadings and evidence and upon a report of a special master as to the feasibility of a crossing at grade, when the court found for the county and dismissed the bill. From this decree an appeal has been allowed.

A great book of testimony has been taken upon the matter of whether under all the conditions it would be best that the county should cross complainant's tracks at grade or by an overhead bridge, or by going under the Mudlick bridge as heretofore, or by providing an under way at some other point. Much evidence has also been had as to how Morgan county can best provide a road which shall approach the new bridge where it now stands or whether it would not be better to build the bridge at some other site, where a better crossing of the railroad tracks might be made than that proposed. The learned counsel for the railroad company has not challenged the right of the county to provide for highways crossing its tracks. This they concede. But whether conceded or not there is nothing more obvious than that a railway company holds its right of way subject to the right of the sovereign to cross its right of way whenever the public convenience shall require the opening of new highways or the changing of the course of old ones. 8 Am. & Eng. Encyc. p. 377, and cases cited; New York, etc., Rd. Co. v. Drummond, 46 N. J. Law, 644.

The point upon which appellant's counsel makes the case turn is upon the power of the court of equity to prevent a grade crossing, and to require that the crossing shall be either under or over the track of the railway; that there is no statute in Tennessee forbidding grade crossings is conceded; that as a rule the highways of that state do cross at grade is also conceded or proven. In Tennessee the jurisdiction over questions of opening, closing, changing or restoring roads belongs to the quarterly or county court. The initiative is a petition addressed to the road commissioners of the district in which the road lies, with notice to persons whose interests will be affected. The road commissioner then fixes a day when he will attend and act upon the matter. This recommendation he reports to the county court, together with an assessment of damages for property taken.

The matter is then considered by the county court through a committee whose action must be assented to by a majority of the justices sitting. This is final unless appealed. But any interested party is allowed an appeal to the Circuit Court and from the judgment of the Circuit Court error proceedings lie to the Supreme Court.

The complainant after getting the matter into the county court by its appeal desisted from further defense there and appealed to a court of equity to stay further proceedings before anything of a definite character had been done. This matter of changing an old road or opening a new one is one which primarily lies within the political or legislative powers which belong to a Tennessee county court. That court is composed of the justices of the peace for the county, and is often alluded to by the Tennessee Supreme Court as a "Miniature Legislature" in respect to matters pertaining to the administration of purely county affairs. Whether a new road shall be opened or the course of an old one changed, are questions which rest in the discretion and judgment of that body. The conclusion is one which must depend upon consideration of public convenience, the ability of the county to incur the expense being one which must largely determine the conclusion. Acts Tenn. 1899, p. 863, c. 368, § 6; Wood v. Tipton County, 7 Baxt. (Tenn.) 112, 32 Am. Rep. 561; Gilson v. State, 5 Lea (Tenn.) 161; State ex rel. v. Justices of Wayne County, 108 Tenn. 259, 262, 67 S. W. 72. The exercise of a power, which rests in discretion and judgment, cannot be coerced. Horton v. Mayor of Nashville, 4 Lea (Tenn.) 39, 48, 40 Am. Rep. 1; Dillon on Mun. Corp. § 753.

It may be that the crossing of a railroad at grade might, under certain circumstances, be absolutely destructive of the franchise to operate a railway, and the damage so resulting irreparable at law. In such a case, if one should arise, a court of equity might find itself able to grant relief under the well-recognized head of equity jurisdiction in respect of damages incapable of redress by an action at law. But we have been unable to discover any authorities of moment where a court of equity has intervened to restrain a crossing unless there has been a taking of property for the purpose which was forbidden by statute as necessary to the enjoyment of the general franchise. Such was the case of Albany Northern Rd. Co. v. Brownell, 24 N. Y. 345, and Smethport R. Co. v. Pittsburg Rd., 203 Pa. 176, 52 Atl. 88. We have been referred to the case of Franklin Turnpike Co. v. County Court of Maury, 27 Tenn. 342, and Turnpike Co. v. Davidson County, 106 Tenn. 258, 61 S. W. 68, cases where the action of county courts of Tennessee, in authorizing the opening of particular roads, was enjoined. Both were cases of turnpikes opened in violation of the charter rights of turnpike companies, and the injunction granted because of the impairment of the contract of a chartered company. The most that has been made out in this case as a reason for enjoining a grade crossing is that such a crossing will to a certain extent inconvenience the business of the railroad company. The crossing is not through the yards or terminals of the company, but at a place south of its yards, but close enough to be

sometimes used for switching purposes when the trains are of unusual length. The extent of such use is matter of great conflict and wide difference of opinion as to the amount of inconvenience resulting. That a grade crossing is more dangerous to the public and to the railway company may be conceded. Still it would take a more than ordinary case to justify a court of equity in substituting its judgment for that of the semilegislative body intrusted with the whole subject of public highways.

The case of the Wabash Rd. v. City of Defiance, 52 Ohio St. 263, 10 N. E. 89, and upon writ of error in the Supreme Court of the United States 167 U. S. 88, 102, 17 Sup. Ct. 748, 42 L. Ed. 87, was a case which, in one aspect, involved the power of a court of equity to restrain the action of a municipality from causing the removal of an overhead street crossing and the making of a crossing at grade. Mr. Justice Brown, speaking for the court, after referring to the modern tendency to avoid grade crossings, said:

"But however this may be, we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised, or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The question before us is simply whether the council had the power to make the change, and of this we have no doubt."

The case of the Lake Shore & M. S. R. Co. v. C. W. I. Rd. Co., 97 Ill. 506, and Illinois Central Rd. Co. v City of Chicago (Ill.) 30 N. E. 1044, 17 L. R. A. 530, were much stronger applications upon the theory of irreparable injury than that made out here; but in both the court declined to enjoin the opening of streets; in one instance through the yards of a railway company.

The right of the general public, when exercised according to law, to make new highways, or to change the course of old ones as the convenience of the public may require, should not be restrained by any mere inconvenience to be borne by the railway whose track is crossed. To the extent that property is actually taken or damages directly inflicted the law provides for compensation. It is not our province sitting as a court of equity to enter into a mere balancing of convenience and inconvenience. The county court will not exceed its power and authority if upon a consideration of all the reasons which should move the discretion of such a legislative body it shall permit a grade crossing. Manifestly no error was committed in denying relief under the pleadings and proofs in this case.

The decree is accordingly affirmed.

SHIELDS v. NORTON.

(Circuit Court of Appeals, Second Circuit. January 18, 1906.)

No. 78.

1. EVIDENCE—EXPERTS—KNOWLEDGE OF FACTS.

Where, in an action for breach of a contract for the laying of water pipes, a witness, qualified as an expert, testified that he was familiar with the work done, had seen it going on from time to time, knew the general conditions existing in the trenches, the dimensions of the trench in question, that he had removed a portion of the excavated materials, and knew the character of the excavation necessary for laying such pipe; and, on redirect examination, his attention was called to the actual conditions and the quantities of earth and rock taken from the particular trench and used in backfill, he was properly allowed to testify as to the average cost of the performance of the balance of the work which plaintiff had not been permitted to do, though he admitted on cross-examination that he did not know the quantities of earth and rock taken from the trench or used in backfill or the details of the work.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2331.]

2. SAME—DAMAGES—BREACH OF CONTRACT—CHARACTER OF PROOF.

Where, in an action for damages for breach of a contract for the laying of water pipes, the difficulty of proving the actual damage by proof of all the conditions of quantity, location, and classification of work and materials, resulted from defendant's wrongful act in refusing to permit plaintiff to complete his contract, plaintiff was entitled to prove his damage by expert estimates.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2342.]

3. APPEAL—QUESTION FOR COURT—SUBMISSION TO JURY—HARMLESS ERROR.

Where a contract required that plaintiff should lay certain water pipes in a street "including excavation, backfill, and all connections," plaintiff was not bound to pay the expense of having the city authorities cut off the water in order to make the connections, and hence defendant was not prejudiced by the court's error in submitting such question to the jury.

4. EVIDENCE—PURPOSE—BEST AND SECONDARY EVIDENCE—WRITTEN CONTRACT—EXPLANATION.

In an action for breach of a contract for the laying of water pipes, defendant testified on direct examination that he had such contract and offered letters to fix its date. He also testified to a conversation with plaintiff about the work which his contract did not cover, and his understanding as to what certain third persons would allow him to do beyond a certain point. *Held*, that questions asked him on cross-examination as to his understanding of the way in which he was obliged to carry on the work merely to require defendant to explain his testimony in chief, and show what he understood to be his rights and obligations under the contract, and what action he proposed to take, was not objectionable, as not the best evidence.

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

See 132 Fed. 873.

This cause comes here on writ of error to review a judgment entered upon a verdict of a jury in the United States Circuit Court for the Southern District of New York, in favor of the defendant in error (plaintiff below), for the sum of $5,119.51, damages and costs.

L. L. Kellogg, for plaintiff in error.
Donald McLean, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Prior to June 23, 1900, the defendant entered into a contract with John B. McDonald for the building of a portion of the Rapid Transit Subway for the city of New York. On said day the plaintiff wrote the defendant the following letter:

"Mr. John Shields—Dear Sir: I will lay the water pipes on the Boulevard between 104th and 125th Sts. for the following prices: Laying 20" pipe including excavation, backfill and all connections for the sum of $2.10 per linear foot. For laying 20" pipe only with connections and not including excavation or backfill $1.25 per linear foot. * * * This does not include rock excavation or asphalt paving, if rock excavation is to be made I shall do the same for $3.50 per cubic yard. All pipes and specials to be delivered alongside the trench.

"Yours truly, William F. Norton."

The defendant replied on July 18th, saying:

"Your proposal dated June 23d, for laying twenty-inch pipe including excavation, backfill, and making all connections and restoring street surface for the sum of two dollars and ten cents ($2.10) per lineal foot complete, is accepted."

After the plaintiff had done a portion of the work, he stopped on account of lack of pipe, and some time afterwards he found the defendant's workmen engaged in carrying on the balance of the work. Thereupon, the parties entered into a new contract for another portion of the work at $2 per linear foot, and plaintiff, because of defendant's failure to provide pipe, after having commenced the work, again stopped, and defendant again proceeded with the work, and refused to allow the plaintiff to resume operations. Thereupon the plaintiff sued the defendant, claiming as damages by reason of said refusal the profits lost, amounting to $3,998.47, being the difference between the contract price and what would have been the actual cost of the work if plaintiff had been permitted to perform the same. The jury rendered a verdict for the plaintiff for the full amount of his claim. The only questions before this court relate to the action of the court below in admitting certain evidence, and in leaving to the jury a question as to the construction of said contract.

To the admission of the testimony of one Smith, called to give an estimate as to the fair cost of performing the balance of the work which the plaintiff was not permitted to do, error is assigned, on the ground that said testimony was not predicated upon any basis of hypothetical or actual facts. That the witness was abundantly qualified as an expert is not questioned. He was familiar with the work done, he had seen it going on from time to time, he knew the general conditions existing in such trenches, and the dimensions of this particular trench, he had removed a portion of the excavated materials, and he knew the character of the excavation necessary for laying such a pipe.

On cross-examination he admitted that he did not know the quantities of earth or rock taken from the particular trench in question, or used in backfill, or the details of the work, or the actual conditions

existing in this particular trench. But upon his redirect examination his attention was called to said actual conditions, and he then stated that the prices given by him would apply to such a trench, and would represent the full average cost under such conditions. The testimony of the witness was therefore relevant as expert testimony, as to the average price of such work, based on conditions admitted to be correctly stated as to its average cost. The objections raised go only to the weight of the evidence, not to its admissibility. The familiarity of the witness with the actually existing conditions qualified him to take into consideration the elements of proportion of rock and earth and the general character of the work. That it was impracticable to furnish the best evidence of actual cost by exact proof of all the conditions of quantity, location, and classification is not the fault of the plaintiff. It is one of the risks which defendant assumed when he wrongfully broke the contract. As the difficulty of proving the actual damage resulted from the wrongful act of the defendant, he should not be permitted to reap an advantage therefrom by requiring that class of proof which by reason of his wrongful act the plaintiff has been unable to obtain. Lincoln v. Orthwein, 120 Fed. 880, 57 C. C. A. 540; Allen v. Field, 130 Fed. 654, 65 C. C. A. 32. In such a case "it is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out. But still, proof of the cost of taking out that which had been mined and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore." Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814.

The next exception relates to the action of the court in leaving to the jury the question whether, under the contract, the plaintiff was required to pay for shutting off the water in order to make the connections required by the contract. The contract, inter alia, provided that the plaintiff should lay the pipe, including excavation, backfill, and all connections. The defendant claimed that this included the expense of having the city authorities cut off the water. Plaintiff claimed that such expense was not included, that it was not customary to include it, that defendant had, in fact, paid it in this particular case. The court submitted this question to the jury as a mixed question of law and fact, and capable of either construction, and held that the ambiguity was to be interpreted by the jury, in view of the situation of the parties and the construction put upon the contract by their acts, and in view of all the surrounding circumstances. The court is of the opinion that under the express provisions of the contract the plaintiff was only required to make the connections after the pipes had been put in such a condition that the connections could be made. The action of the court, therefore, was not prejudicial to defendant.

The third point argued is based on the following assignment of error:

"Nineteenth. The court erred in permitting the witness John Shields on his cross-examination to answer the following question: 'Q. Did the Rapid Transit have a right under your contract to make you either tunnel or

take out pipes?' And to which question the following answer was given: 'A. Not the pipes, they had the right to make me tunnel or to make the open cut.' 'And also the following question: 'Q. Isn't it a fact that your contract for building the subway had no special reference to pipes at all, except in a general clause that you were required in constructing the subway to remove all sewers, water pipes, gas mains and support them or relocate them as was necessary to carry on the work that you had in carrying on the subway?' And to which question the following answer was given: 'A. Now, there seems to be a little misunderstanding about this pipe business on top of this subway. In the first place, from 125th street— I had a right to move the pipes or do anything that required me to do under the contract as I understood it.'"

It is argued that the reception of this testimony was reversible error because it "expressly called for the terms and conditions of a written instrument, which was itself the best evidence as to what the plaintiff in error (defendant) was required to do thereunder." The exception on which this assignment is founded and argued appears to be due to a misconception of the purpose for which this evidence was admitted. It was not admitted to show the terms of the written contract between the Rapid Transit Company and the defendant.

On his direct examination defendant had testified that he had such a contract, and had offered certain letters in evidence for the purpose of fixing its date. He had also testified to a conversation with plaintiff about the work which his contract did not cover, and his uncertainty as to what the rapid transit people would allow him to do beyond a certain point. Having thus opened the subject, he was cross-examined thereon, and in the course of said examination he was asked his understanding of the way in which he was obliged to carry on the work. Manifestly, the questions were asked merely for the purpose of requiring the defendant to explain his testimony in chief, and to show what he had understood to be his rights and obligations under said contract, and what action he had proposed to take.

The judgment is affirmed.

NATIONAL SALT CO. v. INGRAHAM.

(Circuit Court of Appeals, Second Circuit. January 17, 1906.)

No. 44.

1. BILLS AND NOTES—CERTIFICATES OF CORPORATION—NEGOTIABILITY.

Certificates of indebtedness of a corporation containing an unconditional promise to pay to the payee, or order, a certain sum of money, at a time capable of exact ascertainment, contain all the requisites of negotiable instruments, and their negotiability is not impaired by the fact that by their terms the maker may pay them before maturity.

2. SAME—ACTION—DEFENSES.

The fact that a purchaser of negotiable certificates of indebtedness issued by a corporation had notice that they were issued in payment for the stock of another corporation, which it had power to buy, does not charge him with notice that the transaction was in violation of an anti-trust law of the state, nor put him on inquiry as to its legality, and in the absence of actual proof that he purchased mala fides the corporation is not entitled to show such facts as a defense when sued on the certificates.

3. JUDGMENT—MATTERS CONCLUDED—TRUSTEE DEFENDANT AS REPRESENTATIVE OF BENEFICIARIES.

Defendant corporation purchased the stock of another corporation and issued negotiable certificates of indebtedness in part payment. It also deposited the stock purchased, together with stock of its own, which was to be exchanged therefor, with a trustee which was authorized only to hold and manage the same, and to collect the dividends thereon and apply them in payment of the certificates until they were fully paid, when the stock should be delivered to the parties entitled thereto, and the trust should end. Defendant afterward brought suit in a state court to annul the contract on the ground that it was in restraint of competition and in violation of the laws of the state, making parties thereto the defendants the selling stockholders, the corporation, the trustee, and certain certificate holders, including plaintiff, who was a purchaser of certain of the certificates. The court decreed the transaction void and directed the stock to be surrendered, but dismissed the suit without prejudice as to plaintiff. *Held*, that the decree against the trustee concluded plaintiff only to the extent to which it determined his rights or interest in the trust property, and constituted no defense to an action by him against defendant on his certificates.

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

See 139 Fed. 684.

H. B. Twombly, for plaintiff in error.

G. S. Ingraham, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. In ordering judgment for the plaintiff, the court below ruled that the certificates of indebtedness made by the defendant were not created ultra vires; that the plaintiff was a bona fide purchaser, and the defense that they were executed upon an illegal consideration was therefore not available to the defendant; and that the plaintiff was not estopped from asserting the validity of the certificates by a decree of the Ohio state court declaring them void. The assignments of error challenge the correctness of this ruling.

The facts in this case, so far as they bear upon the defense of ultra vires, are fully stated in the opinion of this court reported in 130 Fed. 676. We there decided that the agreement made by the defendant with the stockholders of the Ohio corporation upon the purchase of their shares, whereby the vendors exchanged their shares for certain shares of the preferred and certain shares of the common stock of the defendant, together with certain money payments to be made as provided in the certificates, was not an agreement whereby the common stock transferred to them was constituted preferred stock, nor one guarantying dividends to them upon the stock transferred, and consequently was not ultra vires on the part of the defendant; that it was an agreement by the defendant to pay the vendors partly in its own stock and partly in money, and to issue its obligation for the payment of the money in such installments as the parties had agreed to; and that, although the agreement contemplated that the money payments would practically secure to the holders of the stock thus trans-

ferred all the benefits which they would have derived from an agreement by the defendant that the common stock should be preferred stock, and dividends be guarantied upon both the preferred stock and the common stock, inasmuch as such an agreement was not prohibited by the organic law of the defendant, the expectation or intention of the parties was of no moment so long as they adopted legitimate means to effect their scheme. In other words, we held that whether a corporate act or agreement is ultra vires or not is not a question of purpose or intention, and does not in the least depend upon the state of mind of those who participate in it. We see no reason to change our views upon the subject. The corporation was authorized by its charter to purchase the stock of the Ohio corporation. It made the purchase upon terms which it was authorized to offer and fulfill, and which did not contravene any provision of its organic law, and pursuant to an agreement which was carefully devised so as not to be obnoxious to that law; and, although the vendors were by the agreement placed in a position where they would receive the same practical benefit under it as though it had been one which the defendant would have had no right to make, they could not be deprived of these benefits, and the defendant had not entered into an unauthorized obligation. It follows that the ruling of the court below adverse to the defendant upon the defense of ultra vires was correct.

If the certificates were negotiable paper, the court below properly ruled that the defense that they were executed as part of a scheme in restraint of trade prohibited by the so-called anti-trust law of Ohio could not be raised as against a purchaser of the certificates who had bought them before maturity and without notice of the invalidating facts. The certificates were instruments containing a promise by the defendant to pay to the payee or order a specified sum of money in certain equal semiannual installments. They also provided that at any time before any default in payment the defendant should be discharged from the payment of all further installments by paying the amount to the American Trust Company, of Cleveland, "in trust to pay the same to the registered holder hereof upon demand." They also contained recitals respecting the terms of the agreement between the defendant and the Ohio corporation, and showing that the defendant, to secure the payment of the certificates, had deposited the stock in that corporation, acquired by it, with the American Trust Company as trustee, pursuant to the terms of the declaration of trust executed by the defendant and filed at the office of the trust company. The contract fulfills the usual requisites of negotiable paper. It provides for the unconditional payment to the payee therein or order of a certain sum of money at a time capable of exact ascertainment. Its negotiability is not impaired because it permits the maker to pay the principal before maturity. Riker v. Sprague Manufacturing Co., 14 R. I. 402, 51 Am. Rep. 413; Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197. In Ackley School District v. Hall, 113 U. S. 135, 5 Sup. Ct. 371, 28 L. Ed. 954, it was held that a provision in a municipal bond, by which its amount was payable at the pleasure of the maker at any time before due, did not affect its complete negotiability. The re-

citals in the certificates did not qualify the obligation of the maker or the holder, or incorporate to any extent into the contract the terms of the trust agreement mentioned therein. If, as in cases like McClelland v. Norfolk Southern Railroad Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. Rep. 397, the recitals had made the principal or interest payable upon the terms mentioned in the deed of trust, those terms would, of course, have become a part of the promise, and the negotiable character of the instrument would have to be ascertained by reference to them. We have no doubt that the certificates were negotiable paper within the rule that protects an innocent holder who has purchased it before maturity from defenses which might exist between the original parties. It is not enough to defeat this protection that the purchaser may have had knowledge of circumstances which would excite suspicion in the mind of a prudent man, or was guilty of gross negligence in his failure to make inquiry about facts which could have been ascertained. His protection is complete unless he had actual knowledge, or notice which was equivalent to knowledge, of the invalidating facts. The recitals in the certificates, and in the advertisements offering them for sale, were sufficient to charge the plaintiff with notice that the certificates had been issued by the defendant as an incident of its purchase of the stock of the Ohio company; but they did not indicate that such purchase was part of any illegal scheme between the defendant and the Ohio corporation to prevent competition or effect any of the purposes prohibited by the statutes of Ohio. Unless the mere fact that one corporation has purchased the stock of another, or has acquired all the property and business of another, denotes that it has done so for the purpose of restraining trade or stifling competition, the recitals were not sufficient to charge the defendant with any knowledge of the illegality of the transaction, or to put him upon inquiry with respect thereto. The proposition that such a purchase evinces illegality is hardly capable of serious discussion. A purchase which is perfectly consistent with a legitimate purpose raises no implication of a guilty one. Before the defendant was entitled to offer evidence for the purpose of establishing the illegitimate character of the transaction, it was incumbent upon it to satisfy the trial judge that the plaintiff had acquired the certificates mala fides. The trial judge was fully justified in ruling that the defendant had not done so. Therefore his ruling excluding evidence offered by the defendant to prove the illegal character of the purchase was correct.

The decree of the Ohio Court, relied upon by the defendant as an estoppel precluding the plaintiff from asserting the validity of the certificates, was rendered in an action in equity, in which the present defendant was plaintiff, brought to have its purchase of the stock of the Ohio corporation and all its contracts arising therefrom, including the certificates, declared void, for the reason, among others, that they were part of a scheme restraining trade and to effect an unlawful combination between the two corporations. The defendants in that suit were the Ohio corporation, various stockholders of that corporation, the American Trust Company of Cleveland, and various holders of

the certificates of indebtedness, including the present plaintiff. The present plaintiff appeared and answered the petition, and by his answer alleged the validity of the transaction assailed, and asked for an affirmative decree for the payment of his certificates. By the decree the cause was dismissed without prejudice to the present plaintiff, and as between all the other parties to the action the agreements were declared void, the stock which had been deposited with the trustee was ordered to be surrendered, and the purchase was in all respects rescinded.

It is now argued for the plaintiff in error that the present plaintiff as a defendant in the former action was bound by the decree because the American Trust Company was a party defendant, and as trustee represented all the certificate holders, including the present plaintiff. Upon this theory none of the certificate holders were necessary parties. They were needlessly made defendants in the action, and the dismissal of the cause as to the present plaintiff was of no effect. It is unnecessary for present purposes to consider whether this theory is sound or not, as we are of opinion that the decree against the trustee concluded the plaintiff only to the extent to which it determined his rights or interest in the trust property. The trust company was for certain purposes the agent and fiduciary of the certificate holders. By the terms of the trust agreement, it was its duty to hold, manage, and control the shares of stock which were deposited with it until the certificates should be fully paid, and until such time it was to collect the dividends accruing upon the shares and apply them towards the payment of the certificates; but it had no power to sell the shares or to enforce in any way the payment of the certificates. It was a necessary party to the Ohio suit, because in its absence there could have been no effectual decree annulling the trust agreement. Its powers as a trustee were more limited than those of the ordinary trustee for bondholders upon a trust deed or mortgage. The latter represents the bondholders in all legal proceedings affecting the trust property, and in a suit to foreclose the mortgage, or to annul it, the bondholders are not necessary parties, and whatever the trustee does, in the absence of fraud or bad faith on his part, concludes them in respect to their equitable title to the trust estate. We are aware, however, of no authority for the proposition that he represents them respecting matters as to which he has no control and concerning which he has no voice. He is not a necessary or a proper party in a suit at law by a bondholder to recover the principal or interest upon the bonds, because he has no title legal or equitable to the bonds, or to the moneys payable by the terms of the bonds. The decisions in which it has been held that the bondholder was concluded by the former adjudication against the trustee were made in cases in which the bondholder sought by a subsequent suit to subject the trust estate to the payment of his bonds. The principle of the decisions is stated in Kerrison v. Stewart, 93 U. S. 160, 23 L. Ed. 843, as follows:

"It cannot be doubted that under some circumstances a trustee may represent his fiduciary in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such

obligations that those for whom he holds will be bound by what is done against him as well as by what is done by him. * * * If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part."

In Shaw v. Railroad Co., 100 U. S. 611, 25 L. Ed. 757, the doctrine is thus stated:

"The trustee of the railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them."

Again, in Richter v. Jerome, 123 U. S. 233, 246, 8 Sup. Ct. 106, 31 L. Ed. 132, the court said:

"As bondholders claiming under the mortgage, they can have no interest in the security except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties, binds them."

Conceding for the sake of argument that the present trustee had as extensive a capacity as that of the ordinary mortgage trustee, he certainly had no power to represent the certificate holders for any purpose other than that of the management and protection of the trust estate. While the decree against him will effectually preclude the certificate holders from resorting to the trust fund for the collection of the moneys due them, it does not in our opinion impair in the slightest the rights of those not made defendants to the suit to recover at law the amount due thereon from the present defendant. We conclude that the trial judge properly ruled that the former decree was not an estoppel against the plaintiff.

The assignments of error are without merit, and the judgment is affirmed.

HENNINGSEN et al. v. UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD. (BROWN et al., Interveners.)

(Circuit Court of Appeals, Ninth Circuit. February 12, 1906.)

No. 1,212.

1. UNITED STATES—CLAIMS—ASSIGNMENT.

Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], provides that all transfers and assignments of any claim against the United States or any part or share thereof shall be void unless made in the presence of two attesting witnesses after the allowance of such claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof, and section 3737 [U. S. Comp. St. 1901, p. 2507] declares that no contract or order or any interest therein shall be transferred by the party to whom such contract or order is made to any other party, and any such transfer shall cause the annulment of the contract or order transferred so far as the United States is concerned. *Held*, that an assignment by a public contractor of a claim against the United States for money accruing on a building contract was void, both as against the United States, the contractor's surety, the laborers, and materialmen.

[Ed. Note.—Assignment of claims against United States and government contracts, see note to Greenville Sav. Bank v. Lawrence, 22 C. C. A. 650.]

2. SUBROGATION—PRIORITY OF CLAIMS—PUBLIC CONTRACTORS—SURETIES.
Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523] requires public contractors with the United States to furnish a bond that the contractor shall promptly pay all persons supplying labor and materials in the prosecution of work, and that any person making affidavit to the furnishing of labor and materials for the contractor shall be furnished with a certified copy of the contract and bond, on which such person shall have a right of action in the name of the United States against the contractor and sureties. *Held*, that where a federal contractor's surety was compelled to pay labor and material claims to an amount exceeding the amount due from the government to the contractor it was entitled to subrogation to the rights of the laborers and materialmen so paid against such sum which claim was prior to that of a mere volunteer lender of funds to the contractor, not shown to have been used in the performance of the contract.

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

The record shows that on the 15th of May, 1903, the appellants R. M. Henningsen and Edward W. Clive, then being copartners, entered into a contract in writing with G. S. Bingham, major and quartermaster, United States army, representing the government of the United States, for the construction of certain buildings at Fort Lawton, in the state of Washington, for the faithful performance of which contract on the part of Henningsen and Clive they, as principals, and the United States Fidelity & Guaranty Company of Baltimore, Md., as surety, executed a bond to the United States conditioned that Henningsen and Clive would in all respects duly and fully perform all of their agreements and obligations specified in the contract, and would promptly make full payment to all persons supplying labor or materials in the prosecution of the work therein provided for; which bond was accepted by the government, upon which acceptance the contract was awarded to Henningsen and Clive, and its performance entered upon by them. Subsequently, and before the making by Henningsen of the assignment to the defendant Spencer, afterwards mentioned, Clive withdrew from participation in the performance of the contract under an agreement between himself and Henningsen. The contract, in so far as concerned the completion of the buildings, was fully performed, but the contractors failed to pay in full all persons supplying labor and materials in the prosecution of the work, and failed and refused to pay just and lawful claims for such labor and materials amounting, in the aggregate, to $15,409.04, and in that respect, and to that extent made default in the terms, conditions, and obligations of the bond. After the contractors had so defaulted, the surety commenced suit in the court below against Henningsen, Clive, and each of the persons to whom they were indebted for such labor and materials, stating in its bill its liability upon the bond to such creditors to the full extent of the penalty of the bond, to wit, the sum of $11,625, which suit resulted in a decree adjudging the surety company indebted to such creditors of Henningsen and Clive in the full sum of $11,625, and directing payment thereof to the creditors pro rata, and decreeing that upon making such payment the liability of the surety on the bond be discharged.

Subsequent to the execution of the bond and contract, and after Clive, under his agreement with Henningsen, had ceased his connection with the performance of the contract, and after the latter had been in large part executed. Henningsen executed to the defendant Spencer, in trust for the defendant National Bank of Commerce, of Seattle, an assignment of the balance of the money coming to him under the contract, and directing the quartermaster to pay over to Spencer all such moneys. The purpose of the assignment was to secure the repayment of a loan made by the bank to Henningsen on or about October 10, 1903, of $3,500, and subsequent loans of $1,000 and $370. All of the money so loaned by the bank to Henningsen was paid by it directly to him, who disbursed it without any supervision or control upon the part of the bank or of Spencer.

At the time of the commencement of the present suit by the surety, there was in the hands of the quartermaster, representing the United States, the sum of $13,066, earned by Henningsen under the contract, which sum of money the quartermaster was about to pay over to Spencer in pursuance of the aforesaid assignment and order. The object of this suit was, in part, to prevent such payment, and to obtain a decree that such assignment and order were invalid. Upon the filing of the original bill in the court below, Henningsen, the bank, and Spencer were temporarily enjoined from receiving the money from the quartermaster, after which a written stipulation was entered into between the complainant surety, Henningsen, Spencer, and the bank, pursuant to the terms of which $8,024.21 of the $13,066 were paid to creditors of Henningsen, who had performed labor and furnished materials in the performance of the contract, and the balance, to wit, $5,041.79, was applied in conditional payment and satisfaction of the indebtedness of Henningsen to the bank, which amounted to $5,041.79; the stipulation further providing that, in the event it should be finally determined by appropriate litigation that the complainant surety was entitled to receive the last-mentioned amount, the bank would pay the same to it. The liability and loss of the surety, as finally established and decreed by the court below, in the suit hereinbefore referred to, having exceeded the said sum of $5,041.79, the court below held that the surety company was equitably entitled to receive the said sum of $5,041.79, and accordingly gave judgment against the bank for that sum, with costs. It does not appear that at the time that judgment was entered the surety had, in fact, paid to the laborers and materialmen the full penalty of its bond, as asked for and decreed in the suit brought by it against them and others; but it appears from the certificate of the clerk of the court below, filed in this court, that the complainant has since done so; so that the judgment of the court below is the judgment to which the appellee is entitled, if its equity to the balance of the fund is superior to that of the bank.

George E. de Dteiguer, for appellants.

Graves, Palmer, Brown & Murphy, for appellee.

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

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

The real question in the case is one of priority of equities as between the bank and the surety company. In the first place, it is to be noted that it does not appear that the money loaned to Henningsen by the bank was loaned upon the agreement on his part to use it in the performance of the contract in question, nor does it appear that as a matter of fact it was so used.

Spencer, the trustee, and cashier of the bank, being asked whether Henningsen made any statement as to the purpose for which he wished to borrow the money, answered:

"A. Yes; he stated at the time that he was being hampered on his Ft. Lawton contract by the fact that the inspector was giving him short estimates, and that he would have to have money to carry the contract through: he also stated that there were some little items of debt on the Mary Island contract, the owners of which were bothering him and that he wished to get this money for the purpose of meeting his pay rolls and making payment on material on the Ft. Lawton contract and to liquidate the items mentioned above in the Mary Island contract. Q. Did he make any explanation to you as to whether the items of debt on the Mary Island contract had anything to do with the prosecution of his work on the Ft. Lawton contract? A. He said that they were threatening to sue him, and that he was afraid

it would absolutely prevent him from going ahead with his work, fearing others to whom he was owing money on the Ft. Lawton contract would do the same thing. Q. Did he make any statement as to the respective amounts which he expected to use on the different contracts? A. He did not."

Spencer was further questioned, and testified as follows:

"Q. At the time you made Mr. Henningsen the first advance, being that for $3,500, was there any arrangement between you and him as to the securing of payment of that note? A. There was. Q. What was that agreement? A. He agreed he would assign and turn over to us the payments received on this contract."

The assignment by Henningsen to Spencer and the acceptance of the order by the quartermaster of the fund which he expected to disburse for the government, was void as against the United States, the surety, the laborers, and the materialmen. Rev. St. U. S. §§ 3477, 3737 [U. S. Comp. St. 1901, pp. 2320, 2507]; Prairie State Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; McKnight v. United States, 98 U. S. 179, 25 L. Ed. 115; Spofford v. Kirk, 97 U. S. 484, 24 L. Ed. 1032; United States v. Gillis, 95 U. S. 407, 24 L. Ed. 503; Greenville Savings Bank v. Lawrence, 76 Fed. 545, 22 C. C. A. 646.

Whatever equity, if any, the bank had to the fund in question, arose solely by reason of the loans it made to Henningsen. Henningsen's surety was, upon elementary principles, entitled to assert the equitable doctrine of subrogation; but it is equally clear that the bank was not, for it was a mere volunteer, and under no legal obligation to loan its money. Prairie State Bank v. United States, supra; Insurance Company v. Middleport, 124 U. S. 534, 8. Sup. Ct. 625, 31 L. Ed. 537; Sheldon on Subrogation, § 240. Certainly the bank cannot be justly said to have any sort of equity to the entire sum of $5,041.79, for it is not pretended that in making its loans to Henningsen it was understood that he was to use all of the money so loaned in the performance of the contract in question. It is equally difficult to see how an equity in its behalf can attach to any specific part of the fund in controversy, for the reason that the facts of the case leave it altogether indefinite and uncertain as to how much of the money loaned by the bank to Henningsen it was understood he was to use in the performance of this particular contract. When we come to look at the equities on the part of the surety company, we find that it paid what it was compelled to pay the full penal sum of its bond, to the laborers and materialmen by reason of its principal's failure to pay them, exceeding in the aggregate the amount of the fund in controversy. That bond was given under and in pursuance of the provisions of the act of Congress approved August 13, 1894, entitled "An act for the protection of persons furnishing materials and labor for the construction of public works" (28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]) one of the purposes of which act was, as held by the Circuit Court of Appeals for the Eighth Circuit, in United States v. National Surety Company, 92 Fed. 549, 34 C. C. A. 526, and by this court in United States v. Rundle, 100 Fed. 400, 40 C. C. A. 450: "to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, iasmuch as

such persons could claim no lien thereon, whatever the local law might be for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government." The bond required by that act, and in pursuance of which the bond under consideration was given, was, as said in the cases cited: "intended to perform a double function, in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains—the one for the benefit of the government, and the one for the benefit of third persons—are as distinct as if they were contained in separate instruments; the government's name being used as obligee in the latter agreement merely as a matter of convenience."

Where, as in the Prairie State Bank and the Rundle Cases, supra, the surety is compelled to make good the default of his principal as respects the government, the surety is, as was distinctly held in those cases, entitled to be subrogated to the rights of the government. Upon precisely the same principle the surety is entitled to be subrogated to the rights of the laborers and materialmen, where, as in the present case, it is compelled by reason of the obligations of the bond to pay them for labor and material because of the default of its principal. That right of subrogation relates back, as was held by the Supreme Court in Prairie State Bank v. United States, supra, to the time the contract of suretyship was entered into. See, also, First National Bank of Seattle v. City Trust Safe Deposit Surety Co., et. al., 114 Fed. 529, 52 C. C. A. 313; Richards Brick Co. v. Rothwell, 18 App. D. C. 516.

The judgment is affirmed.

LEFLER v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. January 15, 1906.)

No. 2,045.

1. INSURANCE—LIFE INSURANCE—PROVISIONS—GRACE IN PAYING PREMIUMS.

A life policy, after providing for the payment of premiums in regular course on a designated day in each year, declared that "a grace of one month during which the policy remains in full force will be allowed in payment of all premiums except the first," and that "if any premium is not paid on or before due, or within the month of grace," the liability of the company shall be only that stated in the automatic nonforfeiture provision of the policy. A portion of the second premium was paid in cash and a note given for the balance, which provided that it should be paid "without grace, six months after date," and that, if it should not

be paid "at maturity," all benefits which full payment in cash of the premium would have secured should become "immediately" void and forfeited, except as otherwise provided in the policy. *Held*, that these provisions of the policies and notes show, without any uncertainty or ambiguity, that it was the intention of the parties that the provision for a grace of one month should be applicable to the payment of all premiums in regular course, according to the terms of the policy, but without application to that portion of the second premium which was taken out of the regular course and made the subject of a special agreement extending the time for payment and expressly excluding grace. Amidon, District Judge, dissenting.

2. EVIDENCE—PAROL EVIDENCE CONTRADICTING WRITTEN CONTRACT.

In an action at law upon a written contract, the terms of which are certain and unambiguous, parol evidence of the negotiations preceding its execution is not admissible to contradict or vary its terms, nor can this rule be evaded on the theory that such evidence can be admitted to raise an estoppel in pais.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1756.]

(Syllabus by the Court.)

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

March 18, 1899, the New York Life Insurance Company issued and delivered to Henry C. Lefler two policies of insurance upon his life. Each policy was for $2,500, designated Sarah E. Lefler as the beneficiary, and provided for the payment by the insured of an annual premium of $115.10 on the 18th day of March in each year, until 20 premiums should be paid. Each contained what is called an automatic nonforfeiture provision, under which, notwithstanding a failure to duly pay the second premium, the first having been duly paid, the insurance was to continue automatically for two months beyond the first year, and, notwithstanding a failure to duly pay the third premium, the first and second having been duly paid, the insurance was to continue automatically for two years and two months beyond the second year, and so on, according to a table which was set forth. The premium for the first year was paid, one half in cash when the policies were issued and the other half six months later, according to the terms of two notes given therefor when the policies were issued. One half of the premium for the second year was paid when due and the other half was covered by two notes executed by the insured at that time and similar to those before given. Each policy provided: "If any premium is not paid on or before due, or within the month of grace, the liability shall be only as hereinbefore provided for such case"; the concluding words having reference to the automatic nonforfeiture provision. The words "or within the month of grace" were explained by the following: "A grace of one month during which the policy remains in full force will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of five per cent. per annum." The notes given for the remaining half of the second premium were as follows:

"March 18, 1900.

"Without grace, six months after date I promise to pay to the order of the New York Life Insurance Company, 57.55 Dollars at First National Bank, Omaha, Neb. Value received, with interest at the rate of five per cent. per annum. This note is given in part payment of the premium due March 18, 1900, on the above policy, with the understanding that all claims to further insurance, and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself. Henry C. Lefler."

These notes were not paid or offered to be paid on or before September 18, 1900, which was six months after their date; but three days later, September 21st, the insured tendered payment thereof and the tender was rejected because not made in time. About that time the company wrote to the insured saying: "The notes which you gave in part settlement of premiums due March 18th, 1900, under policies Nos. 931,817–18 has been returned by our branch office unpaid, and the policies are now canceled in accordance with the agreement under which the notes were accepted. As the matter now stands, all claims to further insurance and all benefits whatever which a full payment in cash would have secured to you, have now become void and forfeited, except as otherwise provided in the policies or by statute." November 1, 1902, the insured died. In an action at law on the policies, the beneficiary in her petition set forth the facts just stated, and, in addition to other matters not here material, alleged that at the time of the issuance and delivery of the policies the company's agent at Omaha, Neb., through whom the policies were issued and delivered, told the insured that the company would permit the premium to be paid semiannually; that this could be accomplished by the insured paying one half of each premium in cash when due, and then giving notes like that before set forth for the other half; that this arrangement would give him the same privileges and rights which he would have obtained if the policies themselves provided for the payment of the premiums semiannually; and that the company would so construe the policies and notes. And it was alleged that the insured, relying upon these statements of the agent, did not read the notes before he signed them. A demurrer to the petition was sustained, and, plaintiff declining to amend, judgment was rendered for defendant.

Samuel L. Winters, for plaintiff in error.

Charles A. Goss (James H. McIntosh, on the brief), for defendant in error.

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

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

If the premium notes were payable, without grace, six months after their date, it is plain the insurance had terminated long prior to the death of the insured, and no recovery can be had upon the policies. But the plaintiff contends (1) that the provision in the policies relating to grace in the payment of premiums gave the insured a grace of one month within which to pay the notes after the expiration of the stipulated six months; and (2) that, if the notes contain any provision to the contrary, the defendant is estopped from enforcing it by reason of the statements made to the insured by the agent before the notes were given. The time within which the premiums on a policy of insurance shall be paid, and whether with or without grace, is a subject in respect of which it is competent for the insurer and the insured to make any contract which is satisfactory to them at the time; and such a contract is as obligatory upon the parties to it as is any other contract competently made.

What agreement do the policies and notes show was made in this instance? Each policy, after providing for the payment of premiums in regular course on the 18th day of March in each year declared that "a grace of one month during which the policy remains in full force will be allowed in payment of all premiums except the first"; and that "if any premium is not paid on or before due, or within

the month of grace," the liability of the insurer shall be only that stated in the automatic nonforfeiture provision of the policy. Each note, in extending the time for paying a portion of the second premium, provided that it should be paid, "without grace, six months after date," and that, if it should not be paid "at maturity," all benefits which full payment in cash of the premium would have secured should become "immediately" void and forfeited, except as otherwise provided in the policy. These provisions of the policies and notes when read together, as it is conceded they must be, show without any uncertainty or ambiguity that it was the intention of the parties that the provision for a grace of one month should be applicable to the payment of all premiums in regular course according to the terms of the policies, but without application to that portion of the second premium which was taken out of the regular course and made the subject of a special agreement extending the time for payment and expressly excluding grace. The only objections urged against this conclusion are that the words "without grace" in the notes have reference, not to the month of grace named in the policies, but to the three days of grace allowed by the law merchant in the payment of certain negotiable instruments, and that in the concluding provision of the notes, viz., "and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself," the excepting clause qualifies, not the operative words "shall become immediately void and forfeited," but the words "at maturity." Both objections are without merit. The words "without grace" obviously include the month of grace named in the policies and make the notes payable six months after date without further indulgence or respite. The excepting clause in the concluding portion of the notes clearly has reference to the automatic nonforfeiture provision in the policies, a highly beneficial feature of the insurance which would otherwise be immediately cut off by a failure to pay the notes. It follows that the plaintiff's first contention cannot be sustained.

The remaining question, although spoken of by counsel as one of estoppel, is really whether, in an action at law upon the contract evidenced by the written policies and notes, the certain and unambiguous terms of the latter can be contradicted or varied by parol evidence of the negotiations which resulted in their execution and acceptance. This question, including the authorities now relied upon by counsel, was fully considered by this court in the recent case of Connecticut Fire Insurance Co. v. Buchanan (C. C. A.) 141 Fed. 877, and was ruled adversely to the plaintiff's contention. See, also, Coombs v. Charter Oak Life Insurance Co., 65 Me. 382; Insurance Co. v. Mowry, 96 U. S. 544, 547, 24 L. Ed. 674; Ivinson v. Hutton, 98 U. S. 79, 82, 25 L. Ed. 66; George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232. A reexamination of the subject satisfies us that upon both reason and authority that ruling should be adhered to.

The judgment is affirmed.

AMIDON, District Judge (dissenting). In order to correctly understand the several provisions of the written instruments from which the court holds that the insured ought to have known that his policies would be forfeited on the 18th day of September, 1900, if his notes were not then paid, the parts of the policy bearing on that subject and the notes themselves ought to be brought together before the mind. The pertinent provisions of the policy are as follows:

"This policy is automatically nonforfeitable from date of issue as follows: First, if any premium is not duly paid, and if there is no indebtedness to the company, this policy will be endorsed for the amount of paid-up insurance specified on the second page in the table upon written request therefor within six months from the date to which premiums were duly paid; or, if no such written request is made, will automatically continue from said date for $2,500 for the term specified in said table and no longer. Said paid-up insurance or continued insurance shall be subject to the provisions of this policy, without further payment of premiums, but without participation in profits, or the right of securing cash loans.

"Second. If any premium or interest is not duly paid, and if there is any indebtedness to the company, this policy will be endorsed for such amount of paid-up insurance as any excess of the reserve held by the company over such indebtedness will purchase according to the company's present published rate of single premiums; upon written request therefor within six months from the date to which premiums were duly paid; or if no such request is made, an insurance equal to the net amount that would at the time be payable under this policy as a death claim, will automatically continue for as long a period of time as any excess of the reserve held by the company over such indebtedness will pay for a single premium for term insurance, according to the company's present published rates and for no longer. Such paid-up insurance or continued insurance shall be subject to the provisions of this policy, without further payment of premiums, but without participation in profits, or the right of securing cash loans.

"Third. If the nonforfeiture provisions in either of the two preceding paragraphs become operative, the insured may resume full participating premium-paying membership at any time within five years thereafter, upon written application therefor, and the payment of premiums to date of resumption, with interest at the rate of five per cent. per annum, including interest due and unpaid on any loans, subject to evidence of insurability satisfactory to the company, and to payment or reinstatement of any loans.

"If any premium is not paid on or before due or within the month of grace, the liability of the company shall be only as hereinbefore provided for such case.

"Grace in the Payment of Premiums. A grace of one month during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of five per cent. per annum."

The notes were in the following form:

"March 18, 1900.

"Without grace, six months after date I promise to pay to the order of the New York Life Insurance Company, 57.55 Dollars at First National Bank, Omaha, Neb.

"Value received, with interest at the rate of 5 per cent. per annum.

"This note is given in part payment of the premium due March 18th, 1900, on the above policy, with the understanding that all claims to further insurance, and all benefits whatever which full payment in cash of said premium would have secured, shall become immediately void and forfeited to the New York Life Insurance Company, if this note is not paid at maturity; except as otherwise provided in the policy itself. Henry C. Lefler."

I agree with the majority of the court that when all the foregoing language is examined by the trained judicial mind, aided by the argu-

ment of counsel, the conclusion is justified that the policy became immediately forfeitable on the 18th day of September, 1900, in case of the nonpayment of the notes. Conceding this, however, I do not think that the affirmance of the judgment necessarily follows. It is now elementary law not only in federal courts, but in all American and English courts as well, that the forfeiture of insurance policies is not favored, and that if the language which the insurance company has chosen is open to construction that construction will be adopted which will sustain the policy. Not only this, but it is also now settled that the language conditioning a forfeiture must be both plain and explicit. The policy holder cannot be required to bring together such complicated instruments as are presented by this record, and deduce from an analysis of their provisions the company's right to the forfeiture of his policy. The rule that all the provisions of contracts will be examined to ascertain the rights of parties cannot be resorted to for the purpose of evolving a right of forfeiture. That right, if it exists, must be stated in express language, and not be found either by reference or as a deduction from combining numerous provisions. Any other doctrine makes an insurance contract a snare and a fraud on the assured. McMaster v. Life Insurance Co., 183 U. S. 25, 49, 22 Sup. Ct. 10, 46 L. Ed. 64; Royal Insurance Co. v. Martin, 192 U. S. 149, 162, 24 Sup. Ct. 247, 48 L. Ed. 385; and opinion of Judge Hook in Atlas Reduction Co. v. New Zealand Fire Ins. Co. (C. C. A.) 138 Fed. 509.

I cannot escape the conclusion that the court in the foregoing opinion has approached the question for decision in a mistaken light. The question is not what do these instruments say to a trained judicial mind, aided by the argument of counsel, after all of their relevant provisions have been sorted out and brought into such relationship as to make their meaning manifest. The question rather is what would these provisions mean, as they stand embodied in the instruments, to the average layman, untrained in the construction of written documents. When the question is thus looked at, it does not seem to me that the conclusion of the majority is either "clear" or "obvious," as the opinion states. The words "without grace," occurring as they do in a promissory note, are certainly as open to the construction that they refer to the 3 days of grace allowed by the law merchant as to the 30 days allowed by the policies. The concluding phrase of the note, "except as otherwise provided in the policy itself," would be as likely to direct the mind of a layman to the provisions of the policy allowing 30 days additional time for payment as to the other provisions relative to paid-up insurance. The practice of allowing a period of 30 days for the payment of life insurance premiums is now universal. The payment of the notes in question was really the payment of such a premium. If the company seeks to take that payment out of the general practice as to the payment of insurance premiums and condition a forfeiture of the policy upon a failure to pay the notes promptly at their maturity, it ought to have declared this purpose expressly, and in plain language in the notes themselves, and not by dark and ambiguous reference to the complicated pro-

visions of the policy. Instead of framing the notes in the language adopted, some such language as this should have been used:

"This note is given in part payment of the premium due March 18, 1900, on the above policy. The thirty days of grace allowed by the policy for the payment of cash premiums will not be allowed for the payment of this note; on the contrary, if this note is not paid at the date of its maturity, Sept. 18, 1900, all claims to further insurance and all benefits whatever which full payment in cash of said premium would have secured will become immediately void and forfeited to the New York Life Insurance Company, except the right to paid-up insurance as provided in said policy."

This language would have fully protected the company, and would have at the same time fairly and justly advised the insured that the note was excepted from the general practice as to the payment of cash premiums, and that his policy would be forfeited if the note was not paid promptly at its due date. If we are to adopt the doctrine that language which to the trained judicial mind, aided by the argument of counsel, expresses a right of forfeiture secures that right, what becomes of the rule that the right of forfeiture must be expressly stated and not by reference, and must be embodied in plain and unambiguous language? It is simply abolished. In my judgment the majority of the court has failed to give effect to this rule in the foregoing opinion, and the Supreme Court of Wisconsin fell into a similar error in Behling v. Northwestern Life Insurance Company (Wis.) 93 N. W. 800.

SORENSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1906.)

No. 2,249.

1. CRIMINAL LAW—EVIDENCE—CONFESSION OF ONE NO EVIDENCE AGAINST ANOTHER JOINTLY TRIED.

   A confession of one of two defendants jointly charged and tried for the same crime is inadmissible against the other, when made in his absence and after the crime was committed.

   [Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1002.]

2. SAME—CONFESSION—TEST OF ITS ADMISSIBILITY—STATEMENT BY OFFICER.

   The making of a confession by one charged with crime, in order to make it admissible in evidence against him, must have been free, voluntary, and without compulsion or inducement of any kind, and when it appears that an officer of the United States, authorized to investigate the commission of offenses against its laws and to make arrests therefor, either says to an accused who has been arrested and is held in custody that he has an absolutely good case against him, or advises him that the thing for him to do is to plead guilty and throw himself on the mercy of the court, and that another offense against the state laws will then probably be overlooked, a confession so induced, in whole or in part, is inadmissible.

   [Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1146, 1175, 1178, 1181.]

(Syllabus by the Court.)

In Error to the District Court of the United States for the Southern District of Iowa.

W. A. Spurrier (E. C. Mills and E. D. Perry, on the brief), for plaintiffs in error.

Lewis Miles (George B. Stewart, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Sorenson and Hodge, the defendants below, were jointly indicted, tried, and convicted under section 5478, Revised Statutes [U. S. Comp. St. 1901, p. 3696], for the burglary of a post office at Van Meter in the state of Iowa on the night of September 29, 1904. At the trial the government introduced in evidence, over the objection and exception of the defendant Hodge, an alleged confession of Sorenson made on October 20, 1904, in the absence of Hodge, wherein Sorenson stated that Hodge participated in the crime. The receipt of this statement was error. The court should have excluded Sorenson's declaration against Hodge, and, if it was competent evidence against Sorenson, it should have admitted it against him alone. Where two or more defendants are jointly tried for the same offense, or for a conspiracy to commit it, the declaration of no one of them, made in the absence of another after the completion of the offense, is competent evidence against the latter. It is hearsay. Sparf v. U. S., 156 U. S. 51, 56, 15 Sup. Ct. 273, 39 L. Ed. 343; Logan v. U. S., 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. U. S., 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010.

A post office inspector testified that on October 20, 1904, each of the defendants confessed to him his commission of the crime, and that he made no promise of reward or immunity and made no threat to either of them. According to his testimony the facts and circumstances pertinent to these confessions were these: The defendants were arrested on October 17, 1904. On the next day the inspector took each of them separately out of his cell and upstairs into an office used by the police, where Sorenson denied any knowledge of the robbery, and Hodge "would neither deny or admit he was in the robbery." The witness testified:

"There was nobody present except the man I was talking to and myself. I took them up separately. I took Sorenson up first, and he said he had nothing to do with it. Had about a five-minute talk with him at that time. I told him I had an absolutely good case against him. I brought him up myself and took him down myself and had the conversation myself."

After these conversations the inspector caused the defendants to be put in adjoining cells, where they could talk with each other, saw them every day, and on the morning of October 20, 1904, he again took them out one at a time and talked with them, and he testified:

"I asked Hodge if he was ready to talk to me to-day, and he said: 'I think I am.' I asked him if he was ready to tell me what he knew about the Van Meter robbery. He said he was. I asked him then, 'Was you in it,' and he says, 'I was there.' I says, 'How much did you get out of it,' and he says, 'Thirty dollars.'"

The witness testified to many other questions and answers during this conversation, but to no statement from Hodge which was not ex-

tracted from him by an inquiry of the inspector. He testified that he took Sorenson out of his cell to the fire and police room on the same day, and that, while he and Sorenson were alone in the room, the latter said that he was in the Van Meter post office robbery. These were other parts of his testimony:

"I never wanted him to tell me. It was not the object of those interviews. It was to get the facts. I didn't think of getting any other witness there when he made the confession. He did not want anyone to know he said this to me. * * * He said he wanted to plead guilty of the charge of robbing the Van Meter post office, and tears were running down his cheeks, and he asked me to intercede with the judge, and, if we could arrange to have the sentence suspended or a parole, he would come out and go to work and would turn out more criminals than I ever dreamed of. * * * I told him I did not know what they would get if they pleaded guilty, that they could throw themselves on the mercy of the court and take their chances. I told them that by serving a term in the government case that the state case would probably be forgotten. The thing for them to do was to plead guilty and throw themselves on the mercy of this court, and the matter probably would be overlooked in the state court. * * * They made these statements while they were prisoners. Sometimes they were handcuffed when taken from one place to another. I carried a loaded revolver all the time. I took my gun out in the presence of Sorenson and asked him if that was the gun he had at Van Meter. It was the gun found on him when he was arrested."

Immediately upon the close of the cross-examination of this witness counsel for the defendants moved to strike out all his testimony relative to these confessions, upon the ground that it was incompetent, irrelevant, and immaterial. The motion was denied, an exception was noted, and this ruling was assigned as error.

Counsel for the government argue that the statements of the inspector that the state's case would probably be forgotten, if the defendants pleaded guilty to the case of the United States, were not made until after the confessions were extracted. But the evidence does not establish this fact, and as the burden was upon the government to prove that the confessions were voluntarily made before they became admissible, and any doubt upon this subject must be resolved in favor of the defendants, the contention cannot be sustained.

For more than 200 years the law of England and America has been that confessions induced by compulsion or by any cause legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged are inadmissible as evidence of the guilt of the accused.

In 2 Hawkins, Pleas of the Crown (8th Ed.) p. 595, § 34, there is an admirable statement of the law upon this subject, which seems to have been copied from a note to the sixth edition of that work, and which reads in this way:

"And as the human mind under the pressure of calamity is easily seduced, and liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

The fifth amendment to the Constitution of the United States provides that "no person shall be compelled in any criminal case to be a witness against himself," and a confession compelled by an inspector or by a private citizen is as obnoxious to this prohibition as one compelled by a magistrate or by a court. The learned, exhaustive, and authoritative declaration of the rule upon this subject and of the appropriate practice in its application, which is found in the opinion of the Supreme Court delivered by Mr. Justice White, in Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, renders any further discussion of the law of this case futile. A few excerpts from that opinion may be instructive. At page 542 of 168 U. S., page 187 of 18 Sup. Ct. (42 L. Ed. 568), the court says:

"The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books. In 3 Russell on Crimes (6th Ed.) 478, it is stated as follows: 'But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. * * * A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.' And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Green. Ev. (15th Ed.) § 219: Wharton, Crim. Ev. (9th Ed.) § 631; 2 Taylor, Ev. (9th Ed.) § 872; 1 Bishop's New Crim. Proc. § 1217, par. 4."

At pages 557 and 558 of 168 U. S., pages 192, 193, of 18 Sup. Ct. (42 L. Ed. 568), the opinion reads in this way:

"In this court the general rule that the confession must be free and voluntary, that is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the outset. * * * In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of the prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; Sparf v. U. S., 156 U. S. 51, 55, 15 Sup. Ct. 273, 39 L. Ed. 343. And this last rule thus by this court established is also the doctrine upheld by the state decisions."

At page 549 of 168 U. S., page 189 of 18 Sup. Ct. (42 L. Ed. 568), the court said:

"The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent."

At page 555 of 168 U. S., page 192 of 18 Sup. Ct. (42 L. Ed. 568), the court reviews the then latest decision in England, rendered by the Court for Crown Cases Reserved, in Reg. v. Thompson (1893) 2 Q. B. 12, and calls attention to the facts that the English court there

adopted "the ruling of Baron Parke in Reg. v. Warringham, 2 Den. C. C. 447n, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received," and that the English court then decided that, "on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary," it ought not to have been received.

At page 565 of 168 U. S., page 195 of 18 Sup. Ct. (42 L. Ed. 568), the Supreme Court states its conclusion in these words:

"In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record."

The confessions in the case before this court were made to an inspector while the defendants were prisoners under his control. He stated to one of them that he had an absolutely good case against him, and to both that the thing for them to do was to plead guilty and to throw themselves on the mercy of the court, and the matter would probably be overlooked in the state court. Tried by the decision of the Supreme Court in Bram's Case, either of these statements was "legally sufficient to engender in the mind of the accused hope or fear in respect of the crime charged," and each of them rendered the subsequent confession involuntary and inadmissible in evidence.

The judgment below must therefore be reversed, and the case must be remanded to the District Court with instructions to grant a new trial. It is so ordered.

CLAGETT v. DULUTH TP.

(Circuit Court of Appeals, Eighth Circuit. February 19, 1906.)

No. 2,246.

1. MUNICIPAL CORPORATIONS—ACTION ON BONDS—DEFENSES.
An injunction restraining a municipal corporation or township from paying certain bonds issued by it, granted in a suit by a taxpayer, in itself, constitutes no defense to an action on such bonds by a holder, who was not a party to such suit.

2. STATUTES—REVISION OR COMPILATION—GEN. ST. MINN. 1878.
Gen. St. 1878 of Minnesota, the preparation and publication of which were authorized by the Legislature, but without expense to the state, and which was made competent evidence of the laws of the state by a subsequent act, is merely a private compilation, and not a legislative revision, and when the verity of any part thereof is questioned the court looks to the original enactments.

3. TOWNS—POWER TO ISSUE BONDS—MINNESOTA STATUTES.
Under Act Minn. March 7, 1867 (Laws 1867, p. 58, c. 31), entitled "An act to authorize the supervisors of the several organized townships of this state and those that may be hereafter organized to issue bonds or orders for the purpose of building bridges in their respective towns," and Const. Minn., art. 4, § 27, which provides that "no law shall embrace

more than one subject, which shall be expressed in its title," the power of supervisors in issuing bonds is limited by the title of the act to the single purpose of building bridges, although such limitation is not expressed in the body of the act which confers the power to issue bonds generally when authorized by two-thirds of the legal voters present and voting at an election called for the purpose; and bonds purporting to be issued thereunder and reciting that they were issued "for the purpose of constructing and improving roads and bridges of said town as authorized by more than a two-thirds vote of all the votes cast at a special township meeting called for that purpose," show their invalidity on their face and the recital imparts notice thereof to all purchasers.

4. SAME—CURATIVE ACT—EXCEPTIONS.

Laws Minn. 1903, p. 387, c. 267, confirms the validity of all bonds previously issued by any township for the purpose of constructing or repairing roads or bridges under authority of a prior act authorizing the issuance of bonds for building bridges only, with a proviso that it shall not apply to any pending suit or to any bonds, "where the legality of the same * * * has been questioned in any action or proceeding in any court." *Held*, that bonds which were involved in a pending suit by a taxpayer against the township to restrain their payment on the ground of their illegality, were within the proviso, and not legalized by the act.

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

This was an action instituted by Clagett, plaintiff in error, to recover on three bonds, each for $1,000 issued by the township of Duluth, defendant in error. The bonds recited on their face that they were issued "for the purpose of constructing and improving roads and bridges of said town." The town defended the action on the ground that it had no authority to issue bonds for the purpose specified, and that by reason of such want of authority it had been enjoined by a decree of the district court of St. Louis county, Minn., in a suit instituted by a taxpayer against it, from paying the same. The trial court sustained the defense, and the case is brought here for review.

Horace S. Oakley (S. T. Harris and Charles B. Wood, on the brief), for plaintiff in error.

H. A. Dancer (C. O. Baldwin, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

The injunctive order in the taxpayer's suit in itself constitutes no defense to this action. Clagett was not a party to that suit and is not affected by its result. City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329.

Did the town have authority to issue the bonds? Plaintiff claims it did by virtue of section 114 of chapter 10 of the General Statutes of 1878 (Gen. St. 1894, § 1031), which provides:

"That the Board of Supervisors of the organized townships of this state, or those that may hereafter be organized, be and the same are hereby authorized and fully empowered to issue the bonds or orders of their respective towns, with coupons attached, in such amounts and at such periods as they may be directed by two-thirds of all the legal voters present and voting at any legally called meeting held for that purpose."

This language taken by itself would seem to confer power to issue bonds for any reasonable purpose, subject only to the requirement of a favorable vote of two-thirds of the voters present, and voting at a

meeting called for the purpose of authorizing them. But does this section conclusively express the law of Minnesota on the subject? It is contended that the General Statutes of 1878 is not a revision of the laws, but only a private compilation, and that reference to the original legislation discloses that the town exceeded its power in issuing the bonds in question. The intention of the Legislature, as disclosed by legislation touching the General Statutes of 1878, must therefore be ascertained.

The act of February 20, 1878 (Laws Minn. 1878, p. 118, c. 67), after referring to the public acts then in force including the Revised Statutes of 1866, enacts in section 2 that:

"Said statutes shall be compiled and published by a commission consisting of George B. Young and such others as he may associate with him, under the supervision and direction of the Governor, within one year from the passage of this act."

And in section 3 that:

"All expenses of the preparation and publication of said Statutes shall be borne by the party publishing them and the State shall not be liable in any way for any of the expenses of this work."

The work appears to have been done and submitted to the Legislature in 1879. By the act of March 8, 1879 (Laws Minn. 1879, p. 71, c. 67) the Legislature, in section 1, declared that the edition so submitted "shall be competent evidence of the several acts and resolutions therein contained in all courts of this state without further proof of authentication," and in section 2 enacted that said compilation shall be known and cited as "General Statutes, 1878." No other legislation is found from which it can be concluded that Young's edition was ever adopted or recognized by the state as a revision of its laws. The provision for a private commission to compile and publish the statutes at the expense of the publisher; the legislative designation of the work as a "compilation"; the absence of any express enactment or other distinct recognition of the compilation as conclusive evidence of the laws of the state, such as is generally found in legislation relating to revisions, seem to deny to these statutes the force and effect of a legislative revision of the laws. This conclusion is in harmony with the treatment of this compilation by the Supreme Court of Minnesota. The language employed in the act of March 8, 1879, supra, is not essentially different from that employed in the act of February 27, 1895 (Laws Minn. 1895, p. 723, c. 310), giving force and effect to the compilation of the General Laws of Minnesota, by Harry B. Wenzel, known as the "General Statutes of 1894." His compilation was made "competent evidence of the several acts and resolutions therein contained" quite the same as Young's compilation was.

If either of these compilations constituted revisions of laws of the state, then (except in cases of doubt or ambiguity) no resort could be had to original statutes to modify them. They would constitute final and conclusive expressions of the law. U. S. v. Bowen, 100 U. S. 508, 513, 25 L. Ed. 631; Cambria Iron Company v. Ashburn, 118 U. S. 54, 57, 6 Sup. Ct. 929, 30 L. Ed. 60. But the Supreme Court

of Minnesota has in many cases, quite inconsistent with plaintiff's theory, ignored the compilations of 1878 and 1894, and examined original enactments to ascertain, among other things, whether the title of the original act was broad enough to embrace the subject of the enactments. State ex rel. Keith v. Chapel, 63 Minn. 535, 65 N. W. 940; Palmer v. Bank of Zumbrota, 72 Minn. 266, 75 N. W. 380; Hamilton v. Minneapolis Desk Manf'g Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350; Lien v. Board of County Commissioners, 80 Minn. 58, 82 N. W. 1094; Loper v. State, 82 Minn. 71, 84 N. W. 650. In these and other cases which we have examined, it obviously did not occur to that court to treat the compilations in question as revisions. They were recognized as competent or prima facie evidence of what the law was, but when their verity was questioned, the court recurred to the original enactments for the truth.

In State v. Smith, 35 Minn. 257, 28 N. W. 241, that court, in speaking of the "General Statutes of 1878" says:

"These words refer to Young's compilation of statutes made in that year, which was never adopted or enacted as a law, or revision of the laws, although it was * * * made competent evidence of the several acts and resolutions therein contained in all courts of this state."

In Hall v. Leland, 64 Minn. 71, 66 N. W. 202, that court, in holding that "an act to amend" * * * a stated section and chapter of the "General Statutes of 1878" was sufficiently specific within the constitutional requirement that the subject of the act should be expressed in the title, put its conclusion on the ground of public policy and convenience, suggested by the fact that the people as well as the Legislature had come generally to look upon those statutes as original enactments and that reference to them would afford practically the same definite information concerning the subject of legislation as would be the case if they had been original enactments. Moreover, it does not escape observation that in this case the court refers to the "General Statutes of 1878" as a "mere compilation." The statutes of 1878 not constituting a legal revision of the laws but only prima facie evidence of them we are not concluded by the language employed in them. Their verity being challenged, we may and should resort to the original legislation for accuracy.

The act of March 7, 1867 (Laws Minn. 1867, p. 58, c. 31), supposed to be transcribed in section 114 of chapter 10 of the General Statutes of 1878 (Gen. St. 1894, § 1031), has the following title which does not appear in the compilation:

"An act to authorize the Supervisors of the several organized townships of this State and those that may be hereafter organized, to issue bonds or orders for the purpose of building bridges in their respective towns."

Section 1 authorizes, in the language already quoted from section 114, the board of supervisors to issue bonds of the town. No limitation of the purposes for which the bonds may issue is found in the first or any other section of this act.

Section 2 (page 59) provides as follows:

"No bonds or orders issued under authority of this act shall be so issued * * * or the proceeds thereof be used or appropriated for any purpose whatever other than that specified in this act."

Here is found an assumption that the act in some of its provisions had specified the purposes for which bonds might be issued.

Section 27, art. 4, of the Minnesota Constitution ordains that "No law shall embrace more than one subject, which shall be expressed in its title." Because of this constitutional inhibition the title of an act necessarily limits and restricts the operation of the enacting clause and may be resorted to for aid in the interpretation of the statute. Black on Interpretation of Laws, 175; Cooley's Constitutional Limitations, *149; State ex rel. Stuart v. Kinsella, 14 Minn. 524 (Gil. 395); Hamilton v. Minneapolis Desk Manf'g Co., 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350. Considering, therefore, the act of March 7, 1867, in the light of its title, we find adequate scope for the operation of section 2. The title specifies the purpose, namely, "building bridges." Nothing more.

The conclusion is irresistible that a fair and reasonable interpretation of the act of March 7 limited towns to the issue of bonds only for the purpose of building bridges. This act was amended by the act of March 3, 1868 (Laws Minn. 1868, p. 87, c. 50), but this amendment does not aid the plaintiff. It provides in substance, that the notice for the town meeting to authorize the issue of bonds shall particularly specify the object for which the meeting is called. It is recited in the body of the bonds sued on that they were issued "for the purpose of constructing and improving roads and bridges of said town, as authorized by more than a two-thirds vote of all the votes cast at a special township meeting called for that purpose." This recitation discloses that the bonds were issued for the unauthorized purpose of constructing and improving roads and improving bridges as well as for the sole purpose for which the town was authorized by law to issue them, of "building bridges." It also discloses that there is substantial merit in the defense of these bonds. The legal voters of the town, who alone were empowered to authorize their issue had no opportunity to vote on the proposition, whether the town should incur the indebtedness and issue its bonds for the sole purpose permitted by law. The town meeting was called to consider the proposition of issuing bonds for the fourfold combined purpose just stated, and on this proposition the vote appears to have been taken.

The mere fact that the bonds were voted for and issued for one lawful purpose out of the four purposes specified in the call and recited on the face of the bonds, does not justify the issue of the bonds for the combined purposes mentioned. Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374, 49 N. E. 335. They were issued without a legal vote of the township, and for purposes unauthorized by law and are void. There is no question in this case concerning the rights of innocent purchasers. The plaintiff does not stand in that attitude. He purchased the bonds with the nullifying recitation on their face, and was bound to take notice thereof.

The Legislature of Minnesota, in 1903, passed a confirmatory act. Laws 1903, p. 387, c. 267.

Section 1 provided that:

"All bonds which, prior to the passage of this act, have been issued and sold by any organized town or township in this state for the purpose of constructing, altering, or repairing roads in said town, or for the purpose of constructing, altering, or repairing roads and bridges in said town * * * under authority of the act of March 7, 1867, as amended by the act of March 3, 1868, are hereby declared to be in all things confirmed * * * and are hereby declared to be valid and binding obligations against the town or towns issuing the same."

Under this act plaintiff claims that his bonds are validated and become legal obligations of the defendant. There is a proviso to this act in the following words:

"Provided further, that this act shall not apply to any suit or action now pending relative to the legality of any bonds so issued or to any bonds where the legality of the same, either as to principal or interest, has been questioned in any action or proceeding in any court."

The taxpayer's suit appears to have been instituted against the town in 1899. It unequivocally challenged the validity of the bonds in suit, both as to principal and interest, and resulted, on April 2, 1903, in a final decree adjudging the bonds void and restraining the defendant town and its officers from paying the same. We entertain no doubt that this suit "questioned" the legality of the bonds within the meaning of the mentioned proviso. Argument is made by plaintiff's counsel that the validity of the bonds must have been "questioned" in some action or proceeding to which the bondholders were parties in order to bring the bonds involved in it within the terms of the proviso. We fail to appreciate the force of this argument. The words employed must be given their natural meaning, and no interpolation should be made unless necessary to express the legislative intent. The proviso clearly and explicitly excepts from the operation of the act, any bonds which have been "questioned in any action or proceeding in any court." It does not prescribe in what manner or how effectually they should be questioned.

The taxpayer's suit seems to have been pending at the time the curative act was under consideration. It doubtless was in the legislative mind and one of the actions or proceedings contemplated by the proviso.

Finding no error in the record of the trial court, its judgment is affirmed.

OPHIR CONSOL. MINES CO. et al. v. BRYNTESON.

(Circuit Court of Appeals, Seventh Circuit. February 6, 1906.)

No. 1,191.

1. CONTRACTS—CONSIDERATION—COMPROMISE OF DISPUTED OBLIGATION.

Certificates of stock in defendant corporation were delivered by its agent to plaintiff pursuant to an offer to sell him the stock at a stated price. He did not pay for the stock, but agreed to visit the office of the company. When he did so he returned the stock and refused to complete the purchase, on the ground that the current price at which it was being sold was less than that stated to him. Thereupon after further negotiations, a written contract for the sale and purchase of the stock was entered into for a smaller price, and by which the corporation and its president agreed to take the stock back and refund the money

paid therefor with interest at a certain time, if plaintiff was not then satisfied to retain the same. *Held*, that such contract was not without consideration, because of the prior transaction which was not treated by either party as having created a binding contract, and was not in any event recognized as such by plaintiff.

2. CORPORATIONS—VALIDITY OF CONTRACT—CONTRACT FOR SALE OR RETURN OF STOCK.

Such contract was one of conditional sale only, or what is known as a "sale or return" contract, by which no absolute title passed, and was not ultra vires the corporation, as in violation of Mill's Ann. St. Colo. § 485, which prohibits the purchase by corporations of their own stock, except when forfeited for nonpayment of assessments; nor did it involve any use of corporate funds which could be detrimental to stockholders.

3. SAME—INTEREST—VALIDITY OF AGREEMENT TO PAY.

The agreement to pay interest for the use of the money paid for the stock, so long as the purchaser's option continued, was valid.

4. CONTRACT—JOINT CONTRACTORS—CONSIDERATION.

A joint contract by a corporation and its president, individually, to refund the money paid to the corporation on a conditional purchase of its stock, in case the purchaser exercised his option to return the same, is based upon a sufficient consideration, and is valid as to both makers.

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

The defendant in error, John Brynteson, was the plaintiff below (hereinafter referred to as plaintiff), in an action against the Ophir Consolidated Mines Company and J. O. Buckley, plaintiffs in error (hereinafter referred to as defendants), to recover the purchase price of stock in the defendant corporation and interest thereon, pursuant to express contract of "sale or return." Upon the trial before a jury, verdict was entered against the defendants, by direction of the court, and this writ of error is prosecuted from the judgment thereupon. The bill of exceptions preserves all the evidence received, and the substantial facts are undisputed. The capital stock of the defendant corporation was $3,000,000, in shares of $1, of which 1,700,000 shares were held in the treasury for sale to raise funds for improvements. For 50,000 of these treasury shares the plaintiff paid $15,000, under the following contract:

"Whereas John Brynteson of Campbell, California, has paid Fifteen Thousand (15,000) Dollars for Fifty Thousand shares of the stock of the Ophir Consolidated Mines Company, as evidenced by certificates number 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, and 1099, issued to him April 2d, 1902; therefore, be it understood, that the undersigned hereby bind themselves to return to said John Brynteson said Fifteen Thousand (15,000) Dollars, with interest on the same at the rate of six per cent. per annum, eighteen months after the date hereof, if said John Brynteson be not satisfied with aforesaid investment.

"Dated Milwaukee, Wisconsin, this 7th day of April, A. D. 1902.

"The Ophir Consolidated Mines Company,

"By J. O. Buckley, President.

"Countersigned: Thomas F. Somers, Secretary.

"J. O. and W. S. Buckley."

Within the time stipulated in this agreement the plaintiff gave notice that he was not satisfied with the investment, tendered return of the stock, and demanded that the purchase money, with interest, be returned to him October 7, 1903. It is stated in the brief for the plaintiffs in error that W. S. Buckley, one of the signers of the contract, "died shortly after the action was commenced and was not served with process."

With these facts conceded, the contentions are that the agreement is invalid for want of consideration and other causes, and the only additional

facts involved in this review relate either to the defense of want of consideration or the attitude of the parties respectively; and in so far as they bear upon one or the other contention, such facts are stated in the opinion.

Adolph Huebschmann, for plaintiffs in error.
W. J. Turner, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. The meaning of the agreement in suit is unquestionable. It distinctly provides that the purchaser may, within the stipulated period, return the stock, and thus avoid the sale, and recover the purchase money with interest, if "not satisfied with aforesaid investment." So the verdict was rightly directed in favor of the plaintiff below, if that agreement was binding upon the defendants. The assignments of error rest upon these propositions: (1) That the contract for return of the stock is void for want of consideration; (2) that it is ultra vires the corporation; (3) that it is malum in se, as in fraud of other stockholders and creditors of the corporation; (4) that the provision to pay interest on the purchase money is void; and (5) that in terms the agreement is a joint obligation, and "no recovery can be had against the defendant J. O. Buckley." Further assignments are based upon the rejection of testimony, but the testimony tendered was obviously immaterial under the view stated below of the issues involved.

1. The alleged want of consideration for the agreement is predicated upon the fact of a pre-existing transaction between the parties for unconditional sale of the stock at 32 cents per share. It appears that one Henrickson, who was interested in the corporation defendant, met the plaintiff on the way to Ishpeming, Mich., discussed with him the value of the mine and the opportunity for an investment. The plaintiff was acquainted with mining investments, but not with the mine in question, and entertained a proposal to take a block of shares at the value named, 32 cents. Upon their arrival at Ishpeming, Henrickson communicated with the president of the corporation, by telephone, to have 50,000 shares of the stock forwarded for sale to the plaintiff at such rate. The shares were mailed to Henrickson accordingly, on April 2, 1902, for delivery upon the proposed sale, and a letter was sent to the plaintiff stating that they were so forwarded for purchase by him at 32 cents per share. Henrickson handed the stock to the plaintiff, with the understanding upon his part that the price was to be paid at Milwaukee within a few days. What was said by the plaintiff by way of acceptance is not definitely stated; nor is it deemed material, in view of the subsequent transaction, whether present acceptance of the terms offered was intended or understood by him. When the plaintiff arrived at the office of the corporation in Milwaukee, on April 7, 1902, the witnesses concur in their testimony that he handed the stock to the president, stating that he was informed of recent sales at much lower price than the offer to him, and that he would not purchase at the price named. After considerable negotiation the plaintiff was persuaded to take the stock at $15,000, upon the conditions stated in the agreement, and the bargain was consummated accordingly

The witness Buckley (the president and defendant) thus testifies: "I readily saw or thought that I could not get 32 cents, so I offered to make it even $15,000, 30 cents a share, and offered to him this contract that we would pay back the money" at such time as he named.

The contention is that the bargain was closed at Ishpeming for 32 cents per share, with payment absolutely due at that rate on arrival at Milwaukee, so that payment of $15,000 as the purchase money, on April 7th, furnished no consideration for the new contract of that date. The general rule which is invoked to that end is thus stated in Fire Insurance Association v. Wickham, 141 U. S. 564, 577, 12 Sup. Ct. 84, 87, 35 L. Ed. 860:

> "The rule is well established that, where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where a larger sum is admitted to be due, or the circumstances of the case show there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

Also, the exemplification of this rule, in Palmer v. Yager, 20 Wis. 91, 98, holding that the right of parties to abolish a contract and substitute another in its place, is subject to the requirement of a new consideration for the substituted contract—some "distinct benefit accruing to the creditor" party—or that the substitution be made "upon the compromise of a doubtful or disputed claim."

Without considering the question whether the rule and authorities referred to are applicable to these bargainings for stock, upon either theory of the testimony, we are clearly of opinion that the contention is untenable, for at least two reasons: First, because the proof establishes, as we believe, only the single purchase of April 7th; and, second, on the assumption that a prima facie prior obligation to purchase the stock at 32 cents per share, appeared from the Ishpeming transaction, the ultimate compromise of "a bona fide dispute" (Fire Insurance Association v. Wickham, supra), exempts the case from the operation of the rule cited. That there was no meeting of the minds of the parties in an unconditional purchase at Ishpeming is undoubted, in the light of the attitude of both principals at the meeting in Milwaukee. The fact that the plaintiff received the stock at Ishpeming, when it arrived pursuant to negotiations, which is the main reliance for the alleged prior contract, was not treated by either party as an acceptance of the Ishpeming offer; nor can it be inferred from the conduct or expressions of either party that a bargain had been closed, or that either the plaintiff or the representative of the corporation so understood the prior transaction. In the absence of evidence of such understanding by both parties to the negotiation at Ishpeming, no purchase can be implied from the testimony, and the parties were free to conclude a bargain without reference to that transaction. Aside from this view, however, the consideration was sufficient for new terms of sale by way of compromise. Not only was the fact of acceptance of the Ishpeming

offer disputable, to say the least, but the refusal of the plaintiff to purchase the stock, when he arrived at Milwaukee, was expressly placed upon the ground, in effect, that the previous representations as to the selling price were not true. Thus the elements of a bona fide dispute of obligation to take the stock, under any assumed obligation in the mind of the parties, were there presented. Their force was either conceded or plainly recognized in offering the new terms, and the final arrangement thereupon is not open to objection arising out of the alleged pre-existing contract.

2. The corporation defendant is incorporated under the laws of Colorado, and it is contended that the contract violates section 485, Mills' Ann. St. Colo., which prohibits the use by corporations of any of their funds "for the purchase of stock in their own company or corporation, except such as may be forfeited for the nonpayment of assessments thereon." This agreement is in no sense within the meaning or object of the provision referred to. The stock was held in the treasury of the company to raise funds for improvements, upon such terms of sale as were adopted by the president. The right to so hold and own the stock remains in the corporation until an absolute sale is made. No such sale arose under the agreement in suit. It was of the well-recognized class, known as a contract of "sale or return," as defined in Sturm v. Boker, 150 U. S. 312, 328, 14 Sup. Ct. 99, 104, 37 L. Ed. 1093, where the title passes for the time being, but subject to the option of the purchaser to rescind and return the property within the time stipulated. With the exercise of the option the contract of sale terminates and the right and title of the corporation is restored to its original status. No sale has been accomplished, and no purchase or repurchase arises upon the part of the corporation through this return of its unsold stock. As held in the recent Minnesota case of Vent v. Duluth Coffee & Spice Co., 67 N. W. 70, such transaction is not ultra vires, within the rule applicable to purchase of stock. In the case of Tolman v. New Mexico, etc., Mining Co., 4 Dak. 4, 22 N. W. 505, cited contra, the contract under consideration appears to have been one of actual repurchase of stock by the corporation, and the ruling is deemed inapplicable to the present controversy.

3. The contention that the contract was fraudulent as to other stockholders and creditors requires no discussion, under the foregoing view that no sale of stock was effected, so that the agreement to repay the investment for purchase money, if the stock was not purchased, called for no diversion of corporate funds—plainly distinguishable from the cases cited of release of subscribing stockholders.

4. The agreement provides for repayment of the purchase money, with interest, upon return of the stock, and objection is raised to the promise of interest as invalid. No distinct ground for the objection is stated, and we are impressed with no view which supports it. The promise implies an understanding that the corporation was to have the use of the money, pending the continuance of the option, instead of retaining it on deposit, and for such use it was surely competent for the parties to agree upon the payment of interest.

5. The objection to the recovery against the defendant Buckley,

on the ground that a joint obligation is created by the terms of the contract, is without force, under the foregoing view that the contract is not ultra vires the corporation. The contract is joint only in respect of the promise to return or repay the $15,000 and interest, and the consideration moving between the corporation defendant and the promisee is sufficient to support the joint obligation when the indebtedness accrues.

The several assignments of error are overruled, and the judgment of the Circuit Court is affirmed.

INDIANAPOLIS TRACTION & TERMINAL CO. v. LAWSON.

(Circuit Court of Appeals, Seventh Circuit. February 6, 1906.)

No. 1,217.

1. CARRIERS—LIABILITY FOR INJURY OF FREE PASSENGER.

A passenger on an electric car, although carried free, is still a passenger, and the carrier owes him the duty of exercising such skill as is consistent with the situation and the service undertaken and the greatest possible care for his safety, and any negligence by which the passenger is injured is actionable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 974, 975.]

2. SAME—ACTION FOR INJURY TO PASSENGER—INSTRUCTIONS.

Defendant, an electric street railroad company, offered the free use of three of its cars to take members of a women's convention for a ride about the city. The offer was accepted, the plaintiff's ward became one of the passengers, and was injured in a collision. The cars were operated by the regular employés of defendant. *Held*, that in an action to recover for the injury an instruction that defendant was liable for want of ordinary care, and that the burden of proof to show negligence rested on the plaintiff, was at least sufficiently favorable to defendant.

3. APPEAL—REVIEW—HARMLESS ERROR—PLEADING—VARIANCE.

Under Burns' Ann. St. Ind. 1901, § 394, which provides that no variance between the complaint and evidence shall be deemed material unless defendant was actually misled to his prejudice, and which also requires the defendant to call attention to the fact, and authorizes the court to order the pleadings amended to conform to the proof, where no objection on the ground of a variance was made during a trial, the action of a court in construing the complaint in its charge as covering the case made by the proof, even if such construction was erroneous, did not constitute error prejudicial to the defendant, since the court had power to order the complaint amended.

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

Action at law to recover damages for personal injury to the ward, Ada M. Lawson.

It appears that on May 14, 1903, the order of Royal Neighbors, an auxiliary to the Modern Woodmen, and composed of women, was holding a national convention in the city of Indianapolis, the ward of the defendant in error being in attendance. Some time prior to the convention a committee of the society solicited a donation from the plaintiff in error. The committee was informed that the company could not make a donation, but would arrange for three of its street cars to be placed at the disposal of the committee for the entertainment of their guests by trolley ride. The committee thereupon

caused an invitation to be issued to the assembled delegates, and a large number of the delegates availed themselves of the invitation, and boarded the cars for the purpose of an excursion through the principal parts of the city. During the progress of the ride a collision occurred between two of the cars in which Mrs. Lawson was injured. It further appears that the three cars were in charge of the regular conductors and motormen employed by the company, and the jury found that the company, and not the delegates being carried on the cars, was in control of these conductors and motormen. Defendant in error recovered a verdict for $8,000, upon which judgment was entered June 17, 1905, and to review such judgment this writ of error is brought.

At the beginning of the argument defendant in error by petition suggested the death of his ward, Mrs. Lawson, after judgment and writ of error, and that he had been duly appointed administrator of her estate; and asked to be substituted in his capacity as such administrator for himself in his capacity as guardian. His motion was granted by the court.

Wm. H. Latta, for plaintiff in error.

Percy D. Godfrey, for defendant in error.

Before GROSSCUP and KOHLSAAT, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). The court submitted to the jury the question whether the company or the excursionists were in control of the cars which collided, by whom they were run and operated, and who had control of the conductors and motormen. The jury was also instructed as a matter of law that the company, having done something it was not obliged to do as a common carrier of passengers, and having made a particular arrangement, as to the carriage, thereby came into the relation of a private carrier to Mrs. Lawson as a passenger, if the jury should find that the company was in control of the cars and conductors and motormen; that the company was required to use that degree of care that men of ordinary prudence use under like circumstances, and was liable for a failure therein; and that the burden of proof, on all the issues, was upon defendant in error, and not upon the company. The question of proximate cause was also fully submitted.

A large number of errors were assigned, two of which were pressed on the argument, to the effect that as the company was not a common carrier as to Mrs. Lawson, but only a private carrier, and as the service was gratuitously undertaken, it was liable only for gross negligence. Also that the complaint having counted on the relation of common carrier and passenger, defendant in error could not recover, on the theory that the company was a private carrier, liable only for ordinary neglect, instead of a common carrier, chargeable with the highest degree of care; and that there was a fatal variance between pleading and proof. It is insisted on the part of the company that the parties never came into any legal relation. It is said a donation was requested, and a street car ride offered and accepted; a pure gratuity, without consideration of any kind. This, it is said, removes the case from that large class into which considerations of public policy enter, since by their conduct the parties have voluntarily separated themselves from the great class of carriers and passengers for hire, and no considerations of public policy in any way affect the con-

tract made, or the legal effect of the acts of the parties; that in all private affairs no one is bound beyond voluntary obligations expressed or implied by the contract; and the only thing the company agreed to do was to deliver the cars to the delegates, and surrender to them their control. Having done this it fully complied with every obligation assumed by it, and beyond this it cannot be held.

The position taken by counsel for plaintiff in error is seriously impaired by the finding of the jury that the company actually did run and operate the cars, through its servants, and that the delegates did not control those servants, nor manage the cars. Such position is further opposed by the consideration that even in a private, gratuitous mandate, or bailment of services, the bailor is obliged to use such skill as he possesses, and which is consistent with the situation, the service undertaken, and his profession, business, habits, and position; and that a failure to bestow this degree of care will constitute actionable negligence. Shiells v. Blackburne, 1 H. Bl. 158; Conner v. Winton, 8 Ind. 315, 65 Am. Dec. 761; Wilson v. Brett, 11 M. & W. 113; Mariner v. Smith, 5 Heisk (Tenn.) 208; Preston v. Prather, 137 U. S. 609, 11 Sup. Ct. 162, 34 L. Ed. 788; Gray v. Merriam, 148 Ill. 179, 35 N. E. 813, 32 L. R. A. 773, 39 Am. St. Rep. 172. And finally, it is also well settled that a passenger carried free is still a passenger, as fully as if he pays fare. Railroad Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Steamboat v. King, 16 How. 469, 14 L. Ed. 1019; Keep v. Railway Co. (C. C.) 9 Fed. 625. The basis of this rule is, that where a carrier, common or otherwise, undertakes to carry persons by an irresistible and highly dangerous agency public policy and safety require that it should be held to the greatest possible care and diligence. Whether the consideration for the transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross." Mr. Justice Grier, in Railroad Company v. Derby, supra. In these three respects the case differs, and differs radically, from the one stated by counsel for the company.

What was the understanding between the parties, in view of the verdict? It was agreed or understood that the company would give the delegates a free street car ride. This implied that it would furnish safe and suitable track, cars and appliances, the necessary power, and to apply that power skilled employés, who should be under the control of the company. All the excursionists did, or could do, was to direct when to go and where to go; the very important how to go was necessarily left to the motormen and conductors. All the skill and experience were with the company, all the inexperience with the excursionists. Is it possible that it could be considered lawful or proper for a carrier to be permitted to turn over the control of irresistible power on a public track, in crowded thoroughfares, to a company of women, and be responsible only for the reckless or grossly negligent use of such power by its own skilled servants? It is impossible to consider the case apart from considerations of public policy. The company was charged with the custody and care of

human lives in a service voluntarily assumed, and it is of no importance whether it was in the technical relation of common carrier or not. Keep v. Railway Co. (C. C.) 9 Fed. 625, and note by Mr. Thompson. The trial court held, as matter of law, that the company was not a common carrier as to Mrs. Lawson, was liable only for a want of ordinary care, and that the burden of proof to show negligence was on the defendant in error, plaintiff below. That this was a position sufficiently liberal to the railway company already appears, and is also justified by the following considerations.

A public, common carrier of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, and for a reasonable compensation, furnish reasonable accommodations, must continuously operate its line, and submit to reasonable regulation. It has the franchise of taking tolls, and, if a street railway corporation, the franchise of laying tracks in the streets, of stringing wires and setting poles, and the right of way over all private means of transportation. Owing these public duties, possessing these public franchises, and having the burden of caring for innumerable human lives, it is justly held to the highest degree of care and skill. Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Simmons v. Oregon R. Co., 41 Or. 151, 69 Pac. 440, 1022; Kennedy v. N. Y. C. R. Co., 125 N. Y. 422, 26 N. E. 626; Steamboat v. King, 16 How. 474, 14 L. Ed. 1019; Indianapolis v. Horst, 93 U. S. 296, 23 L. Ed. 898. This burden the company was bearing, and these public franchises it was employing, in carrying these delegates on this free ride. A passenger is one who undertakes, with the carrier's consent, to travel in the carriage of the latter, otherwise than in its service. Higley v. Gilmer, 3 Mont. 90, 35 Am. Rep. 450. It is the existence of a contract of carriage, express or implied, which distinguishes a passenger from an employé, a licensee, an invited person attending on a passenger, and a trespasser. 5 Encyc. of Law, 484, 485. Persons on trains who are present as friends or attendants of travelers are not passengers, and as to them the carrier owes only the duty of ordinary care. 5 Encyc. of Law, 518; Fetter on Carriers, § 237.

In view of these characteristics of common carrier and passenger, what was the relation of the parties? The carrier, engaged in the public service, deriving most if not all of its rights and privileges from the state or municipality, and charged with many duties imposed by public policy, gratuitously turns over the use of its facilities, its track, cars, power and servants, to a company of women, who unhesitatingly place themselves in its charge, relying on its skill and experience as a public carrier of passengers. Charged with the care of these precious lives, how can it be heard to urge that it lays down all the responsibilities incident to its important public position, and becomes like a private person doing a favor? Especially when its public and responsible position was the sole inducement to the so-called "private arrangement." At the very least the company was responsible for ordinary diligence, and liable for any want of ordinary

care. The charge was sufficiently liberal to it; and we find no error in this respect.

It is further insisted by plaintiff in error that as the complaint charges the company with liability as a common carrier of passengers, and negligence in that relation causing injury to Mrs. Lawson as a passenger, there was a fatal variance between pleading and proof. The trial court held that the relation was that of private carrier and passenger; that the company was not charged with the liability of common carrier, but for a want of ordinary care only; and that the burden of proof was on the defendant in error on all the issues of the case. This is assigned as error, on the ground that under the pleadings the company could be held liable only upon the theory of a violation of its duty as a common carrier, and not as a private carrier; that the company was only called on to defend as to the theory alleged in the complaint; that while a common carrier is required to use the highest degree of diligence a private carrier gratuitously is a mere mandatary, liable only for gross negligence; and that all the evidence offered was admissible because, if it had been supported by other evidence showing that the company was actually operating the cars, and had agreed in its public capacity to carry Mrs. Lawson, this would have tended to support the case made by the complaint.

From what has been already said, it is apparent that no mistake was made in pleading. In any event defendant was not injured nor misled. We adopt the opinion of the trial court on the motion for a new trial, as follows: The complaint stated a cause of action. The proofs established a cause of action. The defendant, claiming that there was a variance between the case stated in the complaint and that established by the evidence, presented instructions which would take the case from the jury. Section 394 of the Indiana Code (Burns' Ann. St. 1901) provides that no variance between the complaint and the evidence shall be deemed material unless the defendant is actually misled to his prejudice in maintaining his defense. The same section requires the defendant to call the court's attention to such fact, "and thereupon the court may order the pleadings to be amended on such terms as may be just." A similar provision of the Wisconsin Code was considered by the Court of Appeals of this Circuit in Walsh v. McColclough, 56 Fed. 778, 6 C. C. A. 114. See, also, the Tremolo Patent, 23 Wall., on page 527, 23 L. Ed. 97, and Graffam v. Burgess, 117 U. S., on page 194, 6 Sup. Ct. 686, 29 L. Ed. 839. The better considered Indiana cases are to the same effect. Louisville, etc., R. R. Co. v. Hollerbach, 105 Ind. 137, 5 N. E. 28, and Reddick v. Keesling, 129 Ind. 128, 28 N. E. 316.

Section 399 of the Indiana Code authorizes the court, at any time, in its discretion, to direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendments do not substantially change the claim. So, even if it were conceded to be error for the court to construe the complaint as was done in the court's instructions, the error would be harmless, because such action of the court would amount to no more than if the court had directed the complaint to be amended to conform to the proofs.

This was the second trial of the case. The defendant failed to object to the plaintiff's evidence on the ground that the case being established by the proofs was at variance with the case pleaded, made no motion at the conclusion of the plaintiff's evidence, and at no time made any claim of surprise or prejudice, or that it was misled to its injury in maintaining its defense. The general nature of the plaintiff's claim was that his ward, at a named time and place, while lawfully on one of the defendant's cars, was injured through the negligence of the defendant's servants. There can be no question but that the present judgment is a complete bar to any further action on account of that injury.

The judgment of the Circuit Court is affirmed.

SEMET-SOLWAY CO. v. WILCOX.

(Circuit Court of Appeals, Third Circuit. February 14, 1906.)

No. 54.

1. TRIAL—PROVINCE OF JURY.
   Where a case fairly depends upon the effect or weight of the testimony, it is one for the consideration and determination of the jury.
   [Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 332-343.]

2. MASTER AND SERVANT—WRONGFUL DISCHARGE—QUESTION FOR JURY.
   To carry the question of the discharge of a plaintiff from his employment by defendant to the jury, it is not necessary that plaintiff produce evidence of an express and formal discharge, but is sufficient if he proves facts from which an intent to discharge him may reasonably be inferred.
   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 57.]

3. SAME—ACTION FOR BREACH OF CONTRACT—DAMAGES RECOVERABLE.
   An employé wrongfully discharged may, at his election, treat the contract of employment as absolutely and finally broken and recover the stipulated compensation for its full term, less what he might have earned and may earn in the future during such term.
   [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 50-53.]

4. EVIDENCE—OPINION EVIDENCE—PHYSICAL CONDITION OF PERSON.
   In an action for breach of a contract of employment by the wrongful discharge of plaintiff, his own testimony that at the time of his discharge his health was such that he was able to perform the services required by his contract is competent; the weight to be given his opinion being a matter for the jury in connection with the other evidence.

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

S. H. Holding and W. S. Dalzell, for plaintiff in error.

Thomas Patterson and George E. Shaw, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. In this opinion the parties will be designated in conformity with their respective positions in the court below,

where the defendant in error was plaintiff and the plaintiff in error was defendant. By a contract in writing, dated May 13, 1903, the defendant employed the plaintiff for the term of five years; and in the statement of his cause of action the latter alleged that:

"On or about the 1st day of November, 1904, the defendant, without cause or reason, or previous notice to the plaintiff, advised the plaintiff that it refused to recognize any obligation under said contract, and terminated the said employment and refused to pay the plaintiff the salary due him to that time under the terms of said agreement."

The defendant denied that it had discharged the plaintiff, and insisted that, even if it had done so, his discharge would have been justified by the fact, as alleged, that the plaintiff's condition of ill health had become such as to incapacitate him for performance of the work he had been employed to do. Upon the issues thus presented considerable evidence was adduced, and at the close of the trial the learned judge was requested to instruct the jury that its verdict must be for the defendant. This he refused to do, and the matter to be first decided is whether that refusal was erroneous.

It is not necessary that we should pass upon the weight of the evidence, for the question is not what effect we would attribute to it, but whether the conclusion that was reached by the jury could have been reasonably founded upon it. The settled rule is:

"Where a case fairly depends upon the effect or weight of the testimony, it is one for the consideration and determination of the jury, under proper instructions as to the principles of law involved; and it should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." Phœnix Ins. Co. v. Doster, 106 U. S. 32, 1 Sup. Ct. 18, 27 L. Ed. 65.

Tested by this rule, the refusal of the binding instruction asked for by the defendant was clearly right. Upon neither of the controverted questions we have mentioned was the testimony of such conclusive character as to require that the verdict which was rendered for the plaintiff should be set aside. As to both of them, the cause fairly depended upon the effect or weight of evidence, and it could not have been withdrawn from the jury without encroachment upon its appropriate and exclusive province. Bank v. Hunt, 78 U. S. 394, 20 L. Ed. 190. If the jury erred, the remedy was by the motion for a new trial which was made and overruled in the court below, and much of the argument which has been submitted here, however apposite it might be on such a motion, is not pertinent on writ of error. Schuchardt v. Allens, 68 U. S. 371, 17 L. Ed. 642.

To take the case to the jury on the question of discharge, it was not necessary for the plaintiff to prove that the corporation defendant had expressly and formally terminated his employment. Facts from which an intent to do so could reasonably be inferred were adequately shown, and whether or not the existence of such intent should be actually deduced from them was for determination by the jury. Wardlaw v. City of New York, 137 N. Y. 194, 33 N. E. 140; Railroad Co. v. Harvey, 15 Ky. Law Rep. 809. The instructions which were given upon this subject have, in part, been assigned for

error; but, when fully read, they appear to have been quite as favorable to the defendant as they properly could have been. They were as follows:

"It will be your duty, in considering his [the plaintiff's] side of the case, to ascertain, in the first place, whether he was discharged. The contention of the company is that while he came to see Mr. Handy, and while he talked to Mr. King, and while they refused to pay him the salary for the month of October, the matter was before the executive committee and had not been determined; that he was not discharged, but that Mr. Wilcox mistakenly and erroneously considered himself discharged when he was not in point of fact discharged, and that thereafter he accepted that as a discharge wrongfully, the defendant says; and that he failed to report for duty later, but voluntarily left Syracuse and performed no duty under that contract. Now, gentlemen, it will be for you to say whether Mr. Wilcox was discharged in the fall. * * * If you find that the plaintiff was not discharged in October, and I may say to you as a point of law that the employer to discharge one must make a plain, unequivocal, and certain statement of the fact that he does discharge a man before the law will consider it a discharge, if Mr. Wilcox was not discharged, if he was mistaken in reference to the fact that he was discharged, if the company only held this matter in abeyance for future consideration, and did not then discharge him, and Mr. Wilcox mistakenly took that for a discharge which was not a discharge—then we may say to you that he is not entitled to recover by reason of his having left his connection with the company and performed no services thereafter. In other words, he took it upon himself to discharge himself without there being any discharge from the company, and under those circumstances all he would be entitled to recover would be the thousand dollars for October, with interest upon that amount."

In treating of the defense of justification, the evidence was not in any respect erroneously referred to in the charge, and the instructions which were given concerning it were too manifestly correct to require vindication. The learned judge said:

"If you find that he [the plaintiff] was discharged in the fall, it then becomes your further duty to inquire whether the defendant in this case was justified in discharging him at that time. And here comes in a serious question of fact for you to determine. We have said to you that under this contract Mr. Wilcox was bound to render personal service to that company. You have the contract, but it was substantially to the effect that Mr. Wilcox should furnish services of the same nature that he had been performing before this contract was entered into. Now, if Mr. Wilcox was not able, was not in a physical or mental condition to perform those services, which he had agreed to perform under the contract, then this company was justified in terminating the contract and discharging him from its employ. And here comes in the serious question of fact for you to determine. Mr. Wilcox alleges that he was able to perform those services. The company says that he was not. Mr. Wilcox says that although he was suffering to a certain extent, that his arm was in such condition that he could not raise it up high, and that he was somewhat weaker from the effects of his illness, that he was substantially in the condition and with ability to perform this contract. The other people say that he had the appearance of a paralytic at that time; that he was not able to raise his hand; that he had a halt in his walk; that his mouth was drawn and the saliva was driveling from it. If that be the case, gentlemen, was he in a fit condition to perform the high character of services that were called for by this contract? That is the question for you to determine under the facts of this case. If he was in a condition to go on and perform these services, this company had no right to discharge him, if they did discharge him. On the other hand, if misfortune had come to him and he was not in a condition to perform those services which he had agreed to perform, then this company, unfortunate as it may be in its results, had the right to terminate the contract, and discharge him from its employ."

Respecting the measure of damages, the jury was told, in substance, that, even if the plaintiff had been unjustifiably discharged, it was incumbent upon him to seek remunerative employment elsewhere; and that, if the jury should find the fact of discharge and that it was not justified, it should, in assessing the sum to be awarded the plaintiff, make allowance to the defendant for what the plaintiff might have earned had he sought employment in the past, and for what he might still earn by seeking and obtaining employment in the future. It seems to be conceded, as we think it must be, that this instruction was correct in so far as it related to the period preceding the commencement of the suit; but it is contended that because it was not possible to determine with accuracy what the plaintiff might, by the exercise of due diligence, thereafter earn, he should not have been allowed any damages that accrued after the action was brought. This contention cannot be sustained. It was repelled by the Supreme Court in the case of Pierce v. Tennessee Coal & R. R. Co. (173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591), in which, as was said in Roehm v. Horst (178 U. S. 15, 20 Sup. Ct. 780, 44 L. Ed. 953), "it was held that on discharge from a contract of employment the party discharged might elect to treat the contract as absolutely and finally broken, and in an action to recover the full value of the contract to him at the time of the breach, including pay that he would have received in the future as well as in the past, deducting any sum that he might have earned or that he might thereafter earn."

All the specifications have been dealt with, except those which aver that in several instances the court erred in admitting testimony to which the defendant objected. But the only point which has been pressed in support of any of these averments, and the only one which we regard as at all serious, is whether the plaintiff should have been allowed to testify that at the time of his alleged discharge he was able to perform the duties of his employment. This testimony, it will be observed, was not as to the nature of his disease, or any other matter about which, in the absence of special learning or experience, he might not have been qualified to speak. It was as to his ability, notwithstanding the state of his health, to do the work he had been employed to do, and upon that subject no one could have been better informed than himself. It would be difficult to supply a satisfactory criterion for distinguishing in all cases matters of fact from matters of inadmissible opinion, and we need not attempt to do so. But it may be confidently affirmed that a witness may always testify to any relevant fact which he has perceived by any of his senses, and that his impressions respecting facts so perceived are not in every case to be excluded as being merely opinions. "It is the constant practice to receive in evidence any witness' belief of the identity of a person, or that the handwriting in question is or is not the handwriting of a particular individual, provided he has any knowledge of the person or handwriting"; and, "in an action for breach of promise to marry, a person accustomed to observe the mutual deportment of the parties may give in evidence his opinion upon the question whether they were attached." 1 Gr. Ev. § 440. So, too, any one who saw and

observed the person in question upon the occasion referred to may testify that in his judgment that person was intoxicated. People v. Eastwood, 14 N. Y. 562. The plaintiff's statement of his capability to discharge the duties he had assumed may, in a sense, be taken to import nothing more than that such was his impression or belief on the subject; but his impression, if impression it should be called, was at least based upon facts which he personally knew, and therefore it was itself a fact which the jurors were entitled to consider, though they might deem it to be of but little weight. Blake v. People, 73 N. Y. 586. That the character of the plaintiff's sickness, and all matters pertaining to it, in which a point of medical science was involved, were subjects upon which persons conversant with that science were alone qualified to express an opinion, is undoubtedly true. But much depends upon the nature of the question upon which an opinion is asked, and even if the question in this instance should be regarded as calling for the expression of an opinion merely, it would not follow that the court erred in allowing it. "There are some matters of which every man, with ordinary opportunities of observation, is able to form a reliable opinion" (Ardesco Oil Co. v. Gilson, 63 Pa. 151); and the ability of the plaintiff to do the particular work which he had engaged to do was certainly a matter of which he had more than ordinary knowledge, and upon which he was especially competent to form a correct judgment. That question was not one that could be determined only upon scientific theory, or by abstract reasoning, and the opinion of the plaintiff respecting it, being founded upon facts within his own knowledge and experience, was no less reliable than it would have been had he appeared to be an "expert" in the too restrictive sense in which that term has been sometimes, but not always, used. D. & C. Steam Towboat Co v. Starrs, 69 Pa. 41.

We have reached the conclusion that the evidence which has been under consideration was rightly received; but may add that, even if we entertained a doubt upon the subject, the judgment of this court would be certainly influenced, and might be determined, by the rule that "whether the witness be a competent expert, and whether the contention be such as calls for expert testimony, * * * is largely in the discretion of the trial judge." Ryder v. Jacobs, 182 Pa. 630, 38 Atl. 471; Stevenson v. Coal Co., 203 Pa. 330, 52 Atl. 201.

The judgment of the Circuit Court is affirmed.

STEPHENS v. ESSEX COUNTY PARK COMMISSION.

(Circuit Court of Appeals, Third Circuit. February 27, 1906.)

No. 59.

1. DAMAGES—BREACH OF CONTRACT—PROVISION FOR LIQUIDATED DAMAGES.
A provision of a building contract, authorizing the owner to deduct from any sums due the contractor a stipulated sum as liquidated damages, and not as a penalty, for each day's delay in the completion of the work beyond a date fixed, is valid, and conclusively furnishes the measure of the owner's damages on account of such delay.

2. CONTRACTS—MODIFICATION—EXTENSION OF TIME.
A provision of a building contract, for the payment by the contractor of a certain sum as liquidated damages for each day the completion of the work was delayed beyond the time fixed, was not waived by the failure of the owner to answer a letter written by the contractor explaining a cause of delay which would prevent him from completing the work within the time agreed, where he did not ask any extension or modification of the contract.

3. SAME.
Where a building contract provided for the issuance by the architect of certificates for the work done as it progressed, and for payments to the contractor thereon, and also authorized the owner to "deduct and retain, out of the moneys which may be due or become due," to the contractor, liquidated damages for each day's delay in the completion of the work, except where work was suspended by direction of the architect, the issuance of certificates by the architect for work done after the time fixed for its completion did not involve an admission that the delay was by his direction or consent; nor did the payment by the owner, after such time, of orders given to subcontractors, in itself, constitute a waiver of the provision for damages.

Acheson, Circuit Judge, dissenting.

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

Henry H. Bowman, for plaintiff in error.

Alonzo Church, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff in error brought an action at law against the defendant in error, to recover a sum of money which the plaintiff averred was owing to him by the defendant, under two contracts in writing between them, dated, respectively, March 2, 1899, and July 10, 1899. By the first of these contracts, the plaintiff agreed to construct two subways; and, by the second, to construct three shelters and one public lavatory building, in Branch Brook Park, Newark, N. J. For work and materials which he alleged he had furnished in pursuance and performance of these agreements, the plaintiff claimed that there was due him on subways account a balance of $4,345, with interest; and, on shelters and lavatory building account, a balance of $758.66, with interest—together amounting to the principal sum of $5,103.66. In and by the contract of March 2, 1899, the plaintiff agreed that he would fully complete the work to which it related on or before the expiration of three calendar months from the

date thereof, not including, however, such time as the prosecution of the whole work might be suspended by direction of the defendant; and, following the statement of this agreement, the contract contained a clause in these words:

"Liquidated Damages. And the said contractor hereby further agrees that the said party of the first part shall be and is hereby authorized to deduct and retain out of the moneys which may be due or become due to the said contractor under this agreement, as liquidated damages and not as a penalty, for the noncompletion of the work aforesaid within the time heretofore stipulated for its completion, the sum of twenty-five dollars ($25) for each and every day after the expiration of said stipulated time—Sundays and holidays and such days as the prosecution of the whole work may be suspended by the direction of said architect excepted."

It was admitted that the work was not completed until 159 days, exclusive of Sundays and holidays, after the expiration of three calendar months from the date of the contract, and the learned trial judge, being of opinion that the sum of $25 per day, which the defendant was authorized to retain for noncompletion of the work at the time stipulated, should be regarded as liquidated damages, and not as a penalty, instructed the jury that, as the plaintiff's claim was for $4,345, and as $25 per day for 159 days would amount to $3,975, the plaintiff was entitled to recover under the first contract only the difference between $4,345 and $3,975, to wit, $370, with interest.

This decision of the court below was required by that of the Supreme Court in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, in which it was argued by counsel that, even where a stipulated sum is stated to be liquidated damages, yet, if the amount is disproportioned to the loss, it should be regarded as a penalty; but the court said:

"The asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court."

This statement will be found at page 60 of the report, and the consideration of the subject which thereafter follows leaves no room for doubt that the intention was to decide "that, whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract." We are therefore of opinion that, inasmuch as the legal effect of the contract now in question was perfectly plain upon its face, the court was right in excluding the testimony which was "offered for the purpose of showing that there was no real damage, but, if any, only nominal damage," and in finally enforcing the plaintiff's stipulation in accordance with its terms. Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 209; Wood v. Niagara Falls Paper Co., 121 Fed. 818, 58 C. C. A. 256.

The contract of July 10, 1899, included an agreement by the plaintiff to complete the items of work to which it related, at or before the expiration of the time which, as to each of them, was therein stated; and the court properly instructed the jury that it was for it to deter-

mine to what extent the completion of any of the work had been delayed beyond the time limited by that agreement, and to apply to its finding upon that subject the stipulation respecting liquidated damages which the contract contained. That stipulation was not in all respects identical with the similar one in the contract of March 2, 1899; but, as the case is presented to this court, no question is involved which calls for the consideration of any difference between them. The only point to be decided with respect to the later contract is precisely the same as that which has been already decided with respect to the earlier one, and therefore, no further discussion of it is necessary.

All the specifications of error have now been disposed of, except those that go to the refusal of the learned judge to charge in accordance with three requests of the plaintiff for instructions, as follows:

"(1) That the jury may consider whether or not the work under the contract for subways Nos. 1 and 2 was suspended with the consent and approval of the architects pending the arrival of the granite from the Shea Pink Granite Company. That, if the jury find that the work was suspended with the consent and approval of the architect during the delay occasioned by the failure of the Shea Pink Granite Company to deliver the granite for the subways, the verdict should be for the plaintiff for the full amount of the balance claimed under that contract.

"(2) That it is for the jury to consider and decide whether the various delays that existed under both contracts were or were not with the consent and approval of the architects, and, if so, they may find that they were due to a direction by the architect and the park commission that the work should be suspended during such periods of delay.

"(3) That they (the jury) might consider the payment of $1,775 on the orders dated May 23, 1901, by the park commission, as evidence of a waiver by the commission for any delay on the part of the plaintiff, if it existed."

1. The first of these requests assumes that the architect's consent to a suspension of work, under the first contract, would alone suffice to justify such suspension, and it must be conceded that this assumption is not wholly groundless, for that contract did, in its clause respecting liquidated damages, except from the days of delay for which damages were to be computed "Sundays and holidays, and such days as the prosecution of the whole work may be suspended by the direction of said architect." This excepting provision, if alone considered, would seem to imply that the architect might suspend the whole work, at his discretion. But at the outset of the contract, where the functions of the architects are particularly enumerated, no authority to suspend the work is given them, and the clause which immediately precedes the one respecting liquidating damages is, in part, as follows:

"The prosecution of the work shall be suspended at such times and for such periods as the said commission may from time to time determine. The said contractor hereby further agrees that he will commence the aforesaid work on such day and at such point or points as the said architects may designate, and fully complete the asme, in accordance with this agreement, on or before the expiration of three calendar months from the date hereof; not including, however, such time as the prosecution of the whole work may be suspended by direction of the said commission."

From these several portions of the contract, when considered together, it may well be doubted whether even a specific direction by the architect, if not authorized by the commission itself, would justify a suspension of the work; but, as there was no evidence that would have supported a finding of consent by the architect, either with or without the sanction of the commission, the question of construction to which we have alluded need not be resolved.

It has not been asserted that the architect had in express terms consented to a suspension of the work upon the subways, and the contention that there was evidence from which it might have been found that he had implicitly done so cannot be sustained. No such finding could have been reasonably based upon the evidence relied upon in the plaintiff's brief, or from any which, upon full examination, we have found in the record. The letters to which our attention has been especially invoked were not written to or by the architect, but to or by the commission, and therefore, if for no other reason, they were not pertinent to the question whether or not the work was suspended "with the consent and approval of the architect," and to that precise question the first request of the plaintiff is confined. But there was nothing in these letters from which a consent to suspension, either by the architect or by the commission, could have been legitimately inferred. In the letter written by the plaintiff several weeks prior to the expiration of the time allotted for the completion of the subways, he said that he was having difficulty in obtaining the granite, but he did not ask for leave to suspend the work, and none was granted. The reply which the commission did make to it was to the effect that it desired the work to be done as soon as possible, and surely this cannot be supposed to import an agreement on its part to any postponement of completion beyond the time which the contract prescribed. In his letter of March 22, 1899, the plaintiff explained that there had been delay on the part of the Shea Pink Granite Company in supplying him with the stone for the subways, and stated that his object in writing was "to show just how the matter stands, and give reasons for the delay there will be in carrying out the work over the original time granted me in which to complete it"; but. again, he did not ask to be relieved from his agreement, or even invite a reply to his letter; and the law, in our opinion, did not entitle him, in the absence of any reply to it, to assume that the defendant intended to release him from his obligation to have the subways finished before the expiration of three calendar months from the date of the contract. "Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must clearly show, not merely his own understanding, but that the other party had the same understanding." Bennecke v. Insurance Company, 105 U. S. 359, 26 L. Ed. 990. If the letter of the plaintiff had expressed any doubt of the binding force of his agreement, or had made any proposal for its modification, there might be some reason why the defendant should have responded, and why a failure to respond might be some small evidence of a want of good faith. But as

the plaintiff did not even propose any change in the contract, it is difficult to understand how any alteration of it could have been effected by the mere silence of the defendant. Wheeler v. New Brunswick R. R. Co., 115 U. S. 36, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341; Royal Ins. Co. v. Beatty, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622.

The acts of the architect which it is claimed tended to show that the work upon the subways was suspended with his consent, pending the arrival of the stone from the Shea Pink Granite Company, may be briefly summarized. He visited the quarry of that company; he reported to the commission that the stone could be obtained from it, and the time within which he thought it could be obtained; he urged the plaintiff, as he had repeatedly done before, "to bring pressure on the Shea people and hurry that stone business, and suggested to him that, if they could not do it, he make other arrangements for getting stone"; and he then and afterwards made suggestions to the plaintiff about getting the Shea granite, and "in the line, generally, of urging him to hurry the work." We fail to see, in the whole or any part of this conduct of the architect, anything to indicate that he consented to the suspension in question. It plainly shows that he was solicitous that the delay which had occurred should not be prolonged; but this is all it shows, and we think it impossible to infer from it the existence of a mutual understanding that the plaintiff's agreement as to the time of completion was canceled or released. Bennecke v. Insurance Co., supra.

Mr. Brainerd, the architect, when under examination as a witness, said that, upon his visit to the quarry, he supposed the stone could be taken out "within the time required," and it has been argued that because this visit was made shortly after the contract time for completion had expired, it might be presumed that some extension of time had been assented to. But the record discloses that the witness was testifying under the erroneous impression that the time allowed by the contract itself extended eight days longer than it actually did, and it plainly appears that to that time, and to no other, he intended to refer.

About six months after the date fixed by the contract for the completion of the subways, Carrere and Hastings, architects, gave the plaintiff a certificate for $3,600, and afterwards gave him a final certificate for $745; and it has been further and finally contended that the giving of these certificates was evidential that the architects had agreed to a suspension of the subways work. Both of them purport to refer to a contract "dated March 3, 1899," but we will assume that they were really given under the contract of March 2, 1899, and in pursuance of the provision it contained for the issuance of such certificates, and for payments in accordance therewith. But this provision was not intended to annul the preceding clause by which the defendant was "authorized to deduct and retain, out of the moneys which may be due or become due to the said contractor," the liquidated damages stipulated for. The amount due was to be certified by the architects, and the sum so certified, if not subject to deduction, was to be paid; but the certification of the sum from which the liquidated

damages might be deducted certainly did not involve an admission that a consent had been given by which the right to deduct them was extinguished.

2. In so far as the second of the plaintiff's points refers to the contract of March 2, 1899, it has been sufficiently considered in connection with his first point. There was some conflict of testimony as to whether the plaintiff, or the defendant, was responsible for the delay in the performance of the work under the contract of July 10, 1899, and that matter the learned judge referred to the jury, with direction to make no deduction from the plaintiff's claim on account of any delays which it might find were caused by the architects or representatives of the park commission. No exception to this part of the charge was taken, and the court would not have been justified in submitting to the jury the further question "whether the various delays that existed" under the second contract "were not with the consent and approval of the architects"; for there was absolutely no evidence upon which a finding that they had consented to any delay which was not caused by them, could have been reasonably based.

3. The payment of the $1,775 on the three orders dated May 23, 1901, was not "evidence of a waiver by the commission for any delay on the part of the plaintiff." Each of these orders was drawn in favor of a subcontractor, and the payments were made to the respective payees, and not to the plaintiff. These subcontractors had done the work for which they were paid, and were not in any way responsible for the delays in question; and it is obvious that the defendant might well have deemed it expedient to satisfy their claims, without intending to forego its right to deduct and retain from the balance the liquidated damages to which, under the contract, it was entitled. It may be conceded that a waiver of performance of the plaintiff's agreement as to the time of completion of the work could have been inferred from circumstances indicative of an intention to waive it. But neither the issuance of the architect's certificates nor the payments to the subcontractors was a fact from which the existence of such intention was deducible. Of the certificates, enough has been already said, and that the payments referred to would not, in and of themselves, warrant an inference of waiver, is, in our opinion, unquestionable. Moulton v. McOwen, 103 Mass. 597. There was no agreement by the defendant that they should have that effect (McCombs v. McKennan [Pa.] 2 Watts & S. 219, 37 Am. Dec. 505); and it is not contended that the conduct or position of the plaintiff was in any way influenced or prejudiced by them, and, "in any point of view, it is difficult to understand how a legal liability can arise out of the mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected to the harm of the other party." Royal Ins. Co. v. Beatty, 119 Pa. 9, 12 Atl. 607, 4 Am. St. Rep. 622.

The judgment of the Circuit Court is affirmed.

ACHESON, Circuit Judge, dissents.

HEWS v. EQUITABLE LIFE ASSUR. SOCIETY OF UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 6, 1906.)

No. 52.

1. INSURANCE—EVIDENCE—HEARSAY—ADMISSIONS OF INSURED.
Where a policy payable to insured's wife was alleged to have been procured by fraudulent misstatements with reference to his health and habits, insured's previous admissions concerning his diseased condition and habits of intemperance were not objectionable as hearsay as against such beneficiary, as she could occupy no better position than the insured.

2. SAME—RELEVANCY—ACTION ON POLICY—EVIDENCE.
Where insured, in his application for a policy issued in November, 1903, stated that he had "never" had any serious illness, nor been intemperate, evidence of declarations made by him, the earliest of which was in 1896, that he then had diabetes, with which disease he continued to suffer up to the time of the application, and disclosing habits of intemperance, were not objectionable for remoteness.

3. SAME—APPLICATION.
Where the answers made by insured to insurer's medical examiner were not referred to in the policy, nor made a part of the application, such answers were not within Pennsylvania Act May 11, 1881 (P. L. 20), requiring policies containing any reference to the application of the insured, etc., to contain a correct copy thereof, and declaring that unless so attached such application, etc., should not be received in evidence, nor be considered as a part of the policy.

4. SAME—FRAUDS.
Pennsylvania Act May 11, 1881 (P. L. 20), declaring that where the application of insured, or the constitution and by-laws, or other rules of insurer, shall form a part of a policy, copies thereof not attached to the policy shall not be received in evidence in any controversy between the parties to or interested in the policy, etc., has no application to a policy which was void for fraud of the insured in its inception.

5. SAME—TRIAL—DIRECTION OF VERDICT.
Where, in an action on a policy, the only inference which could reasonably have been deduced from the evidence was that insured had made material misrepresentations as to his physical condition and as to his use of alcoholic beverages, both in his application and in his answers to insurer's medical examiner, and his misstatements were known by him to be false and were made with intent that insurer should believe and act on them, it was proper for the court to direct a verdict for defendant.

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

D. M. Hertzog, for plaintiff in error.
Willis F. McCook, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This writ of error has brought up the record in an action which was instituted by the plaintiff in error against the defendant in error, upon a policy dated November 9, 1903, insuring the life of Samuel R. Hews, who was the plaintiff's husband. The defenses were that the policy had been fraudulently procured, and that the application contained statements which were warranted

to be true, but which in fact were untrue. The verdict was for the defendant, and it was amply justified by the evidence. We, however, are not concerned with the action of the jury, but with that of the court, and the errors averred to have been committed by it are said in the plaintiff's brief to present the following questions:

"First. Was it proper to admit in evidence statements concerning the condition of the health of the insured made by him to a physician while being treated a long time prior to his application for the policy, and also like statements made to another person, not a physician, several years prior to the application?

"Second. Did the paper signed by the insured containing the questions of the defendant company's examining physician and the answers of the insured thereto preliminary to the issuing of the policy form part of the 'Application for Insurance'? If so, was it error to admit that paper in evidence; no copy thereof having been attached to the policy?

"Third. Is it material to the issue to determine whether or not there was a fraudulent intention on the part of the insured in answering the questions set forth in his application? If so, is the finding of such intent a question for the court or for the jury?"

1. Dr. Taylor, a witness called for the defendant, was a resident physician of the "Keeley Institute," in the city of Pittsburgh. He testified that he had there treated Samuel R. Hews for alcoholism in April and May, 1903, and again in September of the same year. He produced two sets of papers, one of which related to the first and the other to the second of these occasions; and each of them, he said, was "a record taken at the time that is kept on file." The defendant first offered these papers as a whole; but, upon objection made, it limited the offer to such part of them as had been signed by S. R. Hews, and that part the court admitted. Jacob Morgan, called for the defendant, was, against the plaintiff's objection, permitted to testify that S. R. Hews had told him in 1896 that he then had diabetes. To the testimony of these two witnesses, and to the statements signed by Hews and produced by Dr. Taylor, the first of the questions which we have quoted from the plaintiff's brief appears, from what there follows, to refer; and the grounds which have been mainly relied on to support the contention that evidence, either oral or documentary, of the declarations of Hews respecting the state of his health and his habits as to temperance, should not have been admitted, are that they were made at a time too remote from the time of the application to be material, and that, because the policy was "in favor of another," evidence of any declaration made by the insured should have been excluded as hearsay. These are the only points which, upon this branch of the case, seem to us to be serious enough to call for discussion, and to them we now direct our attention.

The policy was issued to Samuel R. Hews, and though it was made payable to his wife, if living at his death, subject to his right to change the beneficiary, still the contract was with him, and if he secured it by fraud, it was void, and not enforceable either by him or by her. The fraud alleged was that, both in his application and in his answers to the company's medical examiner, Hews had made material statements of fact which were false, and which he knew to be so. In the former he said, "Nor have I been intemperate, or had any serious ill-

ness or disease, except diseases incident to childhood," and in the latter, that he had never been affected with "any serious disease, injury, or infirmity," and that his practice as regards the use of alcoholic beverages was "an occasional glass of beer," and that he never had been a "free-drinker," and had never taken "treatment for alcoholic or narcotic habit." Upon the question whether these statements were consciously untruthful, the previous admissions by Hews of his diseased condition and habits of intemperance were manifestly pertinent and important; and the contention that evidence thereof, as against the beneficiary under the policy, was hearsay, is fallacious. Under such a policy the beneficiary occupies no better or stronger position than the person from whom the asserted right to benefit by it is derived, and the legal relation between them is such that the former is legitimately affected by the antecedent relevant declarations of the latter. In this case the plaintiff was liable to an inquiry into the previous life and condition of Mr. Hews, and all facts were provable which tended to show what they had been. The policy sued on was procured by him and upon his representations. Therefore she was bound by those representations, and was subject to the consequence of his knowledge of their falsity; and his declarations were evidential against her, because, upon the issue as to whether he had fraudulently procured the policy (upon which depended its legal existence), any evidence was admissible that would have been competent if that issue had arisen in a suit to which he, instead of his appointee, had been a party.

We do not think that any one of the facts in question was so remote from the time of the application as to require that evidence of it should be excluded. The earliest time referred to was the year 1896, when, as testified by Mr. Morgan, Samuel R. Hews said that he then had diabetes, but there was other evidence tending to show that he continued to have that disease up to the time of the application; and it is to be borne in mind, too, that the representations made by Hews were that he never had any serious illness, or had been intemperate. Rulings of the trial judge upon questions of remoteness will not be disturbed by an appellate court in any case, unless an abuse of discretion quite clearly appears; and in this one the discretion of the learned judge of the court below was in our opinion correctly, as well as rightfully, exercised. Nicola Bros. Co. v. Speer Box & Lumber Co., 133 Fed. 914, 67 C. C. A. 208.

2. The Pennsylvania statute of May 11, 1881 (P. L. 20), provides:

"That all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, or shall such application or by-laws be considered a part of the policy or contract between such parties."

The answers which were made by Hews to the company's medical examiner were not within this provision. "This policy, and the application therefor, taken together, constitute the entire contract," and the answers in question were neither referred to in the former, nor made part of the latter. They, of course, formed no part of the "constitution, by-laws or other rules of the company," nor of its charter, which latter, it has been held, might, under circumstances not present in this case, be taken to be within the spirit of the act. Muhlenberg v. Insurance Co., 211 Pa. 432, 60 Atl. 995. Moreover, fraud in its procurement "strikes at the obligation of the policy itself. It is not to be regarded as touching the construction of the paper, but as to the subsistence of the policy as an instrument binding the company"; and therefore to such a case as is now under consideration the statute is wholly inapplicable. Carrigan v. Massachusetts Benefit Ass'n (C. C.) 26 Fed. 230.

3. That the intent with which a representation was made is relevant to a question as to whether a fraud was committed in making it is unquestionably true; and it may be conceded that ordinarily, in an action upon a policy, it is for the jury to determine whether statements material to the risk and untrue in fact were made by the applicant with knowledge of their untruthfulness and with the fraudulent design of thereby inducing the issuance of the policy. But we cannot agree that the learned judge, by taking that question from the jury in this case, committed reversible error. Careful examination of the evidence has entirely satisfied us that the only inference which could reasonably have been deduced from it is that material representations as to his physical condition and as to his use of alcoholic beverages were made by Hews, both in his application and in his answers to the medical examiner, which were absolutely false, and which he knew to be so, and made with intent that the company should believe and act upon them. This being so, there was nothing upon which a finding that the misrepresentations in question had been "made in good faith" could have been sustained, and therefore the defendant was entitled to the binding instruction which, in effect, was given upon this subject; for "it is the settled law of this court that when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the 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." Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. The question is whether from the evidence an inference favorable to the plaintiff could rationally have been drawn, and, as we have already said, we are clearly of opinion that it could not have been. Hart v. United States, 84 Fed. 799, 28 C. C. A. 612.

The judgment of the Circuit Court is affirmed.

DENE SHIPPING CO. v. TWEEDIE TRADING CO.

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

No. 27.

1. SHIPPING—LAWFUL CARGO UNDER WEST INDIAN CHARTER—ASPHALT.
Asphalt is "lawful cargo," under a charter which includes the West Indies; and it is the duty of the owner, in order to render the vessel seaworthy, to fit her for the proper carriage of such cargo by lining, where her construction is such as to require it, and in this respect there is no difference between a time charter and a voyage charter.

2. SAME—SEAWORTHINESS—LINING FOR ASPHALT CARGO.
A vessel under a time charter for a voyage to South American and West Indian ports and return, which provided that she should be in every way fitted for the service and employed in carrying lawful merchandise, was required to load a cargo of asphalt for the return voyage. The vessel was fitted with permanent battens, with spaces between them, and not being lined a large quantity of asphalt was forced between and behind the battens and they had to be taken off in order to remove it. The owners refusing to bear this expense, the work was done by the charterer. *Held*, that such work was not within the duty of the charterer to clean the vessel, but was made necessary by her unseaworthiness for the carriage of the cargo, and that the charterer was entitled to an offset against the charter hire for the expense of the removal, and the time lost.
[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 164.]

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

For opinion below, see 133 Fed. 589.

J. Parker Kirlin, for appellant.

Charles S. Haight, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The libel was filed to recover a balance of hire, claimed to be due the owners of the steamer Myrtledene from the respondent under a time charter. The respondent set off certain charges against this balance. The court held that the respondent was entitled to said offsets to the amount of $2,491.82, and decreed that the amount to be paid to the libelant, after such deduction, was $320.76. From this decree the libelant appeals. There is no dispute as to the balance due under the charter, provided the respondent is not entitled to make said set-off.

The first claim of offset, namely that for the cost of erecting a bulkhead at Trinidad, for the protection of the vessel against the pressure of the asphalt, is not objected to and will not be discussed. There were two charter parties. The first, executed on December 10, 1902, provided for "one round trip South America, not south of River Plate, option of West Indies en route," and the owners agreed that the steamer should be "on her delivery ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service, * * * to be employed in carrying lawful merchandise * * * between ports within the above limits." The Myrtledene, having carried a cargo of coal from Norfolk to Trinidad, was then ordered to load a cargo of asphalt

for Philadelphia. When her master reported to the asphalt company at Trinidad, its manager told him that his vessel was not in a fit condition to receive asphalt, and that the ship should be lined, and the master took the cargo with a statement from the manager that it was taken at his (the master's) risk.

The Myrtledene was not in a fit condition to carry asphalt without being lined. She was fitted up with heavy plank battens, permanently riveted to her side, close together, but with crevices between, and running horizontally from frame to frame, so as to leave a space between the skin of the ship and the battens some four or five inches deep. Where vessels with such permanent battens are to take a cargo of asphalt, it is customary to close the crevices between the battens with wood, by running planks lengthways over or between the battens. This is called lining. The newer type of boats built within the last ten years are provided with cleats so that the battens can be shipped and unshipped as required. In such vessels, when a cargo of asphalt is to be loaded, the battens are taken down and the ship is whitewashed, in order to prevent the asphalt from sticking to the sides. The master of the Myrtledene did not have her lined, but merely had her whitewashed wherever he could get whitewash in. As a result the pressure squeezed the asphalt in between the battens, so that some 50 tons became permanently wedged behind them, reducing to that extent the capacity of the vessel and rendering her hold unfit for the carriage of perishable cargo. A dispute having arisen between the parties as to who was bound to bear the expense of removing the asphalt, and, the owners having refused to do it, the charterer undertook the work, and now offsets the charges therefor, and for time lost, against the charge for charter hire.

It is unnecessary to consider the questions involved as to the redelivery of the vessel, the cables between the parties, or the marginal insertion in the renewal charter. The decisive question is as to the seaworthiness of the steamer. Under the original charter the owners agreed to provide a seaworthy vessel, that is, one which should be in every way fit to render the services undertaken, namely, the carriage of any lawful merchandise. Asphalt is "lawful merchandise" in charters including the West Indies. Dene S. S. Co. v. Munson (D. C.) 103 Fed. 963.

Appellant contends that these offsets should not have been allowed because, inter alia, they are for cleaning the vessel, which was the duty of the charterer. But the uncontradicted testimony is to the effect that the duty of the charterer as to cleaning does not include the removal of any of the permanent structure of the ship, which was necessary in this case in order to take out the asphalt.

Appellant further contends that it is customary for the time charterer to provide the fittings necessary for special kinds of cargo. The evidence on this subject is somewhat indefinite, but it appears from the testimony of one of appellant's own witnesses, that such custom relates to the separation of different kinds of cargoes, and that the duty of paying for this separation is imposed upon the charterer when it is necessary for the protection of the cargo. The evidence does not establish a custom that the charterer shall provide fittings for the protection of the

ship against the requirements of a lawful cargo. It is the duty of the owner to take such measures as pertain to the sufficiency of the ship for the service required, and as are necessary for carriage of the cargo with safety to the ship, and to pay for damage done to it by cargo, due to the failure of the owners to properly protect the ship. Dene S. S. Co. v. Munson, supra.

It is further contended that no obligation rested on the owners to provide means to enable the charterer to remove his cargo in the most expeditious manner. But the question of the removal of cargo is only secondary in this case. The owners, having failed to fulfil their original obligation to make the vessel seaworthy, are bound to bear the expense resulting from such failure.

Appellant seeks to make a distinction between time charters, such as the one in question, and voyage charters. We fail to see what bearing this can have upon the fundamental question in this case, which is that of seaworthiness. Mr. Justice Day, delivering the opinion of the Supreme Court of the United States in The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65, says:

"In the case of The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, Mr. Justice Gray said: 'The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.' This is the commonly accepted definition of seaworthiness. As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect."

The agreement of the owner is that the vessel shall be fit for the services in which it is employed, including therein fitness for the carriage of such reasonable and proper cargo as she may take on board. In this case the owners agreed under the charter party that the vessel should be "in every way fitted for the service * * * to be employed in carrying lawful merchandise." They failed to carry out this agreement, and the expenses of the charterer, and deduction for time lost in repairing the resulting damage were properly offset against the charter hire.

The decree is affirmed, with interest and costs.

THE CITY OF PORTSMOUTH.

(Circuit Court of Appeals, Fourth Circuit. January 5, 1906.)

No. 596.

1. COLLISION—CONTRIBUTORY FAULT—WANT OF LOOKOUT.

Where a ferryboat navigating the river between Portsmouth and Norfolk, Va., on a dark night had no lookout, and master and the man at the wheel, who were the only persons on deck, failed to see the towing lights of a tug with a tow on each side until within a distance of 50 feet, such ferryboat is chargeable with contributory fault for a collision between her and one of the tows, although the tug was primarily in fault.

2. SAME—SUIT FOR DAMAGES—ISSUES AND PROOF.

Upon an issue as to the fault for a collision between a ferryboat and a barge which had previously gone adrift and had been picked up by a tug

and was then in tow, the question of fault or negligence in allowing the barge to go adrift is immaterial.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

On September 18, 1903, about 2:30 a. m., the steam ferryboat City of Portsmouth, on a regular trip from Portsmouth to Norfolk, collided with barge No. 21, which, together with barge No. 17, was being towed by the steam tug Apollo. Both the barges and the steam tug belonged to the appellant, the Merchants & Miners Transportation Company. The two barges, during the early part of the night, had been moored at one of the appellant's docks on the Norfolk side of the river, but about 2 o'clock in the night they had been moved by the tug in order to permit the appellant's steamship Chatham to be berthed in the dock where they had been moored. The steamship collided with them and they had broken adrift. There was a strong wind from the north and a strong flood tide from the same direction, and the barges were carried up the harbor. The tug went to the assistance of the barges and made fast to them by pushing her bow in between them and attaching her bow lines to them near their forward ends. She had gotten them under control and was heading on an northeasterly course with some slight headway when the collision happened. The ferryboat was heading in a northerly direction and the port bow of the ferryboat struck the starboard quarter of the barge, which was on the starboard side of the tug. The ferryboat was injured and her owners filed this libel. The District Court found the tug and the tow solely in fault and decreed in favor of the owners of the ferryboat for the sum of $2,421.50.

Robert M. Hughes, for appellant.

Floyd Hughes, for appellee.

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

MORRIS, District Judge (after stating the facts). The barges were ordinary harbor lighters for moving merchandise, square at both ends and housed over, having a length of 130 feet and width of 28 feet. When they broke adrift they had no one on board and no lights, and, when they were placed one on each side of the tug, the tug's sidelights could not be seen from the ferryboat. It is alleged on behalf of the respondents that there was a lantern with a white light placed on the after end of the starboard barge. As to this light the testimony is so contradictory that it is not possible to make a satisfactory finding either way, but it is certain that the light was not seen by those on the ferryboat. The proof is conclusive that the navigators of neither vessel saw the other until the collision was inevitable. Those on the ferryboat did not see the barges until within 50 feet in distance and a few seconds apart in time, and those on the tug did not see the ferryboat at all until she had struck them. There can be no question as to the fault of the tug. Her own side lights were obscured and there were no side lights on the barges. Her towing lights were not placed according to law and she was without a proper lookout. These omissions are accounted for by the fact that she was obeying a hurry call to rescue the barges when they broke adrift, but as these omissions contributed to the collision, the explanation does not exculpate her from liability for the damage sustained by the ferryboat. The District Court found the tug solely in fault, and the question whether there was also fault on the part of the ferryboat has given us grave consideration.

Shortly before the collision, the tug had got control of the barges somewhere off one of the docks of the Seaboard Air Line Railway on the Portsmouth side of the harbor and had headed them toward Norfolk in a northeasterly direction. The ferryboat had come out of her Portsmouth slip and was on her regular course for Norfolk, heading about north, in order to countervail the strong wind and tide. She was making her usual speed of about 10 miles an hour. The master and a deck hand, who was helping the master to handle the wheel, were in the pilot house on the ferryboat, and there was no one else on the lookout. They testify that the night was dark, with a strong N. N. W. breeze; that when they were not quite half way across to the opposite shore they discovered a barge directly ahead without lights. The captain at once ordered the engine reversed and the helm hard aport, but before either order could have effect, the collision occurred. The ferryboat's port bow struck the starboard barge either on the left starboard corner or a few feet forward of the corner and drove the barge forward with a glancing blow, breaking it loose from the tug. The master and man at the wheel first saw the barge ahead, and, in a second or two afterwards, they, for the first time, saw the tug's towing lights on her flagstaff, which appeared to them a little ahead on the port side of the ferryboat. The captain explains his not seeing the tug's towing light earlier by saying he must have confused it with the lights of vessels ahead lying over on the Norfolk side, which confusion was aided, he says, by the fact the tug's towing lights, by reason of improper construction, appeared to him, he testifies, as one single light, instead of two vertical lights. It is true the two lights were not hung vertically one above the other, as required by law, but were hung from the ends of a three-foot crosspiece on the flagstaff, and were intended to be one lower than the other, although not one directly under the other. This improper arrangement of the lights is sufficient to put the tug in fault, but it is not sufficient to exculpate the ferryboat if the lights could have been seen by a vigilant lookout, and should have warned the ferryboat that there was a vessel ahead of her which she should watch in order to avoid a collision. Undoubtedly these lights were showing on the tug's flagstaff. They were plainly visible either as one light or as two from the ferryboat's pilot house. A careful observation of them would have disclosed that they were not on any stationary vessel near the Norfolk wharves, which were more than a quarter of a mile away. That the lights were not seen at all until after the dark body of the barge was seen within 50 feet is proof that the lookout on the ferryboat was not vigilant and effective. The darkness, the fact that it is expected that few vessels will be moving in the harbor at half-past 2 o'clock in the night, the difficulty of getting and keeping the ferryboat on her course with a heavy wind and a strong tide carrying her toward the Berkley shore, all these elements of the situation which was engaging the attention of the two men who were handling the wheel, may tend, in some measure, to explain the failure to observe the tug's towing lights, but they do not excuse it.

In argument some stress was put by counsel for the ferryboat on the circumstances which led to the barges getting adrift, and it was urged

that the primal fault lay with respondent's employés in so placing the barges that the steamer Chatham broke them from their moorings. We think this is immaterial. No matter by whose fault the barges went adrift, the barges and the tug had a right to navigate the channel of the river where the collision happened, and the ferryboat was bound to have due regard to all the rules for safe navigation and to all dangers of navigation and collision in respect to the tug and barges without any reference to the original occasion of their being there. The Sunnyside, 91 U. S. 208-216, 23 L. Ed. 302. If those in charge of the ferryboat had observed the tug's towing light as soon as it might reasonably have been seen by a vigilant lookout, there would have been no difficulty in avoiding the collision, no matter whether the tug was on a crossing course or was the overtaken vessel. It would have been obvious before the ferryboat had approached the light to within a distance of immediate danger that to avoid a collision the ferryboat must stop and reverse or change her course.

We are constrained to think that the proofs show that the ferryboat was not free from fault in that she did not maintain a vigilant outlook and did not sooner discover the tug's towing lights, and that the decree of the District Court should be so modified as to divide the damages.

Decree modified.

In re COLUMBUS BUGGY CO.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1906.)

No. 56.

1. SALES—BAILMENTS FOR SALE—DISTINGUISHING CHARACTERISTICS.

An agreed price, a vendor, a vendee, an agreement of the vendor to sell and of the vendee to buy for and pay the agreed price are essential attributes of a contract of sale.

The power to require the restoration of the subject of the agreement is an indispensable incident of a contract of bailment.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1-5; vol. 6, Cent. Dig. Bailment, § 1; vol. 43, Cent. Dig. Sales, § 8.]

2. SAME—EVIDENCE OF SALE.

The fact that a contract provides that the receiver of goods is to account for those sold at fixed prices and to retain the difference for insurance, storage, commission and expenses does not make the contract an agreement of sale.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 7, 17, 18.]

3. SAME—CONDITIONAL SALES—CONTRACT OF BAILMENT FOR SALE—TERMS.

A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage and handling and that he will hold the merchandise unsold subject to the order of the furnisher, discloses an agreement of bailment for sale, and does not evidence a conditional sale. Such a contract is not affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 7, 17, 18.] 18, 1335.]

(Syllabus by the Court.)

On Petition for Review.

R. N. McConnell, for petitioner.

H. Y. Thompson, for respondent.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. By a statute of Oklahoma Territory an instrument in writing which evidences the conditional sale of personal property and the retention of title in the vendor until the purchase price is paid is rendered voidable at the instance of innocent purchasers or creditors of the vendee unless it is deposited in the office of the proper register. 2 Wilson's Rev. & Ann. St. Okl. 1903, p. 966, § 162. On August 4, 1903, the Washburn-Lytle Implement Company was adjudged a bankrupt upon an involuntary petition by the District Court of the United States for the Third District of Oklahoma Territory. The trustee in bankruptcy took from the possession of the bankrupt goods of the value of about $5,400, which were situated in Oklahoma and were held by the Washburn company under a contract with the Columbus Buggy Company, which had not been deposited with the proper register of deeds. The material terms of this contract were that the goods should be selected from those of the Columbus company by the Washburn company and should be shipped and billed to it as agent by the Columbus company at the latter's wholesale prices, that the Washburn company might sell the goods at such prices as it saw fit and that it would pay to the Columbus company the wholesale prices less 5 per cent. discount for the goods it sold in each month by the tenth day of the succeeding month, that it would keep the property insured for the benefit of the Columbus company and would bear all expenses of freight, storage and hauling, that the contract should continue in force one year and that, unless it was renewed, the Washburn company would at its expiration return that portion of the merchandise unsold and the Columbus company would repay the freight which had been paid upon this portion and that all the goods should be on consignment and the title should remain in the Columbus company and subject to its order until they were sold and paid for in cash. The Columbus company properly presented to the District Court its claim for that part of the merchandise which the Washburn company held unsold under this contract and which the trustee had taken at the time of the adjudication, and that court denied its petition upon the ground that the contract evidenced a conditional sale and was therefore voidable under the statute of Oklahoma. The case is presented to this court by a petition to revise this ruling.

A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent.

An agreed price, a vendor, a vendee, an agreement of the former to sell for the agreed price and an agreement of the latter to buy for and to pay the agreed price are essential elements of a contract of sale. The contract involved in this case has none of these charac-

teristics. The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment. South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101, 108; 2 Kent's Com. *589; Powder Co. v. Burkhardt, 97 U. S. 116, 24 L. Ed. 973; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. This contract contains a plain stipulation that the goods are at all times subject to the order of the Columbus company until they are sold and that at the expiration of the term of the contract the Washburn company will return the goods which remain unsold. It was therefore a contract of bailment for sale and it was not subject to the statute of Oklahoma regarding conditional sales. One of the most striking and familiar illustrations of its character is given by Chief Justice Gibson in McCullough v. Porter, 4 Watts & S. (Pa.) 177, 39 Am. Dec. 68, where he says:

"Were I to put my horse in the custody of a friend, to be sold for a designated sum, with permission to retain whatever could be got beyond it, it would not be suspected that I had ceased to own him in the meantime, or that my friend would not be bound to return him, even without a stipulation, should he have failed to obtain the prescribed price."

A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage and handling and that he will hold the unsold merchandise subject to the order of the furnisher discloses a bailment for sale and does not evidence a conditional sale. It contains no agreement of the receiver to pay any agreed price for the goods. It is not, therefore, affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers. The fact that such a contract provides that the receiver of the goods may fix the selling prices and may retain the difference between the agreed prices of the accounting and the selling prices to recompense him for insurance, storage, commission and expenses does not constitute the contract an agreement of sale. It still lacks the obligation of the receiver to pay a purchase price for the goods and the obligation of the furnisher to transfer the title to him for that price. Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; John Deere Plow Co. v. McDavid (C. C. A.) 137 Fed. 802; Metropolitan Nat. Bank v. Benedict Co., 20 C. C. A. 377, 380, 74 Fed. 182, 185; In re Galt, 56 C. C. A. 470, 473, 120 Fed. 64, 67; Union Stock-Yards, etc., Co. v. Western Land, etc., Co., 7 C. C. A. 660, 664, 59 Fed. 49, 53; Keystone Watch-Case Co. v. Fourth National Bank, 194 Pa. 535, 45 Atl. 328; In re Flanders, 67 C. C. A. 484, 134 Fed. 560; Martin v. Stratton-White Co., 1 Ind. T. 394, 37 S. W. 833; National Bank v. Goodyear, 90 Ga. 711, 726, 16 S. E. 962; Barnes Safe & Lock Co. v. Bloch Bros. Tobacco Co., 38 W. Va. 158, 164, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846; National Cordage Co. v. Sims, 44 Neb. 148, 153, 62 N. W. 514; Rosencranz & Weber Co. v. Hanchett, 30 Ill. App. 283, 286; Harris v. Coe, 71 Conn. 157, 41 Atl. 552, 554; W. O. Dean Co. v. Lombard, 61 Ill. App. 94, 97; Norton & Co. v. Melick, 97 Iowa, 564, 566, 66 N. W. 780; Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567, 569.

The order of the referee which denied the application of the Columbus Buggy Company and the order of the District Court which confirmed that order must be vacated, and the case must be remanded to the court below with directions to grant the petition of the Columbus Buggy Company for the delivery to it of all the goods remaining in the hands of the trustee which were received by him from the bankrupt, and which had been obtained by the latter from the Columbus company under the contract between them, and that the trustee also pay over to the Columbus company the proceeds of all goods of this character which he received from the bankrupt and has since sold, and it is so ordered.

WHITESTONE v. AMERICAN INS. UNION.

(Circuit Court of Appeals, Third Circuit. February 22, 1906.)

No. 63.

INSURANCE—MUTUAL BENEFIT INSURANCE—AGENTS—COMPENSATION—CONSTRUCTION OF CONTRACT.

A contract by which plaintiff, an insurance order, employed defendant to solicit applications for membership, provided that he should receive in payment for his services a certain sum for each member obtained by him and half of the first six assessments paid by such members. Also that plaintiff should advance to defendant a certain sum semimonthly, and that "against such advance all equities in the business shall be retained by the said first party (plaintiff) until the same shall exceed the advance, whereupon the difference shall be paid * * * to said second party." At the date of a settlement between the parties, the amount of the advances made exceeded the sums received by plaintiff, which were applicable thereon, and defendant gave a note for the difference, on which suit was brought. *Held*, that the contract did not mean that the advances made were to be repaid only by such "equities" as should come into the hands of plaintiff, and that the court properly refused to charge the jury that the note was without consideration.

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

W. K. Jennings, for plaintiff in error.

James C. Gray, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. In the court below, the defendant in error was plaintiff, and the plaintiff in error was defendant, and we will speak of them here as plaintiff and defendant respectively.

The cause of action, as set forth in the statement of claim, was:

(1) A promissory note, dated March 8th, 1901, made by the defendant to the order of the plaintiff, for $1,787.30, payable one year after date;

(2) An indebtedness of $618.19, arising from the defendant's having, on June 15th, 1901, overdrawn his account with the plaintiff, to the aggregate of $618:19, "said sum being in addition to and in excess of

his remuneration, as provided by and under the terms" of a certain contract, marked "Exhibit B";

(3) An indebtedness accruing between the 15th day of June, 1901, and the 15th day of June, 1902, by virtue of a certain contract made and executed between said plaintiff and said defendant, on the 15th day of June, 1901, a copy of which is marked "Exhibit C."

At the trial, the indebtedness, on account of the overdraft of $185.11, was not contested, and the court ruled out the overdraft of $618.19, leaving only the question of the indebtedness on account of the promissory note of $1,787.30, which the court submitted to the jury. The verdict was in favor of the plaintiff, as to the amount of this note, with interest, and from the judgment thereon, this writ of error was sued out by the defendant.

At the trial, the making of the note was proved by the testimony of the defendant himself. The defense set up was want of consideration, which the defendant sought to establish by exhibiting a certain contract between the plaintiff and defendant, the stipulations of which, as he contends, disprove the indebtedness upon which the note was said to be predicated. This contract is attached to the statement of claim, and is called "Exhibit B." It purports to be an agreement, made on the first day of August, 1899, between the plaintiff, a corporation organized under the laws of the state of Ohio, and the defendant, a citizen of the state of Pennsylvania. It recites that the plaintiff, in said contract, employs the defendant to solicit applications for membership in the plaintiff corporation, in the state of Pennsylvania, giving him the official title of State Deputy in and for the said state of Pennsylvania, and providing that he shall have control of all deputies in the state, except as therein provided. The stipulation with which we are here concerned, is as follows:

"In full payment for such work done and services performed, the first party will pay the second party as follows: First, the National fees of $1.50 which shall be collected by the said second party and his Deputies, and retained by the second party; Second, in addition thereto $2.00 for each and every approved member; Third, 50 per cent. of the first six Assessments collected on all approved members which shall have been secured by said second party and his Deputies or shall within a period of one year from date of institution, join a Chapter instituted under the direction of said second party; Fourth, that upon the above contract there shall be an advance made of $150 per month, $75 of which shall be paid upon the 15th and $75 upon the 31st, in accordance with the usual plan in issuing warrants by said first party. Against such advance, all equities in the business shall be retained by the said first party until the same shall exceed the advance whereupon the difference shall be paid in bimonthly installments as above provided, to said second party."

It is undisputed, that the promissory note in question was given for what is called an overdraft by the said defendant, consisting of advances to said defendant as provided for in the contract, as agent of the plaintiff, over and above the amounts due him from said plaintiff. The defendant contends that, as the "equities" mentioned in said contract, to be retained by the plaintiff, were shown to be remittances directly to the plaintiff, made by various Lodges or Chapters organized by the defendant, the advances to the defendant provided for in said contract, were only to be repaid in that manner; that there was, there-

fore, no personal indebtedness created by such advances, and the promissory note, given for the difference between such advances and the so-called "equities" collected by the plaintiff, was without consideration. The defendant also testified that the note was given merely as an accommodation to the Insurance Company, in order to place its affairs in proper shape before the Insurance Commissioner of the state of Ohio, and that the agent of the plaintiff, who obtained the note from the defendant, did so with the express understanding that there was no real indebtedness, and that the balance it represented would be taken care of by credits hereafter due to defendant. These allegations of the defendant are denied by the president and other officers of the plaintiff company, who assert that the note was given in March, for the amount admitted by defendant to be due on a settlement up to the previous January.

The real and only question presented for our determination, is, whether the court should have so construed this contract, as to find that the promissory note in question was without consideration, and therefore have given to the jury peremptory instructions to find for the defendant. It must be admitted that the language of the stipulation, in regard to the retention of "equities" by plaintiff against the advances made, is not as clear as it ought to be, but with such explanation as has been given, of what was meant by "equities," we are of opinion that the contract between plaintiff and defendant does not mean that the advances made are to be repaid only by such "equities" as may come to the hands of the plaintiff, and that no indebtedness is otherwise created on the part of the defendant, by such advances. The contract does not say in so many words, as does the second contract between the same parties, made June 15th, 1901, that if such "equities" failed to reimburse the plaintiff for such advances, then the defendant shall make good any shortage by payment in cash; but we do not think we are justified in presuming that the absence of such express language, means that no individual indebtedness for the difference between "equities" and advances can be imposed by the contract in question. We think, on the other hand, that, if the contract meant what defendant contends that its meaning is, viz., that the advances made were to be repaid in no other way than by these so-called "equities," it should have said so in plain and unequivocal language. The learned judge of the court below, however, without attempting to give to the jury an authoritative interpretation of this written contract, as bearing upon the question of consideration, submitted the whole case to the jury on the evidence, accompanied by a charge, to which the defendant can have no ground for exception, and none was taken thereto.

The three assignments of error, which we find in the record, are for refusing certain prayers for instructions, all of which, if granted, would have made it necessary for the court to give peremptory instructions to the jury to find for the defendant. This, we think the court below was right in refusing to do.

The judgment of the court below should be affirmed, and it is so ordered.

GRIFFIN et al. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. February 19, 1906.)

No. 2,215.

VENDOR AND PURCHASER—VENDOR'S LIEN—WAIVER—TAKING OTHER SECURITY.

The taking by a vendor of an independent security for the payment of the purchase price, such as a negotiable note of a third party, or a mortgage or pledge of other property, is prima facie evidence of a waiver of the lien upon the property he sells, and it casts upon him the burden of proving its subsequent existence.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 733–750.]

(Syllabus by the Court.)

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

For opinion below, see 82 S. W. 684.

Preston C. West, for appellants.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This appeal challenges a decree for the foreclosure of a vendor's lien for $500 upon the undivided half of the Capitol Hotel and its grounds, situated in Okmulgee in the Indian Territory, and the question it raises is whether the purchase price of the property was $2,000 or $2,500. Smith, the vendor, conveyed one undivided half of this property to George M. Griffin and Harry W. Griffin and the other undivided half to W. E. Gentry, on March 23, 1901, by a deed which recited a consideration of $2,500. The Griffins had already paid him $50 on account of the purchase price and, at the time of the delivery of the deed, he took from them their promissory note for $700, payable on September 23, 1901, and a mortgage upon other property to secure its payment, and he obtained from Griffin $1,250 in cash which made in the aggregate $2,000. He testified, and George M. Griffin denied, that the latter verbally agreed to pay him $500 more for the property in a few days so as to make the purchase price $2,500. His agent, Thornburg, testified that about the 7th of March, 1901, Griffin had told him to agree to pay Smith $2,500 for the property, that he had made that agreement in behalf of Griffin and that the latter had admitted that $2,500 was the agreed price of the property. Another witness testified to a like admission. Griffin denied that he had ever given any authority to Thornburg to agree to pay $2,500 for the property, denied the alleged admissions and testified that the agreed price of it was $2,000. The notary public who took the acknowledgment of the deed gave testimony to the effect that on the day it was delivered the vendor told him that he was to receive $2,000 for the property. There was no written evidence except the recital of the consideration in the deed to the effect that the purchase price of the property was $2,500. On the other hand, the record contains a written contract between the

vendor, Smith, and the Griffins, dated February 19, 1901, whereby the former agreed to sell and the latter to buy the hotel property for $2,000 within 10 days from that date, a written contract of extension of the time of performance of the contract of purchase in these words: "March 16. Received of G. M. Griffin $50 to apply on payment of property contracted to him as Capitol Hotel block contract is extended by this payment," signed by the vendor, the promissory note of the Griffins for the $700, dated March 23, 1901, and payable September 23, 1901, an indorsement of the payment of $100 thereon dated August 29, 1901, and an indorsement of the payment of $25 thereon, dated September 14, 1901, a mortgage of other property made by the Griffins on March 23, 1901, to secure the payment of their note for $700, and undisputed testimony that between February 15 and March 23, the Griffins contracted to sell the undivided half of the hotel property to Gentry for $1,250, that Gentry paid this $1,250 to Smith and received his title by Smith's deed of March 23, 1901, pursuant to this agreement, and that the Griffins have paid their note.

The taking by a vendor of an independent security for the payment of the purchase price of the property he sells, such as a negotiable note of a third party, or a mortgage or pledge of other property, is prima facie evidence of a waiver of his lien, and it casts upon him the burden of proving its subsequent existence. Cordova v. Hood, 17 Wall. 1, 6, 21 L. Ed. 587; Richardson v. Green, 46 Ark. 267, 270; Springfield & Memphis R. R. Co. v. Stewart, 51 Ark. 285, 10 S. W. 767; Mayes v. Hendry, 33 Ark. 240, 245; Lavender v. Abbott, 30 Ark. 172, 178. Our faith in questionable stories has been strengthened by constant exercise until it is sometimes triumphant. But in view of the facts that the vendor in this case made a written agreement to sell this property to the Griffins for $2,000, that he accepted $50 in part payment of its purchase price and signed a contract of extension of the time of payment which named no new price, that, when he made his deed, he took the balance of the $2,000 in the form of $1,250 in cash from Gentry and the note and mortgage of the Griffins upon other property for $700 and that the two payments made by the latter before their note fell due were not applied in part satisfaction of the additional $500 which the vendor insists had been due to him ever after March 23, 1901, but were indorsed upon the note which was not yet due, it has proved too great a strain upon our credulity to believe that this vendor conveyed his property to the Griffins without securing any mortgage back upon it, or note, due bill or other written evidence of their liability for the additional amount which he claims was due him for the transfer. A careful reading and analysis of all the evidence has forced our minds to the conclusion that the agreed price of this property was not $2,500, but $2,000. The decrees of the courts in the Indian Territory must therefore be reversed and the case must be remanded with instructions to dismiss the bill. It is so ordered.

TROMP v. WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO.

(Circuit Court of Appeals, Second Circuit. February 1, 1906.)

No. 92.

1. WRIT OF ERROR—REVIEW—INSTRUCTIONS.

Assignments of error based on the court's charge to the jury cannot be considered by the appellate court, where no exceptions were taken to the charge.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1516-1532.]

2. TRIAL—REFUSAL OF INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In an action to recover for services rendered under an alleged contract fixing the amount of compensation to be paid, a request for an instruction, permitting the jury to find for plaintiff for the reasonable value of the services, was properly refused, where there was no evidence of such reasonable value.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

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

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, entered upon the verdict of a jury in favor of defendant in error, who was defendant below. The action was brought to recover for plaintiff's services in instituting and carrying on negotiations between the defendant and the Turkish government, looking to the purchase of a cruiser or war vessel from the defendant.

Norman G. Johnson, for plaintiff in error.
H. G. Ward, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. There are four assignments of error. The first two challenge the soundness of several voluminous excerpts from the court's charge to the jury. No objection was taken, and no exception was reserved to any part of the charge. These assignments of error, therefore, cannot be considered in this court. Morning Journal v. Rutherford, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803; Park Bros. v. Bushnell, 60 Fed. 584, 9 C. C. A. 138.

The third exception is to the court's refusal to charge the following proposition:

"If the negotiations conducted in this country by Admiral Ahmed were the continuation of the Constantinople negotiations, and as such resulted in the contract in question for the cruiser, and the jury find that no specific commission was agreed upon, then the plaintiff is entitled to recover such amount as the jury find from the evidence to be the fair and reasonable value of his services."

The record is barren of any evidence tending to show the "fair and reasonable value" of plaintiff's services. The only claim sought to be sustained by proof was that, in addition to $2,500 and his disbursements which had been paid him, he was entitled to recover by agreement with defendant, express or implied, 1 per cent. on the contract price of a cruiser, which was sold to the Turkish government for

"something like $1,600,000." If the jury was not satisfied that there was an agreement to pay him that commission, there was nothing except blind guesswork upon which to predicate any finding as to fair and reasonable value of services. The trial judge therefore properly refused the request.

The fourth assignment of error is to a refusal to charge that "it was the duty of the defendant to aid the plaintiff in every reasonable way in the negotiations." The court was under no obligation to charge this proposition, unless there was something in the testimony from which the jury might infer that the defendant had in some way refused or neglected to aid him in his negotiations. A careful perusal of the record satisfies us that it contains nothing which would warrant the jury in making any such finding. The request was properly refused.

In thus briefly disposing of the case, we may add that we are strongly of the impression that the proof was insufficient to warrant a finding that there was any contract to pay a commission in addition to the $2,500 and disbursements. However, since the jury did not find that there was, that branch of the case need not be discussed.

The judgment is affirmed.

JAMES et al. v. WILD GOOSE MINING & TRADING CO.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

No. 1,228.

APPEAL—ORDER DENYING PRELIMINARY INJUNCTION—DETERMINATION OF CASE ON MERITS.

An important question such as one involving water rights in Alaska will not be determined on the merits, on an appeal from an order denying a preliminary injunction, the application for which was heard on affidavits.

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

Dudley Du Bose, G. J. Lomen, and Charles E. Naylor, for appellants.

Chas. Page, Edward J. McCutchen, and Samuel Knight, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. We do not think it well to decide the important water-right question argued by counsel for the appellants on this appeal from an order denying them a preliminary injunction, the application for which was heard upon affidavits—especially as it appears that the only use of the waters in question by the appellants with which it can be claimed that the appellee interfered was by virtue of an appropriation of waters of Ophir creek, Alaska; which ap-

propriation, it seems, was subsequent in point of time to the appropriation of the waters of the same creek under which the appellee claims.

The order of the court below refusing a preliminary injunction is affirmed.

VAN EPPS v. UNITED BOX BOARD & PAPER CO.

(Circuit Court of Appeals, Second Circuit. January 23, 1906.)

No. 170.

1. PATENTS—VALIDITY—INCORRECT STATEMENT OF PRINCIPLES OF OPERATION.
Where a patent discloses means by which a novel and successful result is secured, it is immaterial whether the patentee understands or correctly states the theory or philosophical principles of the mechanism which produces the new result.

2. SAME—ANTICIPATION—DEVICES NOT PRACTICALLY OPERATIVE.
Where prior patents, or the machines constructed under them, embody the principle covered by a later patent, and sufficiently disclose the invention claimed therein, they are not deprived of their effect as anticipations by the mere fact that such machines are not capable of successful practical working, because of objections as to minor matters of detail in construction.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 73.]

3. SAME—INVENTION—CHANGE IN FORM OR DEGREE.
It is not patentable invention merely to carry forward an invention shown in a prior machine by a change only in form, proportions or degree or the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means but with better results.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 20, 24.]

4. SAME—INFRINGEMENT—PULP SCREENING MACHINE.
The Victory patent, No. 417,451, for a pulp screening machine was not anticipated, and discloses a patentable invention of merit, but, as limited by the prior art and by the proceedings in the Patent Office, *held* not infringed.

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

For opinion below, see 137 Fed. 418.

This cause comes here upon appeal from an interlocutory decree of the United States Circuit Court for the Northern District of New York, on final hearing, adjudicating the validity, and infringement by defendant, of claims one and two of complainant's patent No. 417,451, granted to Edmund Victory, December 17, 1889, for a pulp screening machine.

Francis T. Chambers, John C. Pennie, and Osgood & Davis, for appellant.

E. H. Risley, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The art to which the patent relates is that of separating, by means of sieves known as screen-plates, the fibrous particles and impurities in paper pulp, and of breaking up matted masses of the fibre. The screen-plates are slotted, and in the

machines herein discussed reciprocating plates, called bellows-plates, form the bottom of a chamber below the screen-plates.

The construction of the Victory screen is accurately explained in complainant's brief as follows:

"The machine has a supporting frame with a rectangular body-frame which has the series of parallel cross-bars forming the rectangular spaces. At the top of the spaces are secured the separate bellows-plates, the sides of which are connected to the cross-bar, while their ends are connected to the side pieces of the frame by flexible bellows-joints, of suitable material. In the lower part of the frame is mounted a longitudinal driving-shaft, * * * and upon this shaft, * * * are mounted a series of eccentrics, * * * connected to the middle underside of the bellows-plates by the frames. These eccentrics are arranged alternately, so that as the alternate eccentrics elevate the alternate bellows-plates to which they are connected, the other alternate eccentrics will lower the alternate bellows-plates to which they are connected. * * * At the outer edges of the strips which run around the top of the frame, is secured a rubber packing, or other suitable material, while the strips extend along the center of the top of the cross-bars to which they are secured by nails or screws, and along both their sides are secured packing strips of rubber or other suitable material. There is a top to the machine. * * * The top or vat has cross-bars, which register with the cross-bars of the body-frame, and the screen-plates are secured on the top of the cross-bars, as shown, with their side edge meeting on the cross-bars. The top and body have opposite apertured lugs through which screw bolts pass, having nuts on their ends, and it will be seen by tightening these screw-bolts, the top will be locked tightly down, the top and its cross-bars pressing down firmly on the packing and around the ends and sides of the bellows-plates, thus separating each bellows-plate by air-tight joints extending entirely around it, and rendering each bellows and the screen-plate above it entirely independent of all the others. (The patentee says:) 'This is an important feature of my invention.' The top of each bellows-plate is covered, and each bellows is formed with a central opening from which a short pipe leads down into a box, which is secured longitudinally beneath the center of the cross-bars. The lower end of these pipes terminate about the distance above the bottom of the box shown and they are always sealed by water and paper 'stuff' in the box, above which they never rise.

"In operation it will be seen that as the driving shaft revolves the bellows-plate, each having its separate eccentric, will be moved up and down alternately as before described, the bellows-joints permitting this movement, and, as the packing around each bellows separates it completely from the other when the top is fastened down by the screw-bolts, it will be seen that each bellows will operate independently of all the others and draw the paper stuff which flows upon the screen-plates above it down through the screen-plates.

"The paper pulp is thus drawn down through the screen-plates upon the concave face of the independently-working bellows, and passes down through the central openings and pipes into the longitudinal box from which it may be discharged through pipes or in any other suitable manner: 'I do not wish to confine myself to the discharge pipes here shown, as I may employ any other well-known means for effecting the same purpose.'"

And the contention of complainant is as follows:

"Victory * * * took some of the independent mechanical elements, old in the prior art when separately considered, and made a new and useful combination, which met the pressing needs of the wood pulp industry and solved existing troubles in the screening of wood pulp. Victory's type of screen has driven out of use all prior types of screens by doing more and better work than was ever before accomplished in the manufacture of wood pulp into paper. The spirit—the very core of Victory's invention consists

in the division of the space under a given screening area into separate, isolated, expanding, and contracting chambers, in which, at all times, there is present a sufficient quantity of air to permit of the expansion and contraction of the isolated chambers, so that by the expansion of the separate chambers a powerful suction is exerted on the stock covering the screen-plates, and when the chambers are contracted the air and stock in the chamber is forced upwardly through the slots in the plates with the force of an explosion, thereby removing all slivers and obstructions drawn into the slots by the down suction. The combination of mechanical elements expressed in claims one and two of the patent revolutionized the wood pulp paper screening industry more than any other single factor and made cheap paper possible."

The so-called Gotham screen, one of the alleged infringements, is the nearest to the patented construction. It is admitted that these screens "are like the Victory screens in having the space beneath the screen-plates divided up into a number of separate and independent compartments, separated from each other by air-tight partitions, and each provided with a vibrating diaphragm forming a part of its bottom." But there is only one compartment below each pair of screens, which compartment is only partially divided into two sections by a cross-bar, and, therefore, not "rendering each bellows and the screen-plate above it entirely independent from all the others, * * * an important feature of my invention." The so-called "bellows-plates" are not dish-shaped. Rubber strips are fastened to the top of the bellows-plates, as in the prior art, but there are no bellows-joints secured to the sides and ends of the bellows-plates. Gotham screens have a different, and apparently more practical and effective, driving mechanism, and a different, and claimed to be an improved, arrangement of a flow box, which dispenses with the forked connecting frame of the patent.

The claims in suit are as follows:

"(1) In a pulp-screening machine, the combination of the series of separate screens, 18, the series of independent bellows-plates, 5, having the flexible bellows-joints, 6, at their sides and ends, the drive-shaft, 7, having the eccentrics, 8, 9, alternately arranged upon it, and the connecting-frame, 10, substantially as set forth.

"(2) The combination, in a pulp-screening machine, of the body-frame, 2, having the parallel cross-bars, 3, the series of independent reciprocating bellows-plates, 5, having the flexible bellows-joints, 6, at their sides and ends, the flexible packing-strips, 13 and 14, extending around the ends and sides of each bellows, and the top, 15, having the series of parallel cross-bars, 17, and the screen-plates, 18, substantially as set forth."

The other machines complained of are those known in the trade as the "Success," "Packer," "New Success," "New Packer," "Monarch," and "Wells" screens. The Packer, Success, Monarch, and Wells screens do not differ substantially from the Gotham construction. The New Packer and New Success machines do not infringe the second claim because, inter alia, "the screen chambers lying beneath the plates and above the vibrating diaphragms are not separated from each other by tight partitions;" they use a continuous sheet of rubber as a vibrating diaphragm, thus dispensing with the "bellows-plates, 5" and "the flexible bellows-joints, 6, at their sides and ends;" they do not have "the flexible packing-strips, 13, and 14, extending around

the ends and sides of each bellows," as claimed, and, therefore, not "thus separating each bellows-plate by an air-tight joint extending entirely around it, and rendering each bellows and the screen-plate above it entirely independent from all the others."

The contention of complainant that pulp stock lodging between screen chambers so constructed as to be in free communication with each other throughout the whole vat, is the equivalent of these specifically limited "flexible packing-strips, 13 and 14," described as "the packing completely around each bellows (which) separates it completely from the others," because the patentee stated that said packing-strips might be of "rubber or other suitable material," is without merit, and does not require discussion. If, in the operation of a machine constructed without such strips, the pulp stock performs the function of sealing and separation, then there is no useful function assignable to or resultant from the provision of such strips.

Much of the evidence in this case is devoted to a discussion as to whether the Victory patent is predicated upon an erroneous theory of pneumatic operation by means of air constantly present beneath the screen-plates alternately pumped up and down through the slots in the screen-plates and causing a powerful downward suction of pulp into the chamber. The conflict of evidence on this point, based upon conflicting theories and practical experiments, leaves the question in doubt. We have not found it necessary, however, to determine this question or the subsidiary question as to whether defendant's screens are pneumatic or hydraulic in their operation.

The language of the patent fails to state any theory of the patentee as to the presence of air below the screen-plates. But where a patent discloses means by which a novel and successful result is secured, it is immaterial whether the patentee understands or correctly states the theory or philosophical principles of the mechanism which produces the new result. Walker on Patents, § 175; Dixon-Woods Co. v. Pfeifer, 55 Fed. 390, 5 C. C. A. 148; National Meter Co. v. Thomson Meter Co. (C. C.) 106 Fed. 531, 538. It may be assumed, however, in the disposition of this case that the patentee proceeded upon the pneumatic theory and that this theory was correct, and that the "important feature" of the Victory invention, the independent air-tight construction, upon either theory of operation was a patentable improvement upon the devices of the prior art.

The patentee originally claimed his invention broadly in the following claims:

"(1) In a paper screening machine, the combination, with a series of screen-plates, of a series of independent bellows working beneath said screens; substantially as set forth.

"(2) In a paper screening machine, the combination, with a series of screen-plates, of a series of alternately reciprocating bellows; substantially as set forth.

"(3) The combination, with the series of screen-plates, of the independent bellows, the drive-shaft having the series of eccentrics alternately arranged upon it, and the connecting frames; substantially as set forth.

"(4) The combination, of the body frame having the cross-bars, the reciprocating bellows-plates having the bellows-joints, the packing around

each bellows, and the top having the cross-bars and the screen-plates; substantially as set forth."

They were rejected on Kron patent, No. 315,420, and were canceled, and the claims in suit were substituted therefor. The Kron patent shows two longitudinally arranged chambers provided with pulsating diaphragms alternately actuated. It does not show the details of construction of the Victory patent, such as the parallel cross-bar air-tight arrangement with packing-strips. In view of the marked differences in construction, it is questionable whether the applicant Victory, instead of canceling, might not have so amended, the rejected claims, especially the fourth, as to differentiate them from the references cited, and still protect some of the broader elements of his invention. But, however that may be, he acquiesced in the action of the Patent Office, and elected to substitute the present narrow claims in suit, and is now estopped to so expand them as to embrace the rejected subject matter. Whether such limitation would have been required upon a full survey of the prior art will be discussed later.

Defendant's expert, Dayton, names as the three closest references to the patent in suit the Richardson & Glenny British patent, No. 4,669 of 1880; the "Engineer No. 1," showing, in 1887, the construction then made under the Miller British patent, No. 3,620 of 1880; and the United States Russell & Cragin patent, No. 359,543 of 1887:

The Richardson & Glenny patent is for an improved strainer for paper pulp. The patentee describes and illustrates a strainer fixed in an inclined position in a vat, provided at its bottom with "a disc and diaphragm of india rubber or other flexible material, and a rapid reciprocal motion is given to the disc by means of a connecting rod and crank working from a revolving shaft." The patentee, stating that "the finished pulp passes through the strainer by the aid of the action of the disc and diaphragm, * * * and the strainer is self-clearing," says:

"It is most convenient and effective to use two or more similar strainers, and for the stuff to flow over the surface of one of them onto that of the next, and so from one to another till all the clean pulp has passed through, and all foreign matter is strained out or separated."

Thus the patent showed a strainer divided into two sections, each having its separate diaphragm. These sections were separated from each other by a cross-partition, so as to be independent one of the other. The diaphragms or bellows-plates were connected with the top edge of openings into the sections by a flexible india rubber gasket, and so connected to the driving mechanism as to enable one of the diaphragms to rise while the other was descending. The openings from the vat were regulated by valves, so used to regulate the outflow that "the level of the stuff in the vat may be regulated and maintained at the level at which the strainer works most efficiently." The patentee, referring to the inclined position of the plates, says that those on the second chamber "may be placed level or slightly inclined." Complainant asserts that this patent does not show a series of parallel cross-bars forming the rectangular spaces, nor the bellows-plates at the top of these spaces, as specifically described and claimed in the patent in

suit, nor its specific driving-shaft construction, nor the air-tight cross-bar construction.

Counsel for complainant says:

"The change of the bellows-plates from the bottom to the top of the frame body reduces the sizes of the expanding and contracting chambers and increased materially the efficiency of the suction, and the size and shape of the bellows-plates are different in the Victory invention."

It may be assumed that this statement is correct.

There is a direct conflict of testimony as to whether experimental machines, claimed to be constructed under the Richardson & Glenny patent, were capable of successful practical operation. The time-worn allegations of painstaking efforts to construct and operate, resulting in utter failure, are met by the conventional counter allegations directed to showing that the prior machines were better than those of the later invention claimed in the patent in suit. There is evidence tending to show that some unwarranted additions were made to the Richardson & Glenny experimental machine constructed by defendant, which largely contributed to its successful operation, and that the so-called Richardson & Glenny machine experimented with by complainant was unwarrantably so constructed that it could not possibly work. It is claimed by defendant that machines made under this patent were manufactured and sold in 1882 and for many years thereafter, while complainant's witnesses testify that the Richardson & Glenny machines used in the Remington factory were not practically successful and were discarded. In view of this conflict of testimony it is impossible to certainly determine the extent of the bearing of these machines on the patent in suit. But, even if the work done by the screens was unsatisfactory, it may be fairly assumed that the chief trouble was, as stated by complainant's witness, Remington. He testified as follows:

"They screened the stock very nicely, but we put only a small quantity through them. Q. 23. What was the reason for discarding the further use of these screens? A. The quantity we could get through them was so small."

In these circumstances, the rule frequently invoked in the case of mere paper patents may with much greater force be applied to these machines, which, even though they may have worked imperfectly, were confessedly capable of a limited, successful, practical operation. Where such patents, or the machines constructed under them, embody the principle covered by a later patent; the mere fact that they are not capable of successful practical working because of objections as to the minor matters of detail in construction will not deprive them of their effect as defenses where they sufficiently disclose the invention claimed in the later patent. Pickering v. McCullough, 104 U. S. 310, 319, 26 L. Ed. 749.

Engineer No. 1 publication illustrates and describes machines constructed under Miller British patent No. 3,620 of 1880. These machines show an arrangement of devices similar to those in Richardson & Glenny, but designed to effect the screening by "producing a disturbance which causes the stuff to pass through the slits." There is no suggestion or construction implying the idea of utilizing suction in

their operation. Nevertheless, the Miller machines, which were practically and commercially successful, serve to closely limit the Victory patent, and their manifest bearing upon its status are not disposed of or seriously affected, save in the particulars noted above, by the criticisms of complainant's expert.

The Russell & Cragin patent, No. 359,543, shows a construction embodying every element found in the patented construction in suit, except the diaphragm and joints. The space beneath the series of horizontal screen-plates is divided by transverse partitions into separate chambers, provided with separate agitators or pumping bars. The upper and lower sections of the vat, hinged as in Victory, contain upper and lower cross-bars, as in Victory, having packing strips thereon, and the discharge passages all deliver into a common flow box. The patentees say:

"B B represent the stationary bars or partitions between the pumping bars, A. These partitions we now provide with longitudinal indentations or channels, C in their tops, and secure to the underside of the screen, C, strips, D, of wood or metal, or other suitable material, coinciding with the channels of the partitions, and fitted closely thereto, so as to form a tight joint and support the central portion of the screen, and at the same time form a separate and distinct compartment for each pumping bar, thereby further increasing the efficiency of the pumping apparatus under the screen."

Complainant's expert's criticisms of this patent are that the pumping bars cannot pump, but are mere agitators, and that there can be no air space between the plates. The second point is immaterial in the view we have taken as to the hydraulic and pneumatic theories; the first point is met by the presence in the art of the vibrating diaphragms, shown in the patents already discussed, and by the description and illustration of the two means in Wise British patent, No. 14,101, and their description as equivalents in Kron patent, No. 14,603.

It is unnecessary to further examine this branch of the prior art. The screen machines chiefly in use in this country prior to the Victory invention were the Knocker, Bremaker & Moore, Gould, and Black & Clausen. Of these the Bremaker & Moore screen, described in Bremaker patent, No 242,428, may be selected as the most important and best type, and will be discussed because of its continuous practical, successful, commercial operation, and also because defendant's screens approach it in construction. This machine belongs to the old type of single chamber and single diaphragm screens. The screen-plates were supported on transversely extending cross-bars, concave on their lower sides, corresponding to the number of screens. The whole space below the cross-bars and above the single diaphragm plate was open, by reason of said concave construction, so that there was free communication throughout. The diaphragm was operated by driving mechanism substantially like that used by defendant. In operation the pulp was shaken through the slots in the screen-plates by the vibration of the diaphragm. It may be noted in this connection, with Bremaker using one compartment and one diaphragm, and defendant using two compartments and one diaphragm, that the much discussed air-tight suction theory applies to each, it being only a matter of degree, and in multiple each acting as one did before.

Complainant's criticisms of these screens are as follows: They "required a special foundation"; they were expensive to install; they were noisy in operation; they required frequent repairs and were slow in operation; * * * no means were provided for producing suction; * * * if at times a suction could be obtained, it was liable to be instantly lost by the irregular flow of the stock."

Complainant's counsel admits that these machines did "good work, though very little." And complainant's witness, Warren, testified as follows:

"In reference to the Bremaker & Moore screen, would say that I consider this practically among the class of diaphragm screens and not subject to so much of the imperfections which are referred to above. * * * In this respect I consider the Bremaker & Moore closely approaches the Gotham screen. Under similar conditions, I would not say it would make more or less lumps than the Gotham screen."

The insufficiency of the foregoing criticisms will further appear from the admissions of complainant's witness, Remington, quoted below. Counsel for complainant, having asserted that the Victory screens were immediately adopted, and have since been successfully used and have displaced all older types, gives 10 reasons for this alleged situation, as follows:

"First. Because Victory's type of screens was unlike any prior screens shown, or described, in that it consisted of a new and useful combination of elements which separated the space under a series of horizontally disposed screen plates, into a series of separate independently operated, air-tight, expanding and contracting chambers crosswise of the vat and located above the horizontal top of the frame, beneath the plates; each independently expanding and contracting chamber, operated upon by a rigid bellows-plate of nearly the size of the chamber, operated crosswise of the length of the vat, whereby a series of partial vacuums were produced immediately under the plates and a series of propulsions of stock and air through the slots of the plate, so that the whole screen area covered with stock is operated upon by suction and blast, and when any portion of the plates run dry only the chamber under the dry screen plate is inoperative, and the instant when the plate is covered the chamber resumes its normal work.

"Second. They removed the string, slime, spots, and defects from web and book paper.

"Third. They cost, to install, about one-third of the cost of prior types of screens.

"Fourth. They screened twice as much stock, and do their work better than the older types of screens.

"Fifth. They required no special solid foundation.

"Sixth. They effected a great saving in repairs.

"Seventh. They made little or no noise in operation.

"Eighth. They required less attention to keep in order; the plates needed cleaning but once per week, while prior types required cleaning every day.

"Ninth. They saved a great amount of power.

"Tenth. They required no special attention while in operation."

The record establishes beyond contradiction the incorrectness of these assertions to any extent which would permit an enlargement of the scope of the claims to embrace defendant's screens. In fact, most of the assertions material to the question of scope may be disposed of by the evidence of complainant's witnesses or undisputed facts. That

the Victory screen, as made under the patent, was not a success, appears, inter alia from the evidence of complainant's witness, Remington, who testifies as follows:

"X-Q. 155. You were asked to state, as I understand it, whether you thought paper produced on the old Knocker screens, the Gould screen, the Black & Clausen screen, or the Bremaker & Moore screens would be salable to-day in the market on equal terms with paper produced from pulp treated by the Gotham type of screens. I will now ask you whether you believe that the so-called Victory screen made by Gotham could be used to produce paper salable in the market in competition with the screen known as the Gotham screen made by him after the termination of the verbal agreement and in use to-day?

"A. I don't think it could. The Victory screens were never used to any great extent on paper machines.

"X-Q. 156. You did try to use them, did you not, and then relegated them to the pulp mill? A. Yes.

"X-Q. 157. The fact that these Victory screens had separate compartments did not save them from being ineffective for work on the paper machine, did it? A. No.

"X-Q. 158. Nor the fact of the movement of the diaphragms alternately in action? A. It did not.

"X-Q. 159. As I understand it, the so-called Victory screens made by Gotham had a separate diaphragm for each screen-plate. Is that correct? A. Yes.

"X-Q. 160. But when you came to build them, after he had given up his license, you provided a diaphragm for each pair of adjacent screen plates. Is that so? A. Yes. * * *

"X-Q. 177. Did you make any profit out of these screens last referred to? A. No.

"X-Q. 178. Did you not conclude that there was no money in making and selling the Victory screen? A. There was no money making them the way we did. * * *

"R-D. Q. 222. The only trouble with the Victory screens in using in connection with paper machines was the fact that the screen had a little too strong suction. Was not that it? A. Yes.

"R-D. Q. 223. And when you enlarged the separate compartments so as to include two screen-plates for each bellows-plate, was there any further trouble with the use of those screens in connection with paper machines? A. We never tried them on a paper machine. It would not have made any difference."

As to the first point. The complainant's description of the Victory construction omits the specific limitations, stated and imported into the claims in suit by reason of the file wrapper and specifications and from the prior art, whereby defendant's construction is differentiated from said claims. This appears from the discussion of the claims and of defendant's screens in the earlier part of this opinion.

The second point may be disposed of by the testimony of complainant's witnesses, Warren and Remington, quoted above, and by Remington's further testimony as follows:

"X-Q. 197. Do you consider that the imperfections in paper due to knots, slime spots and 'strings' are diminished because of the subdividing of the compartments below the screen-plates into separate compartments? A. I don't know that that would make any difference.

"X-Q. 198. Or to the fact that one diaphragm goes up while its neighbor is traveling downward? A. I don't think that would make any difference.

"X-Q. 199. Suppose all of the compartments of a Gotham screen, except one, were out of action and the diaphragm of the single remaining compartment were operated, would you get the same quality of pulp in that single department? A. I think you would.

"X-Q. 200. All of the compartments operate in the same way, do they not, in so far as the avoidance of imperfections result in the paper are concerned? A. Yes, I think so.

"X-Q. 201. You have no doubt of it, have you? A. I have no doubt."

As to the third point, one of complainant's witnesses testifies that the Gould screens, which "ran fairly well," were "well built and not very hard to keep in repair."

As to point four, it would seem from complainant's evidence that even if the Victory screens did more work, it was not necessarily better work.

Disregarding, for the purpose of this inquiry, all of defendant's evidence, we may assume the correctness of complainant's other contentions, that the Victory machine was cheaper, did more work by enlarging the bellows-plates to nearly the size of the chamber, required less repairs and attention, was less noisy, and used less power than those of the prior art. But even if it be further assumed, which certainly is not satisfactorily proved, that these results are due to the constructions covered by the first and second claims of the patent, it is clear that these constructions are not used by defendant. The complainant's specific air-tight construction may have contributed to the efficiency of the machine, but defendant secures its results by a different construction; the comparative noiselessness and prolonged life and saving in foundation and repairs, would seem chiefly to be the results of avoiding shock by the substitution of a modified construction of the old diaphragm for the old agitator, while defendant does not have the patented diaphragm, "rendering each bellows and the screen-plate above it entirely independent from all the others." It is not invention to merely carry forward an invention shown in a prior machine. "A change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent." Smith v. Nichols, 21 Wall. 112, 119, 22 L. Ed. 566; Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327. We conclude, therefore, that the advantageous results asserted on behalf of such elements of the patented construction as are covered by the claims in suit either "fall within the category of degree," or are due to details of construction not used by the defendant.

Thus far the questions at issue have been discussed chiefly in the light of the testimony of complainant's witnesses and the undisputed showing of the prior art. In view of the insufficiency of the testimony to support the assertions made in support of the patent, and its negative character as to the prior art, we are brought to a consideration of the latter as testified to by defendant's witnesses, who are practical paper manufacturers of long and extensive experience. They testify to the continued, actual, practical, successful use for years of

more than a hundred suction diaphragm screens, some with single compartment single diaphragm screens, others with diaphragms divided into several parts, some of which are in use at the present time. They assert that the single diaphragm screens screened just as well, made just as good paper, had as strong suction, and required only the same foundations as the multiple screens. Hall, one of defendant's witnesses, sums the matter up as follows:

"All conditions being equal, I should say there was practically no difference between the workings of single compartment single diaphragm screens and the multiple compartment multiple diaphragm screens."

In this connection it must be noted that the evidence of complainant shows that the various new types of separate compartment suction screens have in large measure displaced the older type, and are now generally used in the wood paper pulp industry. Defendant contends, however, that this change is due, not to the adoption of the characteristic features of the Victory construction, but to an avoidance thereof, and the substitution of noninfringing features. How far this contention is justified by the facts shown it is unnecessary to determine. It is sufficiently proved that the old screens were and are practicable, and that, even if the screens originally constructed under the Victory patent were impracticable, the defects have been remedied, and machines constructed along the lines of his patent are now a practical commercial success.

Counsel for complainant, referring to the testimony of her witnesses, says as follows:

"All these witnesses agree that paper could not now be made and marketed, were the old screens to be used, on account of the damaged quality of the product. This evidence is wholly uncontroverted."

But he fails to point out what has been shown above, that the same criticism applies to the original Victory screens, before the introduction of the later improvements. An exhaustive examination of the record, and careful consideration of all the arguments herein, in view of the importance of the questions involved, compels the conclusion that the Victory conception was a meritorious one, and not justly subject to the criticisms belittling the status of the invention. We conclude that the Victory patent disclosed a novel and more simple and economical construction, which materially contributed to increased efficiency and possible superiority of product, and substantially advanced the pulp screening art. It was new in Victory to use bellows-plates with concave tops, having bellows-joints secured to their sides and ends, flexible packing-strips, such as he describes, and forked connecting frame. And Victory departed from the prior art not only in these details of construction, but also by placing a diaphragm up between each pair of cross-bars, thus effecting a division of the spaces into separate, isolated, independent pumping chambers.

Therefore, every assumption has been made, and every doubt has been resolved, in favor of the patent, so far as this was justified by the record. But, even in this view, we cannot ignore the self-imposed limitations of the claims in suit, justified, if not required, by the prior

art. The defendant, by the elimination or modification of the claimed details of the patented construction, and a readjustment of relative size and location of supporting bars, diaphragms and flow box, either permissible by reason of the disclosures of the prior art, or not covered by the claims in suit, has succeeded in constructing a noninfringing machine.

The decree of the court below is reversed, with costs of this appeal, and the court below is directed to dismiss the bill, with costs.

LOS ANGELES ART ORGAN CO. v. ÆOLIAN CO. et al.

MURRAY M. HARRIS ORGAN CO. v. SAME.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

Nos. 1,234, 1,235.

1. PATENTS—SUIT FOR INFRINGEMENT—EXTENT OF USE OF DEVICE.
That the device of a patent was publicly used and exhibited in actual use for two years is sufficient to sustain a suit for infringement without a showing that it has been in constant use since that time.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 34.]

2. SAME—VALIDITY—PRESUMPTION FROM GRANT.
Due consideration must always be given by the court or jury, as the case may be, to the presumption of validity arising from the grant of a patent and the real question in all cases is whether or not the evidence in the case is sufficient to overcome such presumption.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 162-165.]

3. SAME—CONSTRUCTION OF CLAIMS—GENERIC CLAIMS.
A pioneer inventor is entitled to a generic claim, and may also include specific claims in the same patent, and in such case the broad claims are not, prima facie, to be restricted by reading into them the specific devices claimed in the narrower ones.
[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 248.]

4. SAME—VALIDITY AND INFRINGEMENT—REGULATOR FOR MECHANICAL MUSICAL INSTRUMENTS.
The Tremaine & Pain patent, No. 552,796, for improvements in mechanical musical instruments using perforated music sheets, by which two such sheets in two separate organs or a bank organ, are made to move in unison, so that the instruments will play without variation in time, is valid, and embodies an invention of such novelty and importance as to constitute a distinct step in the progress of the art, and to entitle its claims to a broad and liberal construction. As so construed it is infringed by the device of the Fleming patent, No. 659,442, which, although differing in details, embodies and appropriates the essential principles of the earlier invention.

Appeals from the Circuit Court of the United States for the Southern District of California.

Hazard & Harpham, for appellant Los Angeles Art Organ Co.

G. E. Harpham (J. J. Scrivner, on the brief), for appellant Murray M. Harris Organ Co.

Harold Binney, John H. Miller, George L. Cooper, and Dickerson, Brown, Raegener & Binney, for appellees.

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

HAWLEY, District Judge. These suits were brought by appellees (complainants in the court below) against appellants (defendants in the court below) for an alleged infringement of United States letters patent, No. 552,796, granted on January 7, 1896, to William B. Tremaine and Robert W. Pain for improvements in mechanical musical instruments. The infringement charged in No. 1,235 was making and selling musical instruments constructed "in accordance with the specifications and drawings of United States letters patent, No. 659,442, granted on October 9, 1900, to William B. Fleming." It appears from the records that Fleming was formerly in the employ of the Farrand & Votey Organ Company, one of the predecessors of the Æolian Company, in Detroit, Mich., where he familiarized himself with the Tremaine & Pain construction.

Mr. Votey in his testimony said:

"Mr. Fleming knew of this as early as 1895, as I explained to him the mechanism of the Tremaine & Pain device on my return from New York about that time, and a little later Mr. Pain made me a duplicate of the device and shipped it to me in Detroit to be connected up with one of our organs in Detroit. I mean connected electrically, so that the admission of air to the tracker holes controlled a pneumatic making an electric contact which controlled the circuit for sounding the various pipes of the organ, but the mechanism for controlling the two paper sheets in unison was just like that in New York."

Thereafter Fleming commenced making various alleged improvements and inventions, which, it is claimed by appellees, embodied the Tremaine & Pain principle of operation. In September, 1900, he left the employ of the Votey Organ Company, and early in October of that year he came to California, and was employed by Murray M. Harris, and afterwards by Murray M. Harris Organ Company (appellant in suit No. 1,235). This appellant failed in business and was succeeded by the Los Angeles Art Organ Company (appellant in suit No. 1,234), and it "undertook and agreed with the Murray M. Harris Company to complete contracts still outstanding." The appeal in No. 1,234 is taken from an order of the Circuit Court granting a preliminary injunction. In No. 1,235, which will first be considered, the appeal is taken from a final decree entered by the court for an injunction, and an accounting.

It is assigned as error: (1) That the court erred in holding that the Tremaine & Pain patent sued on by complainant was good and valid; (2) that the court erred in holding that the musical instruments constructed under the Fleming patent was an infringement of claims 1, 2, 3, 4, 5, 10, 11, and 12 of the Tremaine & Pain patent. The evidence in the record, in our opinion, shows that the Tremaine & Pain patent is valid. The evidence also shows that Tremaine & Pain had constructed the apparatus, and put it in use in the hall of the Aeolian Company in New York on an organ of the Ferrand & Votey Organ Company built for the Æolian Company, as early as 1895, and it was there publicly used and exhibited in actual use for playing the organ.

for at least two years. This was sufficient to enable appellees to maintain this action without showing that it had been in constant use ever since. Pitts v. Wemple, 1 Biss. 87, 93, Fed. Cas. No. 11,194; Stitt, Trustee, v. Eastern R. Co. (C. C.) 22 Fed. 649; Masseth v. Johnston (C. C.) 59 Fed. 613. Does the Fleming machine and apparatus as described in his patent, No. 659,442, embody the invention as claimed in the Tremaine & Pain patent No. 552,796, and does it infringe that patent in claims 1, 2, 3, 4, 5, 10, 11, and 12? In other words, did the court err in rendering its decree in favor of the appellees? In order to determine what the rights of the appellees are, it is necessary to ascertain what their status in the art, under the Tremaine & Pain patent, is, whether they were pioneers in their invention, or mere improvers. If pioneers, they would be entitled to a broad and liberal construction, if, mere improvers, the claims would only be entitled to a narrower interpretation.

The invention as specified in the letters patent is as follows:

"This invention relates to mechanical musical instruments in which perforated sheets of paper are used in combination with a series of air ducts or passages leading to musical reeds, pipes, or other sounding devices, or to mechanism for operating the sounding devices, which are caused to sound by the exhaustion or pressure of air; all of which musical instruments are well known. Heretofore it has been very difficult if not impossible to run two perforated music sheets, each operating a separate and independent musical instrument, synchronously or together for the two musical instruments controlled by the two perforated music sheets to play together in unison; the difficulty being caused by the tendency of one of the music sheets in traveling over the air ducts for the operation of the sounding devices to get ahead or in advance of the other, by which the perforations in such advanced music sheet would cause its sounding devices to sound before those in the other music sheet. This occurs from a variety of causes well understood, and needing no particular description herein, and the object of the present invention is to combine mechanism in such manner with the travel of two or more perforated music sheets, each controlling a separate or independent organ, or bank organ, or other musical instrument, that the two or more music sheets will run or travel synchronously or together, in such manner that the music played on the several organs, or bank organs, or other musical instruments controlled by the perforated music sheets will be rendered synchronously or together in point of time, enabling, for instance, on one organ or bank organ, or other musical instrument, the accompaniment to be played and a solo or the melody or other part to be played on another organ or bank organ, so that the musical piece being played by the several instruments would be performed together or in the same time; and the invention consists in the combination of two or more organs, or bank organs, or other musical instruments, each operated or controlled by a separate or independent perforated music sheet, and means for controlling the movements of each of said perforated music sheets, so that the two or more perforated music sheets will travel together, or in the same time, for the playing of the two or more organs or other musical instruments synchronously or together, all substantially as hereinafter fully described; and the invention also consists of the construction and arrangement of the various parts of the apparatus for carrying out this invention, all substantially as hereinafter fully described, reference being had to the accompanying sheets of drawings, in which is illustrated the present invention as arranged to operate the sounding devices of two separate and independent musical organs, or bank organs, or other musical instruments by two separate perforated music sheets—the musical instrument not being shown."

It will thus be seen that the essence of their discovery, which is the gist of their invention, was by causing special control perforation in each sheet to exercise control over the other sheet, and over its driving mechanism, thus making the sheets themselves the instrumentality for retarding either sheet running ahead until the other sheet should catch up and re-establish exact synchronism. Such was also the gist of the patent obtained by Fleming.

This discovery was important. Tremaine & Pain were not mere improvers upon a prior machine which was capable of accomplishing the same general result. They brought to success what prior inventors had been unable to accomplish. It was difficult, and had been considered impossible. They adopted some devices that had been used before, combined them with others that had not been used, and added the necessary elements to make a practical operative machine. Their invention was therefore more than a mere improvement or perfection of what had preceded it. It was of such novelty and importance as to constitute a distinct step in the progress of the art, and the claims of their patent are therefore entitled to a broad and liberal construction. Morley S. M. Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 32 L. Ed. 715, and authorities there cited; Letson v. Alaska Packers Ass'n, 130 Fed. 129, 140, 64 C. C. A. 463; Brown Bag-Filling M. Co. v. Drohen (C. C.) 140 Fed. 97.

In Hobbs v. Beach, 180 U. S. 383, 392, 399, 21 Sup. Ct. 409, 45 L. Ed. 586, the court, approving the principles announced in the Morley Case, and describing the difference existing between the patents there under consideration, said:

"In the case of a pioneer patent like this * * * there would be no difficulty in holding that these differences were immaterial, were it not for the fact that each one of the claims is limited by the words 'substantially as described.' In other words, that unless the infringing device contains mechanism substantially such as is described in the patentee's specification, and shown in his drawings, there can be no infringement. * * * While the words 'substantially as described or set forth' are not absolutely meaningless, they do not limit the patentee to the exact mechanism described in his specification, or prevent recovery against infringers who have adapted mechanical equivalents for such mechanism. In determining the range of such equivalents much depends upon the question whether the machine is a primary one, or whether the patent covers some novel feature introduced into an old machine. It is difficult to say exactly what effect should be given to these words. In one sense it may be said that no device can be adjudged an infringement that does not substantially correspond with the patent. But another construction, which would limit these words to the exact mechanism described in the patent, would be so obviously unjust that no court could be expected to adopt it."

Appellant did not introduce any evidence, nor set up any patent, printed description, actual construction, or any other matter, prior to the invention of Tremaine & Pain, by which two music sheets were mutually controlled, nor was any evidence offered by appellant to anticipate or restrict any portion of the invention made by Tremaine & Pain. Under these circumstances it seems manifest that they were pioneers. The testimony of Mr. Fleming, upon whom appellant relies, virtually admits it. In his cross-examination the following questions and answers appear:

"Q. Isn't it a fact that up to the present moment you have never heard of any double tracker and double music sheet construction provided with connections for controlling one sheet by the other sheet, prior to 1896? A. I can't say that I did. Q. Then, so far as you know to the contrary, Messrs. Pain and Tremaine were absolute pioneers in that undiscovered territory, were they not? A. So far as I know."

Does the Fleming patent infringe upon the claims of the Tremaine & Pain patent? With reference to the suggestion of appellant's counsel as to the presumption arising in favor of the Fleming patent as stated in Kokomo F. M. Co. v. Kitselman, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689, it may be briefly stated that there is in every case a prima facie presumption in favor of the validity of every patent issued by the patent office. Due heed and consideration must always be given by the court or jury, as the case may be, to this presumption, but the real question in all cases is whether or not the evidence in the case is or is not sufficient to overcome the prima facie presumption which the patent affords. Hays v. Sulsor, 1 Fish. Pat. Cas. 532, 534, 535; Fed. Cas. No. 6,271; Corning v. Burden, 15 How. 252, 271, 14 L. Ed. 683; Reckendorfer v. Faber, 92 U. S. 347, 355, 23 L. Ed. 719; Bates v. Coe, 98 U. S. 31, 40, 25 L. Ed. 68; Lehnbeuter v. Holthaus, 105 U. S. 94, 96, 26 L. Ed. 939; Miller v. Eagle Mfg. Co., 151 U. S. 186, 208, 14 Sup. Ct. 310, 38 L. Ed. 121; Boyd v. Janesville Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; Ransome v. Hyatt, 69 Fed. 148, 16 C. C. A. 185; Wilgus v. Germain, 72 Fed. 773, 776, 19 C. C. A. 188.

It is claimed by the appellant that the Fleming construction has accomplished the result claimed to be obtained by the Tremaine & Pain patent, by substantially different means, and is constructed and operated differently; that Fleming not merely made improvements in many of the separate mechanisms which go to make up the patented device; that he accomplished the result by a new and different combination of elements differently arranged, and operating differently, and in part composed of entirely distinct and separate elements, unlike in form and operation; and that the appellees should be held strictly to the particular means as described in the several claims of the patent.

Tremaine & Pain made three generic claims for "mechanism controlled by each music sheet to regulate and control the movement of the other music sheet." This included the numberless species in which the skilled mechanic or future inventor might embody their creation. The other claims were for more specific features and elements. This method as to the different character of the claims was explained by this court in Von Schmidt v. Bowers, 80 Fed. 121, 147, 25 C. C. A. 323. The court said:

"By section 4888 of the Revised Statutes [U. S. Comp. St. 1901, p. 3383], it is provided that every inventor, when making his application for a patent, shall file in the patent office a written description of his invention; and, if the application be for a machine, he is required to explain the principle thereof, and the best mode in which he has contemplated applying the principle, so as to distinguish it from other inventions. But he is not necessarily limited to the one mode shown. The pioneer inventor is entitled to a generic claim, under which will be included every species included within the genus. In

addition to such generic claim, he may include in the same application specific claims for one or more of the species"—citing numerous authorities.

We copy for illustration claims 1, 2, 3, and 4, as follows:

"(1) In a mechanical musical instrument, in combination, two or more perforated music sheets, mechanism for operating each music sheet independent of the other in connection with an independent and separate organ, bank organ, or other musical instrument, and mechanism controlled by each music sheet to regulate and control the movement of the other music sheet or sheets, so that they all will travel together, to perform the music represented by each sheet synchronously or together.

"(2) In a mechanical musical instrument, in combination, two or more perforated music sheets, raceways, or tracker ranges over which said perforated music sheets are arranged to travel, one to each music sheet, air ducts or passages in each raceway or tracker range, arranged to communicate with an independent or separate set or series of sounding devices for the sounding of the same, and mechanism controlled and caused to be operated by each perforated music sheet, to regulate and control the travel of the other music sheet or sheets, for all the music sheets to travel together so that the music performed on the several musical instruments in connection therewith will be performed synchronously or together.

"(3) In combination, two or more sheets of flexible material, raceways, or rests over which said sheets are arranged to travel, one raceway to each sheet, and mechanism controlled and caused to be operated by each sheet, to regulate and control the travel of the other sheet or sheets, for said sheets to travel synchronously or together, over said raceways or rests.

"(4) In combination, a sheet of flexible material, a raceway or rest over which said sheet is arranged to travel, an air duct or passage in such raceway, a perforation in said sheet in line with said air duct, an air chamber, a pneumatic bellows in said air chamber in communication with said air duct or passage, a passage into said chamber from the outside, a bellows outside of said chamber, a passage forming communication with said passage leading to said chamber and said bellows, a valve connected to said pneumatic bellows adapted to close and open said air chamber passage, a lever connected by one arm to said outside bellows, a rotating shaft adapted to move back and forth longitudinally in its bearings and to be moved in one direction by the other arm of said lever, a spring bearing on said shaft, a disk or clutch on the end of said shaft arranged and adapted to be engaged with another clutch or any suitable operating device."

It will be observed that claims 1, 2 and 3, include the entire invention generically, in terms broad and general, while claim 4 is for a subcombination, and is confined to the mechanism for the stopping of one sheet. The other claims are for other specific features and elements. The argument on behalf of appellant is that in such a case the court should read into the three generic claims, the special features of the mechanical means prescribed for producing the result. To use the language of counsel, the court ought "to refer back to the specifications, and read into the claims those elements which are therein specified as being the means by which such functions are performed." The claims of a patent should be construed, where they reasonably may be, to cover the entire invention of the patentee; and where a patent contains several claims, some of which are limited to details, the others are, prima facie, not to be restricted by insisting that they contain, as necessary elements, the particulars which are specifically covered elsewhere. The general rule is, as stated by the court in Risdon I. & L. Works v. Trent (C. C.) 92 Fed. 375, 388,

that "Infringement cannot be avoided by reading into a broad claim of a patent specific devices claimed in narrower claims of the patent." See, also, Mast, Foos & Co. v. Dempster Co., 82 Fed. 327, 333, 27 C. C. A. 191; Bresnahan v. Tripp G. L. Co., 102 Fed. 899, 43 C. C. A. 48.

Tremaine & Pain conceived a new idea and stated it in their specifications in such a plain way that it could be readily adopted and employed by any one "skilled in the science to which it appertains" so as to lead to a practical and useful result. They clearly described their mechanical musical instruments, and the principles thereof by which they could be distinguished from all other inventions, and stated in concise language what they considered to be the best mode of applying these principles, and in their claims pointed out the parts and improvements which they claimed as their invention and discovery, and thus brought themselves within the essential requirements of the patent law. Their invention not only embraced the mechanical musical instruments and modes of construction and operation which they described in their patent, but included all mechanical musical instruments which might be so construed as to operate in substantially the same way by any equivalent means to accomplish the same results. By the express terms of the act of Congress the description of their device in their specifications, and the language of their claims, they were entitled to a patent for their "invention or discovery," and "their patent should be so construed as to give them all that they invented, discovered and claimed; nothing more, and certainly nothing less." Brush Electric Co. v. Electric Imp. Co. (C. C.) 52 Fed. 965, 972.

In the letters patent issued to Fleming it is stated that the invention has for its object a pneumatic regulator for musical instruments, and that "it consists of the construction, combination, and arrangement of devices," that are thereinafter specified and claimed. "My invention is more particularly designed to provide a pneumatic regulator for musical instruments in which plural music sheets may be simultaneously employed and whereby said sheets may be synchronously actuated." After stating that certain features of construction embodied in the present invention were embodied in two different patents issued to him, one on July 6, 1897, "for an electric attachment for musical instruments," the other March 28, 1899, "for an attachment for musical instruments," and explaining some of the features thereof, he states:

"My present invention is designed to provide an attachment in which plural sheets may be employed, the attachment in the present instance being designed to regulate the operation of the instrument or the movement of the music sheets so that corresponding notes shall be in unison or in perfect time and any liability of an uneven movement of the said sheets be avoided or corrected."

There are 10 claims in this patent. 1 reads as follows:

"In a pneumatic regulator for musical instruments, two independently-traveling music sheets, each provided with elongated and with shortened perforations arranged in pairs, and pneumatically-actuated mechanism governed by

said perforations arranged to regulate the travel of said sheets to cause said sheets to operate in unison, said mechanism provided with a controlling pneumatic, 1, with a valve provided with a spindle to govern the exhaust of said pneumatic, and with additional plural pneumatics to jointly actuate said valve spindle, substantially as described."

The others are for certain other features and specific details. Number 7 is here quoted for the purpose of general illustration:

"(7) In a pneumatic regulator for musical instruments, two traveling music sheets each provided with elongated and with shortened perforations arranged in pairs, clutch-actuated mechanism to carry said sheets, a tracker board for each of said sheets provided with two channels having communication therethrough governed by said perforations, pneumatics controlled by one set of perforations and channels governing said clutches, and additional pneumatic mechanism governed by the other set of perforations and channels and governing the first named pneumatic to regulate the travel of the sheets, substantially as set forth."

From an examination of the exhibits in evidence, the testimony given at the trial, and of the respective letters patent, we are of opinion that the Fleming patent clearly embodies the invention of Tremaine & Pain, and is an infringement of that patent. It is true that Fleming made several minor changes in the arrangement of his mechanism, and constructed some parts in a different manner, but throughout the whole the essential principles of the Tremaine & Pain patent exist. When the discovery was made and explained to the public by Tremaine & Pain, it could readily be seen by other inventive and mechanical minds that the means by which the result was produced were simple and plain, and that the result could be accomplished by slight changes in the construction of the mechanical musical device. It is apparent that Fleming, with his intimate knowledge of the construction made under the Tremaine & Pain patent, was able to make changes in some of the means used, and in making these changes he may have improved in some particulars upon the means used in the prior invention.

The rule is well settled that if two machines be substantially the same, and operate in the same manner, though they may differ in form, proportion and utility, they are the same in principle. As was said in Converse v. Cannon, 2 Woods, 7, Fed. Cas. No. 3,144:

"In passing upon the issue of infringement, the question to be determined is whether, under a variation of form or by the use of a thing which bears a different name, the defendant accomplished by his machine the same purpose or effect as that accomplished by the patentee, or whether there is a real change of structure or purpose. If the change introduced by the defendant constitutes a mechanical equivalent in reference to the means used by the patentee, and if besides being an equivalent, it accomplishes something useful beyond the effect or purpose accomplished by the patentee, it will still be an infringement as respects what is covered by the patent, although the further advantage may be a patentable subject as an improvement on the former invention."

See, also, Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Cantrell v. Wallick, 117 U. S. 689, 694,695, 6 Sup. Ct. 970, 29 L. Ed. 1017.

In Blandy v. Griffith, 3 Fish. Pat. Cas. 609, Fed. Cas. No. 1,529, the court said:

"As long as the root of the original conception remains in its completeness, the outgrowth—whatever shape it may take—belongs to him with whom the conception originated."

In Walker on Patents, § 376, the author said:

"On the other hand, a defendant's machine may be better than that covered by the patent in suit; but if that superiority resulted from some addition to the latter, it will have no tendency to avoid infringement."

In Robinson on Patents, § 30, the author said:

"To the patentee belongs, not merely the exclusive right to what he has invented, but also the right to prevent others from using their own inventions, however valuable they may be, if they embrace a single one of his original ideas."

In Curtiss on Patents, § 320, the author, in discussing this question, said:

"The substantial identity, therefore, that is to be looked to, in cases of this kind, respects that which constitutes the essence of the invention, viz., the application of the principle. If the mode of carrying the same principle into effect, adopted by the defendant, still shows only that the principle admits of the same application in a variety of forms, or by a variety of apparatus, the jury will be authorized to treat such mode as a piracy of the original invention."

Our conclusions are that the court did not err in its findings and decree in case No. 1,235, and it necessarily follows that it did not err in granting the temporary injunction in No. 1,234. The order of the Circuit Court in 1,234 is affirmed, with costs. The decree of the Circuit Court in 1,235 is affirmed, with costs.

NATHAN et al. v. HOWARD.

(Circuit Court of Appeals, Sixth Circuit. March 9, 1906.)

No. 1,499.

1. PATENTS—INFRINGEMENT—GAS BURNING STOVES.
The Howard patent, No. 626,997, for improvements in heating stoves designed to secure the more perfect combustion of gases by means for introducing heated air above the fuel, was not anticipated and discloses invention; the construction shown being more effective to secure the result sought than any in the prior art. Also *held* infringed by a construction which is only colorably different from that of the patent.

2. SAME—COLORABLE ALTERATIONS.
Neither the joinder of two elements of a patented combination into one integral part, accomplishing the purpose of both and no more, nor the separation of one integral part into two, together doing precisely or substantially what was done by the single element, will evade a charge of infringement.

3. SAME.
The impairment of the function of a part of a patented structure, by omitting a portion, will not avoid infringement, nor will a mere change of form, when the principle of operation is preserved and appropriated.

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

W. A. Owen and Melville Church, for appellants.

R. H. Parkinson and George M. Finckel (Almon Hall, on the brief), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to restrain infringement and for an account of damage and profits. The patent involved is No. 626,997 issued to the appellee, James B. Howard, June 13, 1899, and is for certain improvements in heating stoves. The invention relates to that class of stoves wherein air more or less heated is discharged above the fuel in the fire pot for the purpose of aiding the combustion of the gases and smoke arising therefrom. The defenses are invalidity and noninfringement. The problem which the inventor proposed to deal with was the combustion of the gases arising from the burning coal before they shall escape up the pipe or chimney.

The patentee in his specifications refers to the fact that in the burning of soft coal a considerable per cent. of the "heating power is lost through the escape of carbonated hydrogen and other gases and minute particles of coal and smoke evolved in the burning process." He also refers to the common knowledge that "ordinary combustion consists of the chemical union of the oxygen of the air with the carbon and hydrogen of the fuel," and that "before this union can be initiated and continued the elements must be heated to a high specific degree, * * * and that if air be introduced and mingled with the gases rising from the fuel and be sufficiently heated the combustion of those gases can be effected before they escape into the pipe or chimney where their ignition will be impracticable." The introduction of jets of heated air into the combustion chamber of coal heating stoves, for the purpose indicated, he recognizes had been often attempted, but

claims that former efforts had not been successful, because "of a failure to insure a thorough heating of the oxygen of the air and its introduction at the proper point and in quantity sufficient to effect the ignition of the gases." He therefore says that the object of his invention "is to provide a construction of stove in which the air is heated to such a degree, and introduced and mingled with the gases as they rise from the fuel in such quantity, that the practically complete combustion of those gases as well as the smoke is insured."

The evidence shows that the construction of Howard accomplishes the result sought beyond all prior devices. Many prior patents have been pleaded for the purpose of showing anticipation. Some of them show that the problem was well understood, and means are shown which, in greater or less degree, are effective in consuming some of the escaping gases, but none of them seem to have come into general use, or to have accomplished the end sought with any such effectiveness as the means devised by Howard. That there is great similarity in the devices intended to secure the combustion of escaping gases must be also admitted. Thus the supplying of air more or less hot, by means of tubes or flues discharging the heated air through an iron ring, having perforations, placed on top of the fire pot, is common to more than one of the earlier inventions. One of the earliest is a patent issued in 1860 to J. Van Wormer, which is described as being "an improvement in the method of supplying atmospheric air to the incandescent gases and product of combustion after they have passed off from the fuel, in order to effect a more perfect combustion of them." The structures disclosed by this patent show that the fire pot is provided with a thick lining of fire clay and is surrounded by a sheathing formed by a portion of the body of the stove so as to create an air chamber which surrounds the fire pot. The air to be heated is conducted up through this air chamber by means of tubes, which are shown as free from contact with either of the walls of the chamber. This absence of contact between the air flues and the fire obviously prevents heating the air conveyed to the combustion chamber to that high degree necessary to accomplish the purpose of Howard's invention.

Mr. Knight, the expert introduced by the defendants, pointed out patent No. 101,001, to H. G. Giles, as showing a construction most nearly resembling that of Howard. But this shows that air is supplied to a perforated ring at the top of the fire pot by pipes outside of the fire pot leading up from an air chamber, below the fire pot, having an opening for admission of fresh air. The prime trouble with Van Wormer and with Giles, and with all the other devices relied upon as anticipating, lies in the failure to supply air heated to a sufficiently high degree and in quantity sufficient, at the right place, to effectively ignite and consume the escaping gases from the burning fuel before they pass up the pipe or chimney so as to be practically beyond control. Howard's device is differentiated from Giles' and all others by his method of constructing his air flues inside the air pot; one wall of the air pot constituting one side of his flue, the other being made by the introduction of an iron plate so shaped, when placed against the inside wall of the fire pot, as to constitute a wide but thin air flue, and the

air from the exterior being admitted at the bottom through an inlet provided with a valve.

Claim 1 of his patent reads as follows:

"In a stove, a fire pot, 1, bulging outwardly at its upper part and having a contracted top, a hollow ring, 9, located at the top of the fire pot and having openings, 9a, and a flue or flues, 3, for heating air communicating with hollow ring and bent inwardly and being narrow or contracted at its upper end, the wall of the fire pot forming one side of said flue, substantially as shown and for the purpose described."

The second claim is identical with the first, but in addition includes the means for admitting air into the flue or flues.

His structure is best understood by the drawings of the patent, which are here set out, together with his explanation of his invention:

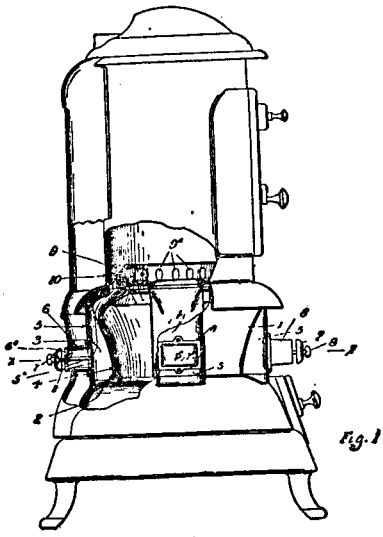


Fig. 1

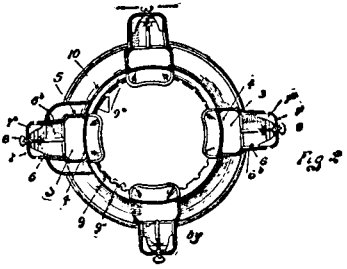


Fig. 2

Fig. 3

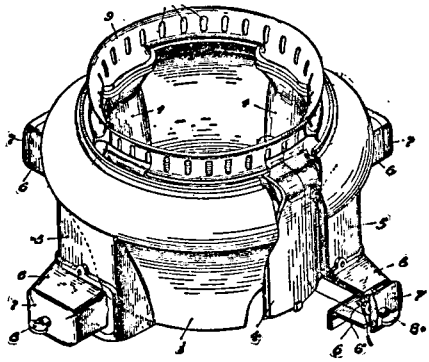


Fig. 4

"Figure 1 is a side view of a heating stove with parts broken out to illustrate the interior construction thereof. Fig. 2 is a horizontal sectional view on the line x x of Fig. 1, looking upward. Fig. 3 is a perspective view of a plate constituting part of the fire pot adjacent the air-heating flue. And Fig. 4 is a perspective view of the fire pot on a larger scale, the air-heating flues, and air-heating ring or chamber; a part of one of the air-heating flues being broken out, as shown in section. Like characters of reference in the

several views designate corresponding parts: 1 marks the fire pot, which is of cast iron and bulges outward at its upper part, but has a somewhat contracted top. The fire pot rests upon the base, 2, over the ash pit or chamber and has no communication therewith except through the grate opening. At one or more points (preferably at four equidistant points) on the fire pot are formed air-flues, 3. These flues are formed between plates, 4, constituting part of the fire pot and the outer shell, 5. In the lower part of the outer shell, 5, or nearly on a level with the lower end of the fire pot, is an opening, 5a, to which is attached a horizontally standing air inlet or duct, 6, provided with a door or valve, 7. The door or valve is preferably supported on a thumbscrew, 8, swiveled therein and threading into a bar, 6a, cast across the outer end of the duct, and in order that the door may be opened and closed in a right line it is furnished with splines or feathers, 7a, to enter grooves, 6b, in the sides of the duct, 6. Supported upon the top of the fire pot and extending entirely around the same is a hollow ring, 9, made with liberal openings, 9a, on its inner side. The outer side of this ring is closed by the sheet-steel combustion-chamber, 10, when set in place (See Fig. 1), and the under side communicates with the hot-air flues, 3, only, and all air passing into the flues must pass through the ring. The location of the ring at the contracted top of the fire pot insures the introduction of the highly-heated air directly in contact with the products of combustion immediately after leaving the bed of fire, thereby effecting a more certain and rapid union of the gases at the proper place in the stove. It will be observed that the outer sides of the flues, 3, are straight, while the inner sides of the plates, 4, forming part of the fire pot, incline inward toward their lower ends. Hence the flues are wide at the bottom and narrow and contracted at the top, so that all air in passing up through the flues comes into close contact with or proximity to the highly heated fire pot, thus insuring an intense heating of the air before it passes into the ring and fire pot."

That the field was narrow when he entered it must be conceded. Nevertheless, he seems to have fallen upon means for bringing about the combustion of gases and smoke, not identical with the earlier devices, and better adapted than any one of them to accomplish the end sought. We therefore agree with the trial judge in holding that his claims 1 and 2 are valid.

The question of infringement presents greater difficulties. The elements of Howard's first claim are: In a stove: (1) A fire pot, 1, bulging outwardly at its upper part and having a contracted top. (2) A hollow ring, 9, located at the top of the fire pot and having openings, 9a. (3) A flue or flues, 3, for heating air communicating with the hollow ring and bent inwardly and being narrow or contracted at its upper end; the wall of the fire pot forming one side of said flue. But defendants say that the fire pot of their stove neither bulges outwardly at its upper part, and does not have a contracted top. Therefore they say that this element, as described and claimed, is not present in their structure, and hence they do not infringe.

That defendants' fire pot increases in diameter from bottom to top is plain. The form of Howard's pot is not of the essence of the invention. Defendants have not in precise detail reproduced a fire pot bulging outwardly at its upper part, if by "bulging outwardly" is meant a "hump" or "rounded protuberance" which they say are meanings attached to "bulging," but another meaning is to "swell" or "bend outward." This gradual increase of diameter is a substantial following of Howard's form in that particular. To escape being contracted at the upper part, defendants have changed the line of divi-

sion between the hollow ring casting, which rests on top of the fire pot, and the fire pot proper. What they have done is most accurately put in the brief of counsel for appellee when it is said:

"Instead of dividing the casting forming the ring, or second element in Howard's claim, from the casting forming the rest of the fire pot near the inner edge of this contraction, as Howard does, the defendants have extended the casting forming the ring downward and outwards, making the junction between it and the casting below near the outward edge of this contracted part, instead of near the inner edge."

Neither the joinder of two elements into one integral part accomplishing the purpose of both and no more, nor the separation of one integral part into two, together doing precisely or substantially what was done by the single element, will evade a charge of infringement. Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 538, 36 C. C. A. 375; Dowagiac Mfg. Co. v. Brennen, 127 Fed. 150, 62 C. C. A. 257. This principle is even more applicable when the change made relates to mere matter of form not of the essence of the invention.

In Winans v. Denmead, 15 Howard, 330, 342, 14 L. Ed. 717, the claim was for a coal carrying car "in the form of a frustum of a cone." The defendant constructed like cars, except they were octagonal and pyramidal in form. He was held an infringer, the court saying that the invention did not consist in a change of form, and the form described and claimed was not of the substance of the invention. Of course, when the form claimed is inseparable from the substance of the invention, a different rule prevails. But, said the court in that case:

"When form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement, and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentee."

Again, defendants say that they have not used the ring of Howard. It is true that they do not extend their ring entirely around the top of the fire pot. A segment has been omitted. That which remains performs the function of the complete ring, perhaps not so well as if the ring had been completed. It is still, in substance and effect, the "ring" of Howard, and though a segment is omitted defendants themselves advertise it as a "ring." But the impairment of the function of this hollow ring by omitting a short segment will not escape infringement. King Axe Co. v. Hubbard, 97 Fed. 795, 38 C. C. A. 423. How near to a complete ring must the imitator go before he can be said to infringe? In Winans v. Denmead, 15 How. 330, 343, 14 L. Ed. 717, where the precise form of the car described as claimed had not been used by the infringer, the court, in answering a like question to that we have propounded, said:

"In our judgment, the only answer that can be given to these questions is that it must be so near to a true circle as substantially to embody the patentee's mode of operation and thereby attain the same kind of result as was reached by his invention. It is not necessary that the defendant's cars should employ the plaintiff's invention to as good advantage as he employed it, or

that the result should be precisely the same in degree. It must be the same in kind, and effected by the employment of his mode of operation in substance."

It is next said that the hot air flue in defendants "is not bent inwardly at its upper end," nor is it "narrow or contracted at its upper end." The claim does not call for a flue "bent inwardly" at its upper end. This limitation is not justified. The words "at its upper end" in the contention of the appellees are not implied and are not a proper limitation upon the description of the flue as "inwardly bent." The specifications describe the hot air flues as inclining inwardly "toward their lower ends." The claims in referring to flues bent inwardly is tracing them from the hollow ring down. The defendants' flue has the same inward bend. There is nothing in the claim which requires that Howard's hot air flue shall be wider at the bottom than at its top. The object is to have a thin stream of hot air at the top. This the defendant has. The inward bend of his plate 4, being a plate substantially like plate 3 of the patent, gives the same heating effect by contact of the air passing up against its lining surface as in the Howard patent, and there is the same narrow or contracted top called for by the patent.

The proceedings in the patent office, as shown by the file wrapper and contents, do not operate to impose any greater limitations than are indicated by the limitations imposed by Howard's claims. These do operate to confine him to a structure substantially of the form and shape there described. But the defendant's stove is substantially the same in form. The departures we have considered are merely colorable evasions. We see no such difference as to enable appellants to escape infringement.

Decree affirmed. Remand for an account of damages and profits.

FORCE v. SAWYER-BOSS MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. January 20, 1906.)

No. 63.

1. PATENTS—DAMAGES FOR INFRINGEMENT—SUFFICIENCY OF PROOF.

A complainant is entitled to recover only nominal damages on account of the competition of defendant by the sale of an infringing article, where on the accounting it does not furnish evidence showing the amount of its loss on that account, or even the profit it made on the patented article when sold.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 426, 579.]

2. SAME—PROFITS.

Where the devices covered by a patent were mere improvements in the line of simplicity of construction and consequent saving in cost of manufacture, and there is no satisfactory evidence that they rendered the machine as a whole more salable, an infringer is only liable for profits realized from the use of the patented parts which were new and wrongfully appropriated by him, and the complainant must furnish evidence from which the profits may be thus apportioned.

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

See 131 Fed. 884.

This case comes here on appeal by defendants from a final decree of the United States Circuit Court for the Eastern District of New York in favor of complainant against the defendant Sawyer-Boss Manufacturing Company in the sum of $5,889.02, for profits realized by defendant from the manufacture of a hand stamp which infringed complainant's patent, No. 462,065, granted October 27, 1901, to Willard E. Sawyer, and against the defendant Holihan for $1,172.63, as his individual share in the profits made by Stewart & Co. from the sale of the infringing machine, and upon cross-appeal by complainant from the decision of said court, rejecting his claim for damages suffered, growing out of defendants' unlawful competition.

H. Albertus West and Peter B Olney, for appellants.

Henry Schreiber, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The questions of law involved in these appeals have been so fully considered in recent decisions of this court that in order to determine the issues raised it is only necessary to apply said decisions to the facts proved in this case. The interlocutory decree, adjudicating the validity of claims 1 and 2 of said patent, and their infringement by defendants, and ordering an injunction and accounting, was affirmed in this court on the opinion of the court below. Upon the accounting, the master reported that the complainant had failed to prove the profits made by defendants in the manufacture and sale of the infringing machines, or the net profits that the complainant would have realized if the defendants had not infringed, and reported that complainant was entitled to recover nominal damages only. The court below, on the hearing of complainant's exceptions to the master's report, concluded that the complainant had failed to show the amount of profits lost by defendants' competition, and sustained the finding of the master that complainant was not entitled to recover therefor, but it held that complainant was entitled to recover certain profits claimed to have been made by the defendant corporation and by the defendant Holihan. As to the claim of complainant that he was entitled to recover the net profits, which he would have made, except for defendants' competition, the master reported as follows:

"Complainant's computation of the damages which he claims in addition to profits, on the theory that he would have sold 4,076 more machines at his own prices, if the Sawyer-Boss Manufacturing Company had not made that number, rests on the same basis, that only cost of labor and materials are to be deducted from the gross prices, and I also think it cannot be assumed that he would have sold so many more machines if the defendants had not infringed. There were other hand stamping machines which customers might have taken, provided they could not have bought defendants' machines and were looking for a cheaper machine than complainant's. * * * In this case it is probable that complainant suffered damage, but the state of the proof does not warrant the finding of any particular sum, and only nominal damages, therefore, can be reported."

And the court said as follows:

"It is undoubted that the wrongdoer compelled the complainant to reduce its prices, but the complainant even then probably made a profit,

and it sold more machines on account of the reduced price. What, on the whole, it lost does not appear. It was within the power of the complainant to illustrate to what extent its whole profit fell off by reason of the competition. It did not do so, and the court is unable to know to what extent it was finally injured by the competition. Therefore, no damages growing out of this unlawful competition can be allowed."

These statements are fully supported by the evidence, and we concur therein. The complainant failed to show even the profit which he made on the machines sold at reduced prices.

The court differed with the master as to the evidence of profits received by defendants from the manufacture and sale of the infringing machines, and held that the complainant was entitled to recover said profits, on the grounds stated as follows:

"It is considered that the combination shown in the first claim covered the substantial profit of the patented articles, and that the chief value is found therein, although the stop-pin may have facilitated sales. It is further considered that the sales of the Defiance machines were made possible by employing the patented combination. In other words, the salability of the device resulted from the use of the patent. This conclusion results from the evidence of the business done by means of the patented device, both by the complainant and the defendants. The whole history of the business shows that the new article was the inducement of the sale. There is no satisfactory evidence from which it could be concluded that any sale would have been made had not the machine involving the combination been offered."

If the evidence sufficiently sustains this view, the decision must be affirmed. The underlying and determinative question in this case is as to the character of the improvements covered by the patent.

Claim 1 of the patent in suit is as follows:

"(1) In a stamp, the combination of a main frame, a series of similarly spaced numbering wheels, corresponding ratchet-wheels, detents for these numbering wheels and ratchet-wheels, operating radially within a support, pawls for imparting motion to said ratchet-wheels, a movable yoke sustaining the numbering and ratchet-wheels, a framelike lever carrying the pawls and pivotally connected to said yoke and also to the main frame, and an inking-lever fulcrumed to the main frame and pivotally connected between its ends with said lever which moves the pawls, substantially as specified."

This claim covers a very narrow improvement upon the hand stamps of the prior art. The file wrapper of the patent in suit shows that its claims were repeatedly rejected, and that claim 1, which was originally claim 3 of the patent, was not allowed until it had been amended by changing it so as to read:

"An inking-lever fulcrumed to the main frame and *pivotally* connected, *between its ends*, with the said lever which moves the pawls."

That is to say, without the underscored words "pivotally" and "between its ends" the claim stood rejected. The patent itself fails to contain any definite statement as to what the patentee has invented, or what is the object sought by, or advantage derived from, the claimed improvement.

Claim 2 is as follows:

"(2) In a stamp, the combination of a main frame, a longitudinally-movable rod fitted thereto and carrying similarly-spaced numbering wheels, slots in said rod, a cross-pin connected to the main frame and passing through said slots, and an enlargement in one of said slots for receiving an enlarged

portion of said pin to lock the rod in its depressed condition, substantially as specified."

The new feature covered by this claim is the sliding stop-pin with "similarly-spaced numbering wheel." Neither complainant nor defendants ever charged anything for the sliding stop-pin, or increased their prices by reason of its introduction. Its cost was about 2½ cents. As to its value, complainant's witness, Chase, says:

"I should say that the stop-pin was the more valuable device of the two. It is pretty hard to place an actual intrinsic value on different devices without being fully familiar with the market and demand for such machines. Speaking as an individual, I would give this particular device in this instance a value of $1.00, as affecting the retail price of a machine, if I myself were to be the purchaser."

It appears that the Ajax and Bates machines, with stop-bolts, were sold for years prior to the bringing of this suit, and complainant's witness, Dye, admitted the salable value of the old Defiance numbering machine, which did not have the sliding stop-pin. Defendant Holihan says:

"The locking-pin does not add anything to the commercial or salable value of a hand numbering machine."

He also says, referring to defendants' Shaw numbering machine:

"On account of the fine printing qualities of this machine, we took it up in August, 1901, and have sold about 1,600 of these machines without the spring locking-pin, and have never once been asked why a locking-pin has not been put upon them. As can be readily seen the machine is of much cheaper construction than the Triumph machine, and would necessarily have to sell for a cheaper price."

It appears that the improvements covered by these claims were adopted by complainant because of their extreme simplicity and the low cost of manufacture. Complainant's witness says that "a somewhat simpler construction is embodied in the swinging frame of the machine" of the patent in suit than in that of complainant's Paragon Automatic machine. The Conqueror machine, made by complainant, contains the stop-pin device, and the lever-acting device to which the inking-pad lever is pivoted, and which also supports the working pawl. It embodies all the improvements of the patent in suit. After the injunction herein defendants modified some 200 machines which they had on hand, containing these improvements, and advanced the prices and sold all of them, and no complaint was made of the absence of the improved locking device, and there was no falling off in sales. The locking-pin used on said changed machines was old, and was in common use long prior to the date of the patent in suit.

These facts indicate that the devices covered by the claim of the patent in suit were mere improvements, and, as stated by complainant's own officers, were in the line of simplicity of construction and consequent saving in cost of manufacture. There is no satisfactory evidence that the machine was more salable by reason of these improvements; the testimony of defendants, referred to above, tends to show that their sales were unaffected by the presence or absence of said devices.

There is no evidence that the improvements introduced any new function or result, nor any satisfactory proof that the machines were by reason thereof more convenient or practical for the user, or more commercially successful. In short, there is no evidence that the patented improvements were a dominant feature of the machine, or contributed to its sale, or created a new article, or obviated prior objections in practical operation, or which shows that the sales may not have depended upon advertising, changed discounts, and other mere business methods. Furthermore, there is evidence that other machines, not containing these patented improvements, were on the market, and were salable. In these circumstances, the defendant is only liable for profits realized from the use of that part of the patented invention which is new, and which he has wrongfully appropriated, and the complainant must furnish evidence from which the profits may be thus apportioned, or he cannot recover. Ingels v. Mast, 6 Fish. Pat. Cas. 415, Fed. Cas. No. 7,033; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 462, 12 Sup. Ct. 40, 35 L. Ed. 817; Brickill v. Mayor, etc., of City of New York, 112 Fed. 65, 50 C. C. A. 1.

The evidence as to defendants' profits may be summarized as follows: The defendant corporation made Triumph, Paragon, and Defiance numbering machines, and other kinds of goods at the same time, and could not tell from its books the separate cost of the various infringing machines. Its treasurer and foreman testified that as the employés worked on numbering machine work and on other work, he had no way of ascertaining the amount of labor required for the production of the infringing machines, and could not tell their cost or that of the materials used, or the quantity. It regulated its prices according to the prices of competing machines in the market. It was asked by defendants, Stewart & Co., its selling agents, to make goods at these prices, and it undertook to do so; but the only way it could determine whether it had made a profit or loss at the end of a month was by comparing the accounts of cost with accounts of moneys received from Stewart & Co.

As stated by defendant Holihan:

"The reason the Sawyer-Boss Mfg. Company could not get at the cost of the machines was the same one that applies to all small concerns who cannot put into effect expensive systems to follow through details of the work, but are compelled to trust to general results, and this I believe is in force in all small manufacturing concerns."

This witness explains at length the reasons why it would be practically impossible to keep such a detailed statement of cost. Complainant's witness Dye, who, as a member of the firm of William A. Force & Co., was engaged in supervision of accounts, general executive work and selling goods, testified as follows:

"158 X-Q. Did Force & Co. keep books which showed the monthly or yearly profits or losses in the manufacture and sale of the Paragon Automatic, Paragon Lever, or the Conqueror numbering machines? A. Our books of accounts do not show specifically profits or losses on any individual article that we make or sell.

"159 X-Q. Did Force & Co., keep books that show the cost of such machines mentioned in the last questions? A. No books are kept showing the aggregate cost of the numbering machines."

Defendants' witness Holihan further asserts that the estimate of cost of manufacture of defendants' machines, made by complainant's witness Chattaway was erroneous, by reason of omissions of various items which should have been included, and that defendants spent large amounts for advertising, as they were manufacturing under a patent, and supposed their profits would accrue for years to come; and that:

"The Sawyer-Boss Manufacturing Company's books and Stewart & Co.'s statements furnished each month give the full transactions, dollar for dollar, and by slight figuring the exact cost to the Sawyer-Boss Mfg. Company of these machines will be obtained, although it will show that the machines cost more than we got for them. This accounts for the loss by the Sawyer-Boss Mfg. Company and their indebtedness to Stewart & Co."

As to complainant's estimate of defendants' profits the master says as follows:

"Complainant admits that the only basis for computation of profits made by the defendant, the Sawyer-Boss Manufacturing Company, in manufacturing the machines they furnished Stewart & Co., is to be found in an estimate of amount of labor and material required for his own manufacture and given by one of his witnesses. Too many other elements enter into the cost of manufacture to justify the acceptance of this estimate as conclusive. * * * The defendant, the Sawyer-Boss Manufacturing Company, made many articles besides the infringing machine. It could not be shown by their books and statements what the cost of manufacture of infringing machines was. The general result of the whole business could be shown but not the profit on any particular branch of it. Complainant therefore urges that his own estimate of the cost of labor and material in making a machine deducted from the price at which he sold it affords a basis for computing his loss by multiplying this difference by the number of machines that he would have sold, which gives the above sum of $17,739.96. I do not think this method of computation is proper and conclusive; it does not give sufficient data to compute the net gains and profits either of the complainant or the defendant. As to the profits and sales by Stewart & Co., none of their selling expenses being testified to, it is left to the master to guess what profits they made in this branch of their business."

The evidence fully supports this finding.

In Westinghouse v. New York Air Brake Co. (C. C. A.) 140 Fed. 545, Judge Wallace, delivering the opinion of this court, reviewed the authorities on the question of recoveries in infringement cases, and distinguished between those where the patented part was of such paramount importance that it really created the value of the whole article, and those where such part was relatively an unimportant factor in the normal value of the whole, or where such value depended chiefly upon the presence of the unpatented parts. There the court recognized the well-settled rule that in cases of the former class the infringer should be held accountable for all profits, as a trustee ex maleficio, by reason of having confused profits made by the use of a trust property with those from his own property, and commingled them so that they could not be separated. The court, however, quoted from the opinion in Wales v. Waterbury Mfg. Co., 101 Fed. 126, 41 C. C. A. 250, as follows:

"Such a rule would work unjustly in many cases,—as where the patented feature is of an insignificant part of a machine or article; and it is probably because of its manifest inequity in such cases that the courts have placed upon the complainant the burden of proof."

The court also quoted from the opinion of the Supreme Court of the United States in Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, the following:

"The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible, and not conjectural and speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature."

In these circumstances, irrespective of the apparently unconscionable conduct of the defendants in infringing a patent which they had sold, and depriving the complainant of his profits in the manner shown, a majority of the court is constrained to hold that he has failed to sustain the burden of proof as to what were the gains, profits and advantages made by the defendant, the Sawyer-Boss Manufacturing Company, in the manufacture, or by the defendant Holihan by the sale, of the comparatively unimportant infringing portion of the machines manufactured and sold, and that, therefore, that portion of the decree of the court below, which adjudicates that the complainant recover said profits realized by defendants, must be reversed.

The cause is remanded to the court below, with instructions to modify the decree in accordance with this opinion, but without costs to either party in this court.

PLOTTS v. CENTRAL OIL CO. OF LOS ANGELES.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1906.)

No. 1,237.

PATENTS—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

Where, on the hearing of a suit in equity for infringement of a patent, in which an injunction and accounting were asked, it was shown that defendant made and used but one of the patented articles about which there was any dispute as to complainant's consent, and that a royalty for its use was agreed on, which defendant promised to pay, and there was no evidence of defendant's insolvency, or of any profits to be accounted for, or tending to show any threat or intention to use the patented article without complainant's consent, the bill was properly dismissed, on the ground that no case was shown for the exercise of equitable jurisdiction.

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

Hazard & Harpham, for appellant.

Percy R. Wilson and Robert N. Bulla, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellant filed in the court below a bill of complaint alleging in substance that prior to July 22, 1901, he invented a certain new and useful improvement in well bailers, for which invention the United States issued to him, on the 19th day of November, 1901, its letters patent securing to him the full and exclusive right of making, using and vending the device for the term of 17 years thereafter; that at a certain time and place mentioned the defendant, subsequently, without the license of the complainant, against his will, and in violation of his rights, made and used the said patented improvement, within the jurisdiction of the court below, and intended to continue such use; that the defendant has not paid to the complainant any of the profits made by it by reason of such unlawful manufacture and use of the patented article, and has refused to desist from the further infringement of the complainant's patent, wherefore, the complainant prayed an accounting, damages for the alleged past infringement, and an injunction against its future infringement. The bill therefore stated a case for the exercise of the powers of a court of equity.

The defendant answered the bill, and, in its answer, admitted its use of two well bailers substantially the same in construction and operation as the bailer described in the complainant's patent, but denied that it constructed those bailers; and, on the contrary, alleged that they were constructed by one J. M. Smith with the consent of the complainant, that the defendant paid the complainant the royalty upon them, and that he consented to their use by the defendant. The defendant also admitted in its answer that in addition to the two well bailers which it used with the complainant's consent, and upon payment of royalty therefor, it constructed one similar well bailer, to which, it alleged, the complainant consented, "stating that it was all

right; and that all he wanted was his royalty, which royalty the defendant agreed to pay on demand, and requested the plaintiff to send in his bill therefor, which complainant has never done." The defendant, in its answer, denied that it had ever derived any profit or income from the use of either of the bailers, and denied that it had ever threatened or intended to infringe the complainant's patent.

In respect to the two bailers made by Smith, it was admitted by the complainant at the trial "that the Central Oil Company paid Mr. Smith for those two bailers, and that Mr. Plotts gave Mr. Smith the authority to make those two bailers," and that such payment included the royalty. The evidence showed that the only other bailer in question was constructed by the appellee. Whether or not with the complainant's consent, the testimony is not entirely agreed, but the evidence is without conflict that the appellee never claimed any right to make such bailer without the patentee's consent, and at no time threatened to use it contrary to his consent or without the payment of such royalty or fee as he should exact. In respect to the bailer made by the appellee, the evidence shows that the parties agreed upon a royalty of $4, which the president of the appellee company promised to pay, and would have paid at the time if he had had the money in his pocket. No question was made in respect to the company's solvency, nor was there, as has been said, any evidence tending to show that there were any profits to be accounted for, or any evidence tending to show any threat or intention on the part of the defendant company to continue to use the bailer in question without the patentee's consent, or in violation of his rights. There was therefore nothing in the evidence calling for the exercise of any equitable power on the part of the court below, there was nothing to enjoin, there was no occasion for any accounting, nor for any discovery of any character. If the $4 agreed upon by the parties as the royalty upon the one bailer made by the defendant company was not paid when wanted, an action at law for the amount would have afforded an adequate and complete remedy.

The court below was therefore quite right in dismissing the bill. Root v. Railway Company, 105 U. S. 189, 215, 26 L. Ed. 975; Smith et al. v. Sands et al. (C. C.) 24 Fed. 470, 471; Spring v. Domestic Sewing Machine Company (C. C.) 13 Fed. 446.

The judgment is affirmed.

THOMSON-HOUSTON ELECTRIC CO. v. HOLLAND et al.

(Circuit Court, N. D. Ohio, E. D. February 20, 1906.)

No. 7,022.

1. COURTS—PREVIOUS DECISIONS AS PRECEDENTS.
The decision of a Circuit Court of Appeals sustaining the validity of a patent, especially where such court has had the same or related patents before it in a number of cases, should be followed by a Circuit Court in another circuit where there are no conflicting decisions.
[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 327, 328.]

2. PATENTS—INFRINGEMENT—TRAVELING CONTACT FOR ELECTRIC RAILWAYS.
The Van Depoele reissued patent, No. 11,872 (original No. 495,443), for a traveling contact for electric railways, *held* valid and infringed.

3. SAME—INJUNCTION—SCOPE.
An injunction against infringement of a patent should not be made so broad as to prevent the defendant from making and selling a device which it had added to that of the patent and designed to be used with it.

Betts, Sheffield & Betts and Squire, Sanders & Dempsey, for complainant.

Thurston & Woodward, for defendants.

TAYLER, District Judge. This is a bill filed by the complainant, based on the Van Depoele reissue letters patent No. 11,872 (original No. 495,443) for "a traveling contact for electric railways," charging infringement of the patent referred to, and seeking to enjoin the defendants from making, using, selling, etc., any devices, apparatus, trolleys, traveling contacts, or trolley-stands, containing, embodying, or employing the inventions and improvements covered by reissued letters patent No. 11,872, or the substantial or material parts of the same, etc., and for an accounting.

No serious question is made as to the infringement, taking the device of the defendants as a whole; but a primary and secondary question arises, as follows: (1) Whether the reissued patent is valid; and (2) if it is, whether any injunction allowed should be so modified as to permit the defendants to supply, as an addition to the device of the complainant, certain rotating parts which, without displacing the vertical pivot in the complainant's device, will permit further and freer movement of the trolley-arm through a lateral arc.

The original patent, No. 495,443, has been many times before the courts, and a brief history of the litigation respecting it is necessary in order to arrive at a determination of the rights of the parties in this particular controversy.

Prior to the decision of the Supreme Court, in Miller v. Manufacturing Company, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121, this patent, No. 495,443, was invariably sustained when its validity was attacked in the courts. In that case, the court held as follows:

"No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. The second patent, although containing a broader claim, more generical in

its character than the specific claims contained in the prior patent, is also void. But where the second patent covers matter described in the prior patent, essentially distinct and separable from the invention covered thereby and claims made thereunder, its validity may be sustained."

The Circuit Court of Appeals for the Second Circuit, in the case of Thomson-Houston Electric Co. v. Union Railway Company, 86 Fed. 636, 30 C. C. A. 313, held that this Van Depoele patent, No. 495,443, for a traveling contact for electric railways, must be construed, as to claims 2 and 4, as including, by implication, means for retaining the contact device and the conductor in their normal relations, and, so construed, is void as being for the same invention as that covered by letters patent No. 424,695 to the same inventor.

To the same effect is the case of Thomson-Houston Electric Company v. Jeffrey Mfg. Co., 101 Fed. 121, 41 C. C. A. 247, decided by the Circuit Court of Appeals for the Sixth Circuit. The proposition of the syllabus in that case is as follows:

"The Van Depoele patent, No. 495,443, for a traveling contact for electric railways, is rendered invalid by patent No. 424,695, previously issued to the same inventor for precisely the same devices: the only difference being that the earlier patent states an additional function to be performed by one of the elements."

This decision was rendered March 15, 1900. The decision in the Union Railway Company Case was rendered in 1898.

Referring to claims 2 and 4, and the other claims of patent No. 495,443, and the analogous claims of patent No. 424,695, the court, in deciding the Jeffrey Mfg. Co. Case, say: "The specifications are, in every material respect, the same." A similar decision was reached by the Circuit Court of Appeals for the Second Circuit, in the case of Thomson-Houston Electric Co. v. Hoosick Railway Co., 82 Fed. 461, 27 C. C. A. 419, respecting claims 6, 7, 8, 12, and 16 of the original patent; but it is not necessary to refer in detail to that opinion.

To avoid the effect of these decisions, the patentee, September 28, 1900, applied for, and, later, was granted, this reissue, No. 11,872, on a new specification, which expressly disclaimed the element whose inclusion, by implication, in No. 424,695, had rendered the second patent (No. 495,443) invalid.

The claims made in the reissued patent are as follows:

"(1) In an electric railway, the combination of a car, an overhead conductor above the car, an upwardly extending and laterally swinging arm mounted on the roof of the car, and carrying a contact device at its free end, and making underneath contact with the conductor, substantially as described.

"(2) In an electric railway, the combination of a car, an electric overhead conductor above the car and parallel with the line of travel, an upwardly extending trailing arm carrying a contact device at its free end, adapted to make underneath contact with the conductor, said arm being supported on the car on vertical and transverse axes, so as to permit said contact device to follow the position of the conductor, notwithstanding the great variations of height and of lateral displacement thereof, substantially as described."

The following disclaimer is contained in the specifications:

"The combination with the contact carrying arm of a weighted spring, or of a weight and spring, as the special means for holding the contact arm pressed upward, and enabling the motorman to lower the contact wheel, are not claimed herein, because this special improvement has been claimed already in the patent No. 424,695, dated April 1, 1890, which was issued as a division of this application. Nor is there claimed herein the so arranging of the weight or spring (as by causing it to work through suitable grooves or rollers arranged in the car roof) as to tend to cause the arm to assume a normal central position, or one parallel with the longitudinal center of the car, as that has also been claimed already in the said divisional patent No. 424,695, being an arrangement which is of especial value only in connection with the switches to which said divisional patent more particularly relates. In the present application no special form or arrangement of tension device is essential to or a part of the invention claimed."

We thus find that, prior to this reissue, the Circuit Courts of Appeals for the Second and Sixth Circuits had held that the claims made in patent No. 495,443, which are substantially the same as the two claims made in the reissued patent under consideration, were void because covered by patent No. 424,695, granted April 1, 1890; and the question now before the court is as to whether the subsequent proceedings, resulting in the reissued patent under consideration, are effective to make the claims in the reissued patent valid.

We are not without judicial information and authority in relation to this question. In the case of Thomson-Houston Electric Co. v. Black River Traction Co., 124 Fed. 495, the Circuit Court for the Northern District of New York, in a decision by Judge Ray, August 12, 1903, explicitly held this reissued patent No. 11,872 (original No. 495,443) to be void, for the same reason as the original was void, because such swinging arm was fully described and claimed in patent No. 424,695, to the same inventor, as an essential part of the combination of the patent; and that the invalidity of the original patent, declared in a number of decisions, was not because it was rendered inoperative because of defective or insufficient specifications, or for any other reason which could be obviated by a reissue. A very elaborate and instructive opinion was delivered by Judge Ray, in support of the proposition laid down above. This case was appealed to the Circuit Court of Appeals, and is reported in 135 Fed. 759, 68 C. C. A. 461. It was heard before Wallace, Circuit Judge, and Wheeler and Hazel, District Judges. Judge Wallace had sat in both the Hoosick Railway Company Case and the Union Railway Company Case. The decision of the lower court was reversed. The reissue patent, No. 11,872, was held valid; that it covered a novel and useful combination, disclosed invention, and was infringed. The opinion in this case was written by Judge Wallace, and reference is made in it to the former decision of the court in the Union Railway Company Case, and to the Jeffrey Mfg. Co. Case in the Sixth Circuit Court of Appeals; and the court held that, notwithstanding the invalidity of the original patent, on the ground that the invention had previously been described and claimed in patent No. 424,695 to the same inventor, the reissued patent in controversy was valid. I quote, as follows, from the opinion:

"Where the claims of a patent were construed to include, by implication, an element not expressly claimed therein, but which was described and shown

in the specification and drawings, and, as so construed, held anticipated, and, to avoid the effect of such decisions, the patentee applied for and was granted a reissue on a new specification, which expressly disclaimed such element, it should not be read into the claims of the new patent, although they are in terms substantially like those of the old; but the courts should, if possible, adopt the construction placed on them by the patentee and the Patent Office giving effect to the disclaimer."

And this, also, is held in that case:

"A patentee of a combination may also obtain a patent on a divisional application for a subcombination of some of the same elements if new and useful in itself, or in connection with previously known means or devices necessary to make the whole an operative machine or structure. Even though the changes in description in the specification of a reissued patent are not material, and the claims are identical with some of those of the original patent, such facts do not impeach their validity."

We therefore have a situation wherein the Circuit Court of Appeals, which has had the question of the validity of this patent before it many times, and held, as the Circuit Court of Appeals for the Sixth Circuit has held, that original patent No. 495,443 was invalid, has, by its latest decision, held the reissued patent valid because of the form of the claims and disclaimers made in the application for the reissued patent. The Circuit Court of Appeals for the Second Circuit does not indicate, in any way, in its opinion in this last case, that it was qualifying its former conclusion; that it had come to a determination inconsistent with its former holdings; or that there is any contradiction between its later holding and the decision of the Circuit Court of Appeals for this circuit in the Jeffrey Mfg. Co. Case. Certainly, the decisions in the Hoosick Railway Company Case and the Union Railway Company Case are as explicit and unqualified as the decision of our Circuit Court of Appeals in the Jeffrey Mfg. Co. Case; and, unless some manifest error appears in the decision in the Black River Traction Case, there would seem to be no reason why we ought not to conclude that the Circuit Court of Appeals for this circuit would come to the same conclusion on this new state of facts.

A just regard for the comity that should exist between a Circuit Court in one circuit, and a Circuit Court of Appeals in another circuit, under these conditions, would at least suggest, if not require, that this court should follow the decision of the Circuit Court of Appeals for the Second Circuit. And this spirit of comity is emphasized, if not controlling, in view of the fact that the court which passed upon the question in the Black River Case has so often, and so thoroughly, considered this patent in all of its phases.

In the Circuit Court of Appeals for the First Circuit, in Beach v. Hobbs, 92 Fed. 146, 34 C. C. A. 248, it was held that, as a general rule, and especially in patent cases, for the purpose of according to a patent the same recognition throughout the country, as contemplated by law, the decision of a Circuit Court of Appeals of another circuit should be followed with respect to the issues determined, if based on substantially the same state of facts.

In the case of Fairfield Floral Co. v. Bradbury (C. C.) 87 Fed. 415, which is not a patent case, and therefore a case in which the rule of

comity is not as necessary of application, Circuit Judge Putnam, sitting in Circuit Court, says, on page 417:

"If I were free to follow my own judgment, I should say that Congress, neither directly, nor through the Postmaster General or any one else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial. But I am not sure that I will be able to follow my own convictions in this case, even if on a final hearing they remain as they now stand. I am not sure that I will not be bound by the decision of the Court of Appeals in the Sixth Circuit (Association v. Zumstein, 67 Fed. 1000, 15 C. C. A. 153), when the case comes to a final hearing. My own view is that the decisions of the Court of Appeals in one circuit should ordinarily be followed quite implicitly by the courts in other circuits. The case in the Sixth Circuit does not seem to have been taken to the Supreme Court. I cannot find anything to indicate that it was taken up by writ of error or otherwise, and it seems to have been left on the decision of the Court of Appeals; so that it stands to-day the highest judicial authority which we have on the validity of the statute."

I am therefore constrained to follow the decision of the Circuit Court of Appeals for the Second Circuit, and hold the reissued patent valid, and that it is infringed by the defendants.

As to the second question, I see no reason why the injunction, which ought to be allowed in this case, should not be so qualified as to permit the defendants to sell the portion of their trolley-base which, attached to the complainant's trolley-base, may make freer the lateral movement of the trolley-arm; and this, notwithstanding the fact that the addition of such a member to the complainant's device may exhibit a superiority, for the purpose designed, over that portion of the complainant's device which is designed to permit the trolley-pole to freely move in a lateral direction.

Its use requires the use of complainant's device; and the complainant is not therefore prejudiced, if the purchaser of its device obtains another device which he may think adds to the efficiency of the original purchase. One might as well say that the user of complainant's trolley-base could not lubricate the vertical pivot in order to increase the freedom of movement upon it.

An order may therefore be drawn allowing a preliminary injunction, with the modification suggested above.

AMERICAN FOG SIGNAL CO. v. COLUMBIA FIRECRACKER CO. et al.

(Circuit Court, N. D. Ohio, E. D. February 14, 1906.)

No. 6,609.

PATENTS—INFRINGEMENT—RAILROAD TORPEDOES.

The Weaver patent, No. 667,813, for a railroad torpedo, *held* not anticipated, to cover a novel and useful device, and valid as against the defense of prior invention by a defendant. Also held infringed.

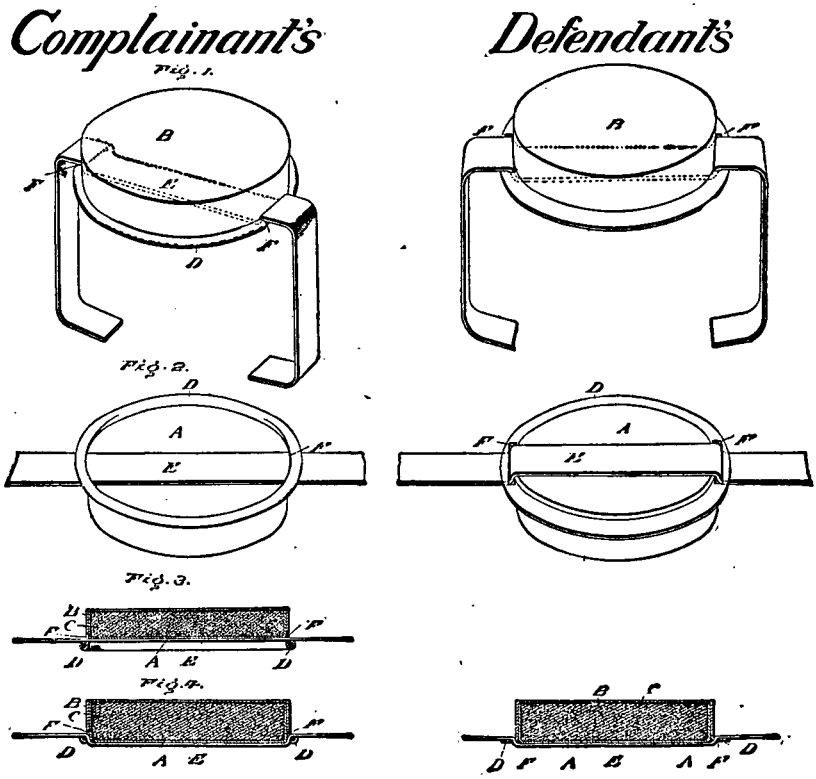
In Equity. On final hearing.

A. S. Pattison, for complainant.

J. B. Fay, for defendants.

TAYLER, District Judge. This suit is based upon the alleged infringement, by the defendants, of letters patent No. 667,813, dated February 12, 1901, granted to Wylie W. Weaver, and duly assigned to the complainant, for improvements in railroad torpedoes. The bill alleges infringement, and asks for an injunction restraining the defendants, and each of them, from making, using, or vending, or causing the same to be done, railway torpedoes embodying or employing the inventions covered by the complainant's patent, or from infringing such patents in any way, and for an accounting of profits and damages.

The device covered by the complainant's patent and that manufactured by the defendants are shown by the accompanying drawings:



By reference to these drawings, it will be observed that the patented torpedo and the defendants' torpedo embody in their structure two cup-shaped metal cases, one of which is telescoped within the other, and that the detonating or explosive compound is held between these two cup-shaped members. It is necessary to embody means for attaching the torpedo to the railroad rail, and in each case it is accomplished by a lead strap adapted to be bent around the tread of a railroad rail in the position shown in figure 1 of the drawing of both

the patented torpedo and the defendants' torpedo. Both of the torpedoes have slots in the edge of the outer case or member, through which the lead strap passes, and the walls of these slots serve to unite the strap to the torpedo. In each torpedo the strap is so passed that it extends across the outer face of the inner member, and serves to hold these two members together. The strap is the only structural means in each case for locking the two members together, and positively preventing their separation. Another construction common to both the patented and the defendants' torpedoes is that each is provided with a marginal stiffening and strengthening reinforcement, or flange, completely surrounding the case. In both the patented torpedo and the defendants' torpedo the marginal stiffening and strengthening reinforcement, or flange, serves to connect the lead strap to the torpedo; and the marginal stiffening or strengthening reinforcement, or flange, is the sole means of uniting or connecting the lead strap to the torpedo.

This suit is based upon claims 1, 2, and 3 of the Weaver patent, which are as follows:

"(1) A signal-torpedo, comprising opposite telescoping members, detonating material held between the members, one of the latter having a marginal stiffening or strengthening reinforcement, and a strap extending transversely across the outer end of the inner member and projecting outwardly in opposite directions through corresponding openings formed in the marginal wall of the outer member, the intermediate portion of the strap forming the sole means for connecting the members, and the opposite ends of the strap forming rail-engaging devices.

"(2) A signal-torpedo, comprising opposite telescoping members, detonating material held between the members, the outer member having its free edge provided with an external stiffening and strengthening flange, and a strap extending transversely across the outer end of the inner member and projecting outwardly through corresponding openings in the outer member, the intermediate portion of the strap forming means for connecting the members, and the opposite ends of the strap bearing across the outer side of the flange, and also forming rail-engaging devices.

"(3) A signal-torpedo, comprising opposite telescoping members, detonating material held between the same, an external marginal reinforcement for the outer member, and opposite rail-engaging devices connected to the reinforcement."

It will be noticed that complainant's device is constructed with a bead and wire, with the slotted opening, while the defendants' device has a projecting flange with the slot. These are practically the same construction, and the defendants' device is specifically covered by claim 2, which provides for "an external stiffening and strengthening flange."

The similarity of the two devices thus appearing, two main questions are presented: First. As to the validity of the patent, involving (a) its novelty and usefulness, and (b) whether it was anticipated by prior patents; and, second, whether the claim of the defendants, that one of them, Matthew, himself discovered and used this device before it was invented and patented by Weaver, the patentee of the patent which is the basis of the complainant's bill, is established.

First. The question of the validity of the patent, as to its novelty, usefulness, and anticipation by prior patents, is easily disposed of:

(a) The device is novel and useful. It is simple, economical of construction, the three parts can be assembled by hand without the use of force which might prematurely explode the detonating contents, and it seems to be, of all the devices of its kind, the simplest and most effective. (b) In its essential features it departs materially from the prior patents, and is not anticipated by them.

Second. The chief contention arises over the claim of prior invention by Matthew, and, in respect to it, a large amount of conflicting testimony has been taken.

Upon the whole, the claim of Matthew does not impress me as being justified by the facts. Dismissing, for the moment, the account which he gives of the manner in which he discovered it, it would seem to be absolutely inconceivable that, considering the extent of its claimed manufacture and use, there should not now be the slightest disinterested evidence to support it. The two parts of the device are the shell, consisting of two pieces, and the lead straps by which they are fastened together and the whole torpedo fastened to the rail. It is shown by the defendants' testimony that in the fall of 1899, about the time, or shortly after the time, when he claims to have invented this device, he ordered lead for straps from a jobber of these articles in Cleveland. There is no doubt that this order was given; but it is also as apparent as anything in this case can be that the defendants were arranging, at the time when this lead was ordered for straps, to manufacture torpedoes made out of paper, and under a contract which had been theretofore made with Dutcher, who had experience in that branch of manufacture. These paper torpedoes required the use of lead straps, or tapes. So that the testimony as to the lead straps is wholly consistent with another purpose, which was evidently in the minds and plans of the defendants.

The witness Matthew testifies: First, that he ordered some sample shells from a tinner named Russell in Toledo. He is unable to give this man's first name, to tell the street on which he did business, or in any way to identify the person, beyond saying that he had a place, or worked, on a street leading off from the main street parallel with the river. Second, that he gave a verbal order to the E. P. Breckenridge Company, of Toledo, for a million tin shells. The books of the Breckenridge Company show that the only transaction which Matthew or his company had in 1899, at or about the time when he claims to have given this order, and for a long time thereafter, involved a small order for powder cans, the bill for which was $15.75. The testimony of a man named Rose was to the effect that in the fall of 1899 a die was made at the Breckenridge works for such shells as are in controversy here; but the testimony of Winter, the head bookkeeper of the Breckenridge Company at the time in question, and of the superintendent in charge of such work, and documentary evidence, show conclusively that the witness Rose is in error as to the time, and that the transaction to which he refers took place in the fall of 1900, and that the die was made for the predecessor of complainant. The witness Matthew testifies that these million shells were manufactured into torpedoes during the following year or 15 months after they were

received; that is to say, during the year 1900, and early in 1901. He thinks he remembers two railroads to which torpedoes were sold, but not an item of evidence is produced, and no railroad officer or employé testifies, that any of these million torpedoes were ever purchased from the defendant company. It is true the claim is made that the books in which the accounts were kept were destroyed by fire; but it is past belief that enough could not be remembered by the persons who had in that year sold such a vast number of these torpedoes to suggest some places in which inquiry might be made respecting them.

Besides this, several employés of the defendant, working for the defendants during the time that it is claimed these torpedoes were made, employés who must have known of it if it had been true, testify positively that no such torpedoes were made during that time. Other evidence points to the same conclusion, and other facts appear which, as it seems to me, are inconsistent with the claim of the defendants that one of them discovered this device prior to its being patented by Weaver.

Here were a million cases which must have been manufactured by somebody; a million shells filled, assembled, and straps applied, by employés in defendants' factory; a million shells shipped over various railways, and sold to, and used by, various customers; and not a syllable of disinterested or credible evidence of it survives. No man remembers it, and no written evidence of it can be found. If the conclusion to which I have arrived does injustice to the defendants, it must be confessed that there has been such an annihilation of ordinarily enduring and producible testimony as is unparalleled in the history of litigation. I cannot believe that such a calamity has happened, or can happen.

The complainant is entitled to the relief prayed for, and a decree may be entered accordingly.

LOCKE INSULATOR MFG. CO. v. LEY et al.

(Circuit Court, D. Massachusetts. January 26, 1906.)

No. 1,617.

PATENTS—INVENTION—INSULATOR PIN.

The Locke patent, No. 493,434, for an insulator pin comprising a base having a central opening, an insulating sleeve mounted thereon, and a bolt for securing them together and to the cross-arm, does not specify the material of which the base is to be made, and contains no suggestion that it is to serve any purpose other than that of a support to the insulating sleeve, and cannot be construed to cover the use of an insulating base for the purpose of securing an added insulation, but only as a mechanical structure; and, as such, it is void for lack of invention.

In Equity. On final hearing.

Affirmed by Circuit Court of Appeals, 143 Fed. 985.

Howard P. Denison, for complainant.

George A. Rockwell, for defendants.

BROWN, District Judge. This suit is for infringement of letters patent No. 493,434, dated March 14, 1893, to Fred M. Locke, for an improvement in insulator pins. The only question presented is whether the patent describes a patentable invention. The defendants do not deny infringement if the patent is valid. The claims sued upon are:

"(1) An insulator pin comprising a base having a central opening, an insulating sleeve mounted thereon, and a bolt for securing them together and to the cross-arm, as set forth.

"(2) An insulator pin comprising a hollow base, and a threaded or corrugated insulating sleeve mounted thereon, and a bolt for securing them together and to the cross-arm.

"(3) An insulator pin comprising a base, enlarged in size at its lower end and having a central opening, an insulating sleeve mounted thereon and means for securing them together and to the cross-arm."

The devices of the prior art shown by the defendant are the following: The ordinary wooden insulator pin, with a thread at the top to hold the glass insulator cap, a tang at the bottom which enters the cross-arm, and a shoulder which rests upon the top of the cross-arm; and the "insulator support" of the Doren patent, No. 472,529, which consists of an iron pin which goes through the cross-arm, and has at its top a wooden thimble or sleeve to receive the glass insulating cap. Doren's main object was to substitute iron for wood, and to avoid the boring of large holes in the cross-arm, and thus secure greater strength.

The device of the patent in suit resembles Doren's in having an iron pin which goes through the cross-arm, and a wooden sleeve. It differs from it in having a base which surrounds the pin, supports the insulating sleeve, and rests upon the cross-arm. This base is enlarged at the lower end, affording lateral support; the enlargement serving the same purpose as the shoulder of the old wooden pin. It is said also that this enlarged base serves to shed water, and to prevent the accumulation of water at the junction of the iron pin and cross-arm, and consequent rot. The iron pin of the patent is provided with a nut, and serves to bolt firmly together the sleeve, the base, and the cross-arm.

While it is quite probable that moisture is better excluded from the junction of the pin and cross-arm by the patented structure than by the wooden pin or by Doren's pin, this feature is not referred to in the patent. Cheapness and durability of construction were apparently the patentee's only objects; and I agree with the opinion of defendant's experts that the insulator pin of the patent, regarded merely as a mechanical device for giving mechanical support to a glass insulator, does not exhibit invention.

The complainant seeks to extend the scope of the patent by reference to certain electrical advantages of the complainant's pin. Nothing of this kind is referred to in the patent; and, in view of the concessions of complainant's expert, it is highly improbable that, at the time of the application for the patent in September, 1892, the patentee had any conception that an insulator pin should be constructed so as

to prevent static discharges of a current of high power from burning out or charring the pin at its juncture with the cross-arm.

The patent discloses no intention to make the base an insulator in itself, and following the directions of the patent would not result in a pin having such electrical advantages as are attributed to the pin manufactured by the complainant. The complainant uses a base of heavy glass, and it is said by complainant's expert that the use of a base of high insulating material tends to obviate short circuiting and burning out of the pin at the point of junction of the pin with the cross-arm. I am of the opinion, however, that such advantages as result from the use of a base of glass or porcelain, or high insulator, as distinguished from wood, metal, or noninsulating material, are without the scope of the patent.

The only insulating feature of the insulator pin of the patent is a removable insulating sleeve. The insulating sleeve is to receive the insulating cap to which the wires are attached. There is no suggestion in the patent that the base is to serve any other function than that of a mechanical support. As it is conceded that the claims would be equally infringed whether the base were composed of high insulating material or of noninsulating material, in determining the question of invention we must consider only those features common to bases of insulating and of noninsulating material, namely, mechanical features.

It is urged, however, that one of the advantages of the mechanical structure shown in the patent in suit, having the base and insulating sleeve separate parts, is that the two parts can be made of different material, thus permitting the use of a high insulating material for the base.

It is quite true that a post, consisting of two or more pieces fastened together with a bolt, possesses an advantage over a post made up of a single piece of wood or stone. In the former the two pieces may be of different material, while in the latter they must be of the same material. But this is a piece of common knowledge, and its application to a post for an insulating cap by one who desired to use two different materials in a single post, would not constitute invention.

Assuming, for the argument, that it might constitute invention to make an insulator pin which served to support an insulator cap and also was itself an insulator to prevent arcing and burning out of the wood of the cross-arm, there is no indication in the patent that Locke had made such an invention prior to his application. At what period he began to use a base of high insulating material does not appear. This question, however, is immaterial. It is very clear that the patent shows merely a mechanical device having no novel electrical properties, and that it describes neither the complainant's commercial insulator pin nor a patentable invention.

The bill will be dismissed.

HUNTER v. UNITED STATES.

(Circuit Court, S. D. New York. January 26, 1906.)

No. 3,771.

1. CUSTOMS DUTIES—CLASSIFICATION—FLAT ENVELOPES.
Paper cut into particular shapes and sizes, ready to be folded and gummed, so as to constitute envelopes, and found to have been commercially known as "flat envelopes" at the time of the passage of the act, *held* dutiable as "paper envelopes, plain," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 399, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672].

2. SAME—EVASION OF HIGHER RATE—CHANGE OF CONDITION.
In the classification of imported articles, it is immaterial that they were put in an unfinished condition to escape a higher rate of duty.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,867 (T. D. 25,857), which affirmed the assessment of duty by the collector of customs at the port of New York on importations by John Hunter under the tariff act of 1897.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importer.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The articles in question "consist of pieces of paper which have been cut into particular shapes and sizes for the purpose of being specifically folded and gummed so as to constitute envelopes." They were assessed for duty under paragraph 407 of the existing tariff act (Act July 24, 1897, c. 11, § 1, Schedule M. 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673]) as "manufactures of paper or of which paper is the material of chief value, not specially provided for in this act." The duty under this provision of the tariff act is at the rate of 35 per centum ad valorem, and the importer contends that such merchandise is assessable for duty at 20 per centum ad valorem, under paragraph 399 (30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), or at the rate of 25 per centum under paragraph 402 of said act. In Hunter v. United States, 134 Fed. 361, 67 C. C. A. 343, which was a similar case by this protestant, the Circuit Court of Appeals intimated that if it were established in that case by the evidence that the importation was known in trade and commerce as a "flat envelope" at the time of the passage of the tariff act, and that in ordering the goods or in describing them they were designated by that term, then the protest of the importers would have been sustained.

Testimony was given in this case by 11 competent witnesses engaged in the paper and stationery business, showing that the articles in question consisted of flat envelopes, and that prior to the tariff act of 1897 the special trade recognized two kinds of envelopes, namely, flat envelopes and folded envelopes. This testimony was not before the Board of General Appraisers. It is well established that the intention

of Congress must be ascertained from the ordinary meaning of the words used to express such intention unless a different commercial meaning is explicitly given to the language employed. As the uncontradicted testimony indicates that there was at the date of the passage of the act a definite, uniform, and general commercial designation of the articles in question, the contention of the importer must prevail. The articles known in trade as "flat envelopes" are dutiable under paragraph 399 as "paper envelopes, plain." Upon the authority of In re Blumenthal (C. C.) 51 Fed. 76, the intimation that the articles were imported in an unfinished condition to escape a higher rate of duty is immaterial.

The decision of the Board of General Appraisers is modified accordingly.

J. S. JOHNSON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 22, 1905.)

No. 3,398.

CUSTOMS DUTIES—CLASSIFICATION—PRESERVED PINEAPPLES—FRUIT IN SUGAR.

As to pineapples put up in cans in their own juice, about 3 per cent. of sugar being extrinsically added, the sugar being used principally to improve their flavor and not acting prominently in preserving them, *held*, that they are dutiable as "pineapples preserved in their own juice," and not as "fruits preserved in sugar," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651].

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,352 (T. D. 24,494), affirming the assessment of duty by the collector of customs at the port of New York on merchandise imported under the tariff act of 1897. Note U. S. v. Boden (C. C.) 133 Fed. 839.

Walden & Webster (Howard T. Walden, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The goods in question consist of pineapples contained in tin cans weighing about 1¼ pounds per can. They were assessed for duty at 35 per cent. ad valorem and 1 cent per pound, under paragraph 263 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]) as "fruits preserved in sugar." The importers claimed that they should be assessed either at 25 per cent. ad valorem, under the same paragraph, as "pineapples preserved in their own juice," or under paragraph 268 (30 Stat. 172 [U. S. Comp. St. 1901, p. 1651]) relating to "pineapples in barrels and other packages," at 7 cents per cubic foot.

I agree with the board that the latter claim is manifestly without merit. The facts before the board, supplemented by those before the court, show that the cans contained nearly 14 per cent. of sugar, but that a very large proportion of this was sugar found in the juices of the pineapple.

It appears that pretty much all the preservative qualities are found in the juice itself, the boiling of the pineapple in the juice, and the hermetically sealing of the contents in the tin cans, so as to exclude the atmosphere. It is true that the importation contains a little over 3 per cent. of cane sugar extrinsically introduced by the manufacturers in the course of preparation; but it is not a fair inference from the testimony that this additional sugar acts in any substantial degree toward preserving the pineapple, but seems to have been added rather in the way of flavoring. The preservation of the pineapples, therefore, is substantially accomplished in the way suggested, and the addition of the cane sugar seems to be merely an incidental matter. The board argues that, although they are preserved in these other ways, they are in sugar, and it is therefore proper to classify them as pineapples preserved in sugar. It seems to me that, when Congress referred to fruits preserved in sugar, it meant fruits in which sugar plays a prominent and important part in the act of preservation. I must therefore venture to disagree with the board.

The decision is reversed.

SPENCER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 4, 1906.)

No. 3,953.

CUSTOMS DUTIES—MEASUREMENT—ALLOWANCE FOR IMPURITIES IN NUTS.

In ascertaining the dutiable weight of shelled nuts dutiable by the pound, under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, pars. 269, 270, 30 Stat. 172 [U. S. Comp. St. 1901, pp. 1651, 1652], no allowance should be made for impurities in importations not shown to contain abnormal quantities of foreign matter, nor to vary from the ordinary wholesale condition.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 5,943 (T. D. 26,090), affirming the assessment of duty by the collector of customs at the port of New York on importations under tariff act July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626].

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Henry A. Wise, Asst. U. S. Atty.

PLATT, District Judge. The importers claim allowance for impurities found in certain shelled nuts. The nuts are of three varieties, walnuts, almonds, and filberts; the first in boxes, and the other two in bags. Walnuts and filberts were assessed at five cents per pound, under paragraph 270, and almonds at six cents per pound, under paragraph 269, present act (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, pp. 1651, 1652]).

They say that the proof is clear and that it is only necessary to decide whether the case falls within the principles of the Flaxseed Case (157 U. S. 183, 15 Sup. Ct. 583, 39 L. Ed. 665), or whether

we shall be guided by the decision in the Currant Case (United States v. Ried, Murdoch & Co., 120 Fed. 242, 56 C. C. A. 538). Both cases make it plain that the important thing is to find out what the shelled nuts of commerce were when paragraphs 269 and 270 were enacted. These impurities are said to have appeared in the nuts since then. If this were so, and if the percentage of impurities has been clearly shown, there would be great force in the contention. Let us look for a moment and see: The collector assessed on the weigher's returns because there was nothing to show "abnormal quantities of foreign matter" in the importation, or that the merchandise varied in any respect from the "ordinary wholesale condition." The importer tries to overcome these conclusions of fact by testimony taken before the appraisers, and later in court. Over 6 per cent. of impurities were found in some of the consignments, but a claim is only made for an average reduction of 3 per cent., and for our purposes we may deem the appellants to have waived any claim for a greater amount. The practical effect of a ruling in their favor might be to establish that percentage as the average allowance hereafter on like merchandise. The testimony before the appraisers and here, as I read it, all tends to show that the nuts of commerce did not contain as much waste and dirt prior to the present act as they do now, but the trade has at all times called them shelled nuts. The buyers may have grown more particular, but such a condition of mind on the part of the trade can hardly be said to establish a commercial usage. When the present act was passed the shelled nuts of commerce had some impurities, and it is difficult to understand the reason for asking an allowance now, when the percentage of waste has increased from perhaps 1 per cent. to perhaps 3 per cent. It is even more difficult to discover why the entire percentage of impurity should be allowed, because that would leave the nuts paid for somewhat cleaner and purer than the shelled nuts of commerce, which Congress had in mind. At what particular percentage do the impurities become appreciable? What percentage can be fairly called negligible?

The decision of the board must be affirmed.

LUEDERS v. UNITED STATES.

(Circuit Court, S. D. New York. November 3, 1905.)

No. 4,008.

CUSTOMS DUTIES—CLASSIFICATION—FORTIFIED ENFLEURAGE POMADE.

So-called muguet pomade, produced by the combination of several kinds of enfleurage grease, to which is added about one-half of 1 per cent. of various essential oils to fortify and combine the article, thus producing an odor like that of the lily of the valley, *held* free of duty, under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 626, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], as enfleurage grease.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6,024 (T. D. 26,310), which affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by George Lueders & Co.

This merchandise consisted of so-called muguet pomade, or lily of the valley pomade. It was classified by the collector as dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 3, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627], relating to combinations of essential oils. The importers claimed that it was free of duty, under the provision for enfleurage grease in paragraph 626 (Free List, § 2, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685]). The evidence taken before the Board of General Appraisers and the Circuit Court showed the article to be made by the combination of several different enfleurage pomades or greases, completed by the addition of two or three essential oils, amounting to about one-half of 1 per cent., to fortify and combine the resultant odor, which is similar to that of the lily of the valley, or "muguet," as it is known in French.

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for importer.

Charles Duane Baker, Asst. U. S. Atty.

HAZEL, District Judge. Decision reversed, on the authority of U. S. v. Dodge (C. C.) 94 Fed. 481.

UNITED STATES v. BEER.

(Circuit Court, S. D. New York. November 6, 1905.)

No. 3,914.

CUSTOMS DUTIES — CLASSIFICATION — UNBLEACHED COTTONS — CLOTH WITH BLEACHED FIGURES.

As to cotton cloth which is unbleached, except with respect to figures covering about one-eighth of the surface of the fabric, which are made of bleached threads, *held*, that these figures do not make the goods "bleached," within the meaning of the various provisions for bleached cotton cloth which are found in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1655].

On Application for Review of a Decision of the Board of United States General Appraisers.

These proceedings relate to a decision which sustained the protest of Henry S. Beer against the assessment of duty by the collector of customs

at the port of New York. The subject of the assessment consisted of figured cotton cloth in which the warp and filling threads are composed of unbleached cotton threads, but in which the figures consisted of dots made with bleached cotton threads and covering about one-eighth of the surface of the fabric. By reason of this bleached feature of the goods, the collector considered them "bleached" within the meaning of the various provisions for bleached cotton cloth in Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1655], and assessed duty accordingly. The importer contended that the goods should have been subjected to the duty applicable to "unbleached" cloth. Note G. A. 2,934 (T. D. 15,834). This contention being upheld by the Board of General Appraisers, the government brought these proceedings for review.

Charles Duane Baker, Asst. U. S. Atty.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for the importer.

HAZEL, District Judge. The decision of the Board of General Appraisers is affirmed.

ROBINSON v. UNITED STATES.

(Circuit Court, S. D. New York. December 19, 1905.)

No. 3,980.

CUSTOMS DUTIES—CLASSIFICATION—"MANUFACTURES OF WOOL"—GOODS IN PART OF WOOL.

Goods of silk and wool, the latter being the minor component, *held* to be within the purview of Tariff Act August 27, 1894, c. 349, § 1, Schedule K, par. 297, 28 Stat. 531, deferring until January 1, 1895, the reduction in duties provided in said act on "manufactures of wool."

On Application for Review of Decisions of the Board of United States General Appraisers.

In the decisions below the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York on importations by Harry Robinson. The merchandise in controversy consists of dress goods composed in part of wool, but in chief value of silk, and was either entered for consumption or withdrawn from bonded warehouse for consumption after August 27, 1894, and before January 1, 1895, which was the period covered by paragraph 297, Schedule K, § 1, c. 349, Tariff Act August 27, 1894, 28 Stat. 531, prescribing that the reduction in duties provided by said act on "manufacturers of wool" should be deferred until January 1, 1895. The collector construed said expression "manufactures of wool" as including merchandise of this character, though not composed wholly or in chief value of wool, and therefore classified it as "women's and children's dress goods * * * composed wholly or in part of wool," under the provisions of the preceding act. Paragraph 394 or 395, Schedule K, § 1, c. 1244, Tariff Act October 1, 1890, 26 Stat. 596, 597. The importer contended that paragraph 297 did not apply, and that, as the merchandise went into consumption after the act of 1894 took effect, the rates of duty provided by said act should have been imposed.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

Charles Duane Baker, Asst. U. S. Atty.

PLATT, District Judge. The decision of the Board of General Appraisers is affirmed.

FULD & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 26, 1906.)

No. 4,038.

CUSTOMS DUTIES—PROTEST—SUFFICIENCY—FAILURE TO POINT OUT PROPER RATE OF DUTY.

A protest against the assessment of duty which does not point out distinctly and specifically the proper rate of duty is not sufficient, under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The question involved is whether the importers' protest sufficiently complied with the provisions of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], which requires that an importer, if dissatisfied with the assessment of duty, shall set forth in his protest "distinctly and specifically, and in respect to each entry or payment, the reasons for his objections."

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles Duane Baker, Asst. U. S. Atty.

HAZEL, District Judge. The protest does not point out specifically and distinctly the proper rate of duty in respect to the different entries, and I am of opinion that the question of sufficiency of protest is controlled by U. S. v. Fleitmann (C. C. A.) 137 Fed. 476, and U. S. v. Bayersdofer, 126 Fed. 732, 62 C. C. A. 16. The decision of the Board of General Appraisers is sustained.

MIRABILE CORP. v. PURVIS et al.

(Circuit Court, E. D. Pennsylvania. February 21, 1906.)

No. 32.

COURTS—JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

When the jurisdiction of a federal court depends upon diversity of citizenship alone, and there are more defendants than one, all must be liable to be sued in the particular suit, and the court is without jurisdiction when one defendant is a citizen of the same state with the plaintiff.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 855.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

On Demurrer for Want of Jurisdiction.

William C. Mayne, for complainant.

J. W. Westcott, for defendants.

HOLLAND, District Judge. This is a bill for an injunction, and sets forth that the plaintiff is a corporation and a citizen of the

state of New Jersey. One of the defendants is a citizen of Pennsylvania and inhabitant of this district. The other defendant, James E. Hays, is a citizen and inhabitant of New Jersey. Mr. Hays questions the jurisdiction of this court, because he is a citizen of the same state with the plaintiff.

When the jurisdiction is based upon diverse citizenship alone, the rule is that where there are more plaintiffs or defendants than one, all of the plaintiffs must be competent to sue, and all the defendants must be liable to be sued in the particular suit. Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; Excelsior P. P. Co. v. Brown, 74 Fed. 321, 20 C. C. A. 428.

The plaintiff being a citizen of the state with the objecting defendant, the bill must be dismissed; and it is so ordered.

In re WHEALTON RESTAURANT CO.

(District Court, E. D. Pennsylvania. February 21, 1906.)

No. 2,276.

BANKRUPTCY—LANDLORD'S LIEN—PENNSYLVANIA STATUTE.

Although Act Pa. 1836, §§ 83–85 (P. L. 777), provides that the goods and chattels on any demised premises liable to the distress of the landlord, which have been taken by virtue of an execution, shall be liable for the rent in arrears for one year at the time of such taking, the landlord has no lien which will be preserved in a court of bankruptcy, where the bankruptcy proceedings were instituted within four months after the issuing of the execution.

In Bankruptcy. On report of referee.

Rowland Evans, Henry B. Hodge and Richard L. Ashhurst, for Philadelphia Trust, Safe Deposit & Insurance Co.

Humbert B. Powell, for trustee.

HOLLAND, District Judge. Although sections 83, 84, and 85 of the Pennsylvania act of 1836 (P. L. 777) provide that the goods and chattels upon any demised premises, liable to the distress of the landlord, which have been taken by virtue of an execution, shall be liable for the rent in arrears for one year at the time of such taking, the landlord has no lien which will be preserved in a court of bankruptcy, where the bankruptcy proceedings were instituted within four months of the issuing of the execution. Nor do the cases referred to by the claimant sustain the contention that he, as landlord in this case, had a lien upon the goods under the Pennsylvania act before the execution was issued which the bankrupt act will preserve.

The referee's order dismissing the petition is affirmed.

UNITED STATES v. AULTMAN CO.

(District Court, N. D. Ohio, E. D. February 19, 1906.)

No. 3,118.

ALIENS—CONTRACT LABOR LAW— PERSONS TO WHOM APPLICABLE.

The alien contract labor law, as amended in 1903 (Act March 3, 1903, 32 Stat. 1214, § 4, c. 1012 [U. S. Comp. St. Supp. 1905, p. 277]), does not apply to a man who entered the United States as an immigrant from Germany when young and remained continuously domiciled and working in this country for 12 or more years, although without becoming naturalized, and who then went temporarily into Canada, where he had been for two weeks when the contract alleged to be in violation of the statute was made.

[Ed. Note.—Importation of contract labor, see note to United States v. Parsons, 66 C. C. A. 133.]

At Law. The plaintiff and defendant having rested, the testimony being all before the court, counsel for the defendant moved the court for a nonsuit, and that the court direct the jury to return a verdict for the defendant.

John J. Sullivan, U. S. Atty.

Lynch, Day & Day and Kline, Tolles & Goff, for defendant.

TAYLER, District Judge (orally). This action is based on sections 4 and 5 of the act to regulate the immigration of aliens into the United States. Act March 3, 1903, c. 1012, 32 Stat. 1214 [U. S. Comp. St. Supp. 1905, p. 277]. The claim is that the defendant, in violation of that law, solicited and procured the importation of one Hermann, an alien, from Canada. Since the observation of the district attorney as to changes in the law since its original passage, or since the time when the decisions referred to were rendered, I have looked at the statute with a view of finding out what changes were made as respects the question involved in this case, but I do not find that there has been any such change. There have been advances made in the law, with a view of more fully carrying out its purposes, and especially the law has been carefully amended since those decisions. This is an important circumstance, as will hereafter be noted. Section 4 provides that it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parol or special, express or implied, made previous to the importation of such alien, to perform labor or service of any kind, skilled or unskilled, in the United States. The law has been since its original passage just as it is now in section 4, except that it adds unskilled labor to the classes covered by it, and has more carefully disclosed the unlawful methods by which the purpose sought to be accomplished may be carried out, by adding the word "solicitation." So that section 4 in its present form represents the results of the experience of intelligent men, determined to see that the purpose of the law was expressed in the

law itself, and carried out. Then section 5 provides, in substance, for the penalty which shall be incurred for every violation of any of the provisions of section 4 of this act.

Now, the statute seems to be clear and explicit in its terms; and it was not until the witness Hermann had testified that he had come into this country from Germany in 1891, when he was quite young, and had remained constantly in this country, working at his trade almost all the time, never outside of the country until a couple of weeks before this transaction occurred which is the subject of this petition, that my attention was arrested and directed to the question as to whether or not such a person was included within the terms of this act. I say "arrested," because this provision of the law has been familiar to me for a long time, though not in its exact phraseology, and I have been especially familiar with, and deeply interested in, the purpose for which the law was passed, and had a familiarity, greater or less, with several of the amendments, including the last one, which was passed in March, 1903. So, as I say, my attention was arrested by that situation, and I tried, as well as I could, to reason out the proposition whether or not a man with this history was to be included within the provisions of this law, and a contract made with him, under the circumstances that existed here, prohibited by the law. Now, I thought that I understood what the purpose of this law was. It was intended, primarily, to prevent persons who are dissatisfied with the wage level of this country going into some other country, where the wage level was lower and where the promise of higher wages in this country would be extremely attractive, and where, on that account, it would be easy to make a contract with a person thus working for lower wages to come into this country and work for higher wages, with the result that, by making a contract at a rate of wages higher than the rate at which the alien was working, and lower than the prevailing, and through our civilization the necessarily prevailing rate of wages, the wage level in this country would be demoralized; and, as the wage level in this country determines the level of civilization in this country, very serious wrong would be done, not merely to labor, but to society, which, in its units, is almost all made up of labor. That was the general condition of things which demanded this legislation as a protection to society, and to the civilization which depends upon the amount that men earn, and therefore the amount that men spend. We are all familiar with the rule that, where it is possible to do so, a law must be construed in accordance with its spirit, and that a penal law is to be strictly construed. Those are elementary propositions.

The first case that I found during the recess was the case of Moffitt v. United States, 128 Fed. 375, 63 C. C. A. 117. That was a case under the immigration law; and the syllabus, which fairly states the substance of the decision in that respect, says:

"The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole."

"We are of opinion," says the Circuit Court of Appeals in the text, "that this act clearly relates to immigration, and is leveled only against immigrants, although neither of these words is expressly mentioned in section 10 of the act. Section 3 excludes the encouragement of immigration to this country of aliens by promise of employment. Section 4 makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage the immigration of aliens into the United States, except in certain specified particulars. Section 6 forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense," and so on. And on page 380 of 128 Fed., and page 122 of 63 C. C. A.:

"Where the intent of the statute is plain, nothing is left to construction; but where the mind of the court must labor to discover the design of the Legislature it seizes upon everything from which it can be derived. In this search courts should not overlook nor ignore the well-known canon of construction, which often proves to be a safe guide in determining the meaning of the statutes. The rule is universal, in cases of this character, that the evil which Congress intended to remedy must be looked at. All the circumstances, conditions, and contemporaneous events which induced Congress to pass the law must be considered and given due weight."

Now the law, in respect to its application, what persons it applied to, has been considered in that sense in two aspects: First, to define what kind of persons, measured by their employment, are included; and, second, to define what is meant by aliens or immigrants. Those two phases of qualities which must inhere in the person whose contract is subject to consideration have been considered. On the first proposition we have the case of Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. That case passed upon the question of the kind of employment or work which the person who it was said was being imported in violation of law was engaged in. That is not our question here, but naturally the principles of law that govern that case would govern here. This is a very instructive and well-considered opinion by Mr. Justice Brewer, in which he held that a minister of a church was not included within the law. He is now excluded from its operation by the amendment to the law; but at that time there was no such exclusion. A contract had been made in England with a minister to go to New York and take charge of the spiritual affairs of a certain church. The courts below held that the contract was in violation of this law, and the case went to the Supreme Court for determination. Justice Brewer says (on page 458 of 143 U. S., and page 511 of 12 Sup. Ct. [36 L. Ed. 226]):

"It must be conceded that the act of the corporation (that is, of the church corporation) is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind'; and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force in this reasoning, we can-

not think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Continuing the reasoning (on page 463 of 143 U. S., and page 513 of 12 Sup. Ct. [36 L. Ed. 226]), Justice Brewer says:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. The situation which called for this statute was briefly, but fully, stated by Mr. Justice Brown when, as district judge, he decided the case of United States v. Craig (C. C.) 28 Fed. 795, 798: 'The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at low wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupation to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.'"

So, also, we find quoted in this opinion a part of the report made by the committee of the House which recommended the passage of this very legislation in the Forty-Eighth Congress. That committee said:

"It seeks to restrain and prohibit the immigration or importation of laborers who would have never seen our shores but for the inducements and allurements of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens, and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them. They are men whose passage is paid by the importers. They come here under contract to labor for a certain number of years. They are ignorant of our social condition, and that they may remain so they are isolated and prevented from coming into contact with Americans. They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen. They, as a rule, do not become citizens, and are certainly not a desirable acquisition to the body politic. The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor."

Ending the quotation, and continuing with the language of Mr. Justice Brewer, is this sentence:

"We find, therefore, that the title of this act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor."

Now, I must confess that, having read so much of that opinion, I could not escape the conviction that the Supreme Court of the United States would have greater difficulty in excluding from the language of that act a minister than it would have to exclude a person like Hermann from the act. It seems to me that the reason that was applied by the Supreme Court in that case would apply with double force to the case that we have here; and to that conclusion, subject to further reflection and the argument that might be presented, I had come when my attention was called to what I had not had time to find—these cases where the United States courts have held, both in a contract labor case and in other cases where the definition of the persons who were included within this act was made, that a person who had come into this country, who had migrated to this country, had become a part of the wage-earning body of this country, in a sense had assimilated to our society, who, in a word, had become a resident and domiciled here, although not naturalized, could not be said to be a person with whom to make such a contract as here charged would be to violate this contract labor law. But we find that in many instances the courts have so held.

In Re Maiola (C. C.) 67 Fed. 114, Judge Lacombe held, as it is stated in the syllabus:

"The statutes of the United States relating to the exclusion of contract laborers, including the act of March 3, 1891, making the decision of the immigration officers final as to the right of such laborers to land, are directed solely against alien immigrants, not against alien residents returning after a temporary absence; and the courts, therefore, have power, upon habeas corpus, to inquire whether one who is refused admission to the country by the immigration officers is or is not an immigrant, and so within the jurisdiction of such officers.

"An unmarried man, who has immigrated to the United States in 1892, with the intention of making his home there, has remained about two years, working at his trade, and then, being taken ill, has returned to his native country, remained about 10 months, doing no work, and then in 1895 returns to the United States—is not an immigrant on his return in 1895."

There are three other cases cited to the same effect as to the definition of an immigrant. They are not contract labor cases, but they are under the same general law, the title of which I quoted at the outset.

In Re Panzara et al., 51 Fed. 275, it is held by the District Court for the Eastern District of New York that:

"The power of the federal superintendent of immigration to return passengers is confined to 'alien immigrants,' and the question whether persons ordered to be returned are of that description is jurisdictional, and may be determined by the courts on habeas corpus. 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."

In Re Martorelli, 63 Fed. 437, Judge Lacombe, in the Circuit Court for the Southern District of New York, held:

"The acts regulating immigration, existing when Act March 3, 1891, was passed, refer to aliens who are imported into or who migrate to this country, and do not exclude a person already resident here, though not naturalized, who temporarily departs, with the intention to return."

The District Court for the Northern District of California, in Re Ota, 96 Fed. 487, held:

"The provisions of Act March 3, 1891, 26 Stat. 1084, c. 551 [U. S. Comp. St. 1901, p. 1294], excluding certain classes of aliens from admission to the United States, and requiring their deportation, do not apply to aliens domiciled in this country, and who are returning thereto after a temporary absence."

I must differ from these several judges who have defined this law and declared that such a person is not within the terms of the law, if I find that Hermann comes within it.

The facts in this case are infinitely stronger than the facts in any of the cases from which I have just quoted. In this case nobody would pretend that Hermann ever intended to go back to Germany to live, or that he was any less absorbed into the body of American workmen than anybody who had always lived here. He came here when he was about 17 years of age. He had worked some at the trade of coremaker, he said, before he came over; but he did not get to work at that in this country immediately, whatever he may have known about it before. But from 1891, when, a German boy, he landed in New York like any other immigrant, and was reported as an immigrant from Germany, from that moment until two weeks before he made this contract, if he made any at that time, until about two weeks before the 31st of July, 1902, he had never set foot outside of this country. From the age of 17 to 30 he had worked in this country; and, then, because he had been working as a strike-breaker, he went to Canada to help break a strike there, and there remained, as he said, a short time, two weeks, when he was called upon to assist in breaking a strike down at Canton. Now, was he an immigrant when he came over from Canada? Could the immigrant officers have stopped him? The unbroken current of authority is that he was not an immigrant within the meaning of this statute. I doubt if he would be an immigrant within the meaning of any statute. If he belonged anywhere, he belonged in this country, whatever technical relation he may have sustained to the Emperor of Germany.

Counsel refers to the fact that he was a strike-breaker, and that they are the kind of people that this legislation was intended to keep out. It is not worth while to discuss whether the work of the strike-breaker is virtuous, or the contrary. The legislation was not intended to touch the case of strike-breakers in the sense in which that argument was made. It was intended to reach strike-breakers, in the way of cheaper labor coming here at lower wages, as it would demoralize labor here, and most seriously and grievously affect the well-being of this country. But it was not intended to touch strike-breakers in the sense in which these men were strike-breakers, whatever we may think of such a trade, if there is such a trade.

The last of the four cases defining an alien immigrant was decided December 1, 1899. Since that time the law has been amended, especially by the act of March 3, 1903; and it is a familiar principle that when a certain construction has been given to a statute, especially when its general language has been qualified and subsequent legislation has not undertaken to change the language so as to meet with the judicial definition, added persuasiveness is given to the construction of the law which the courts have put upon it. That is to say, if Congress intended to give a wider application to the law than the courts had given to it, it is reasonable to assume that it would have so legislated when it came to amend the law after the decisions were made public.

I have no sort of doubt at all that, considering the title of this act, considering its various provisions, considering the conditions that brought about its passage, considering the state of the public mind regarding it, and its history, not to mention the other things which are of themselves conclusive, the decisions of the United States courts and the holding of the Supreme Court in the Holy Trinity Church Case—this person Hermann was not in 1903 a person with whom the act referred to prohibited the making of a contract. So that it would not make any difference whether a contract was made, or whether the defendant knew he was an alien in the sense in which he was an alien. It would not make any difference what the fact is as to that. The law could not be violated as respects this particular person.

And for that reason, therefore, gentlemen of the jury, as no question of fact exists for your consideration, but only this question of law upon admitted facts of the case, and there is no confusion or uncertainty about the facts in so far as they relate to the proposition I have just determined, it will be your duty to return a verdict for the defendant, which is accordingly done.

MICHIGAN YACHT & POWER CO. et al. v. BUSCH.

(Circuit Court of Appeals, Sixth Circuit. March 16, 1906.)

No. 1,488.

1. CONTRACTS—CONSTRUCTION—SECURITY FOR PERFORMANCE.
Defendants contracted to build for plaintiff a launch of certain speed and dimensions, to be paid for in installments as the work thereon progressed. As a part of the contract, defendants were to loan plaintiff, free of charge, another launch until the delivery of the one contracted for. *Held*, that the boat loaned did not stand as security for the completion of the other according to the terms of the contract, and the fact that defendants had sold her did not justify plaintiff in refusing to pay the second installment until other security was given.

2. SAME—NONPERFORMANCE—EXCUSE—FAILURE TO PAY INSTALLMENT.
A positive refusal by one for whom a launch was being built to pay an installment according to the terms of the contract, unless the builders would give him a security they were under no obligation to give, relieved them from further performance on their part.

3. SAME—RECOVERY OF PAYMENTS.
A party to a contract which he has himself failed to carry out may under the common counts recover money paid by him in part performance to the extent that his payment was beneficial to the other party and in excess of the damages sustained by reason of the breach.

4. ASSIGNMENTS—ACTION AGAINST ASSIGNOR—AMOUNT OF RECOVERY.
Under Comp. Laws Mich. 1897, § 10,054, which provides that the assignee of a nonnegotiable chose takes subject to every defense which existed before notice of assignment, where the assignor of a contract to build a boat is sued by the other party who has himself breached the contract, upon the common counts, in assumpsit, for payments made by him, the limit of such recovery is the excess of payments made over the damages sustained by reason of the breach.

5. SET-OFF AND COUNTERCLAIM—RECOUPMENT—BREACH OF CONTRACT.
Where one party to a contract sues the other party to recover payments made thereon, the latter may show that plaintiff has himself broken the agreement and prove his damages for such breach, and thus cut down or wholly extinguish the plaintiff's claim.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Set-Off and Counterclaim, § 6.]

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

This was an action in assumpsit to recover money paid upon a contract for the construction of a boat to be built for the plaintiff by the defendants. The contract between the parties was in writing and bore date of December 5, 1901. The defendant companies undertook to furnish all of the materials and construct and equip and deliver in New York June 1, 1902, one launch according to plans and specifications covering dimensions, fittings, equipment, and speed. In consideration of this agreement, plaintiff agreed to pay $8,500 as follows: $2,125 in advance on signing the contract; $2,125 when the boat is planked and already for inside finish; $2,125 when ready to launch; balance when delivered in New York. It was provided, among other things, that there should be a speed trial before delivery, and that if the boat "failed to develop a speed of 16 miles per hour," or to come up otherwise to specifications, "then C. M. Busch may declare the contract void and demand a return of the money already paid."

Another provision was in these words: "It is part of this contract that the Michigan Yacht & Power Company and the Sintz Gas Engine Company

will loan to C. M. Busch, free of charge, the launch 'Helen,' with complete outfit, until the delivery of the boat contracted for or until the cancellation of this contract or the refunding of the cash paid thereon, as provided for above. The 'Helen' is to be delivered f. o. b. cars in Detroit to C. M. Busch and he is to pay all expenses on her thereafter until delivered in New York Harbor on the delivery of the new boat as above specified. C. M. Busch agrees to be fully responsible for the 'Helen' while in his charge and to deliver her as above specified in first class condition in New York Harbor."

The plaintiff alleges that he made the advance payment required by the contract, but that the defendants have failed entirely to perform said contract and have failed to build and deliver a launch as required, though often requested to do so. Plaintiff avers that he has well and faithfully performed each and all of the obligations of the agreement, etc.

The defendants plead the general issue, and gave notice as required by the local practice of a claim of recoupment, in which they aver that they did perform the contract and stood ready and willing to perform, and that, when the boat so contracted for "was planked and ready for inside finish," they gave notice and demanded payment of the second installment, which payment was refused wrongfully, and though many times requested to make said payment refused, whereby the defendants were greatly injured and damaged, etc.

Upon the issues joined there was evidence showing the boat being constructed for the plaintiff had been so far carried forward as that it was "planked and ready for inside finish" some time in January, 1902, and that the plaintiff caused an inspection to be made upon notification and made no complaint that the condition was not such as was requisite before the second installment was due and payable. Upon being several times solicited to make payment then due, Mr. Busch advised with counsel and through his said counsel demanded that security be given him by the builders for the due performance of their contract as a condition to payment of any further installments.

The ground upon which this demand was made is shown best by the letter which Mr. Busch caused to be written, which was as follows:

"Atlantic City, N. J., Feb. 20, 1902.

"Michigan Yacht & Power Co., Sintz Gas Engine Co., Detroit, Michigan—Gentlemen: Mr. C. M. Busch has shown me contract of December 5, 1901, for construction of launch and also your letter to him of the 8th inst., in which you say that the yacht 'Helen' has been sold by your company to a Mr. Pungs. By the terms of the agreement the yacht 'Helen' is to be loaned to Mr. Busch free of charge until the completion of the boat contracted for, and as a security for the payment made on account of the 'Helen' contract and to be made under contract of December 5, 1901. The information that the 'Helen' is not your property has caused Mr. Busch to feel insecure, both as to the money already advanced and that required to be paid by the terms of the contract of December. You will at once appreciate that Mr. Busch ought to have ample security for money he has paid you and is called upon to pay under his contract. In view of the fact that he now seems to be without security, I write you as his attorney to say that you must in some way provide indemnity against any loss, in the event of the new boat proving unsatisfactory or not, being in compliance with the contract. Even though you were the owner of the 'Helen' and Mr. Busch might regard it as his property should you fail to complete the new boat the security in the 'Helen' is quite inadequate for $6,375 which Mr. Busch is required to pay before the new boat is delivered. Please acknowledge receipt and advise what your company is willing to do under the circumstances.

'Yours very truly, C. L. Cole."

To this defendant replied under date of February 24, 1902, as follows:

"Detroit, Mich., February 24, 1902.

"Mr. C. L. Cole, Atlantic City, N. J.—Dear Sir: Replying to your favor of the 20th inst., will say that the launch 'Helen' was not furnished Mr. Busch

as security in any sense of the word. Mr. Busch's is in the new boat we are now building for him. His contract is plain and a duplicate of all contracts we make for boats. Mr. Busch has no reason to feel insecure about the title of the 'Helen,' because he has no interest in her whatever. Mr. Busch asked for no security when he signed the contract and we gave him none. We never had such a proposition presented to us before, although we have built a great many boats. We are under no obligation whatever to furnish Mr. Busch any further security than we are furnishing him in the boat we are building for him. We have asked for no payment on this boat until it was due and until there was more money in the boat than Mr. Busch has furnished. We ask that you please read this contract again and see if you have not made a mistake in assuming that we ever agreed to furnish Mr. Busch any other security than the boat we are building for him. Yours truly.

"Dic. H. A. W.

"P. S. A payment on this boat has been due since some time in January and Mr. Busch's treatment of this part of the contract has been very dilatory. He sent a representative here to examine the condition of the boat and was to remit us the payment after receiving this report. It is now a week since his representative reported and we have every reason to believe that the report was favorable."

This did not satisfy Mr. Busch, who, on advice of counsel, persisted in his refusal to make the payment due and refused payment of a draft drawn for the installment so due.

Thereupon defendants wired him under date of February 27, 1902: "All work on your boat is stopped, waiting the fulfillment of your part of the contract." There was evidence tending to show that defendants kept the unfinished boat in condition when payment of second installment was refused for about one year, and then disposed of it to another purchaser at the best price obtainable at a loss exceeding the amount received from plaintiff as an advance payment.

Upon the conclusion of all the evidence the trial judge instructed the jury to return a verdict for the advance payment made by plaintiff, with interest.

Dwight W. Rexford, for plaintiffs in error.

S. T. Douglas, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

The case in short is this:

The defendants agreed to supply materials, machinery, etc., and build and deliver by June 1, 1902, a completed launch, with a guaranteed speed of 16 miles, to be constructed according to plans and specifications. The plaintiff agreed to pay for such boat the sum of $8,500, of which $2,125 was to be paid down, the balance in installments as the work progressed. The second installment he agreed to pay when the boat was planked and ready for inside finish. When that stage of the work was reached and this second installment was due, he refused to make the payment unless the defendants would give security for their performance of the agreement or pay back the money received as the work should progress. That the Helen was never intended to stand as a security for the completion of the boat contracted for according to contract or for the return of the installments paid if she failed to develop the guaranteed speed or come up to the substantial terms of the contract otherwise is not a matter of

serious doubt. There is no word in the agreement which squints that way. The Helen was to be a "loan" without rent. The consideration for her use was part of the price to be paid for the launch contracted for. If the purpose was that she was to stand as a security, it is extraordinary that no intimation of the intent is found in the long and elaborate agreement between the parties. The refusal to comply with the distinct agreement to pay an installment of $2,125 when the boat was planked and ready for inside work, unless the defendants would give a security they were not obliged to give, was in substance and effect a refusal to carry out the agreement unless the defendants would add a new term to the contract.

But the learned counsel say that, if the plaintiff was in error in refusing to pay this installment unless a satisfactory security was given him, it was not conduct evidencing an intention to abandon the contract, and did not, therefore, justify defendants in their refusal to complete the boat. In short, that the breach was not such a breach as set the defendants free. It must be conceded that even in the case of a single or entire contract, such as this was, when articles are deliverable or payments to be made in installments, that the mere failure to deliver or receive an installment or to pay an installment of the price may not by itself evince an intention no longer to be bound by the contract.

In Freeth v. Burr, L. R. 9, C. P. 208, 213, Lord Coleridge said:

"The real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of or an intention to abandon and altogether to refuse performance of the contract. * * * Now, nonpayment on the one hand, or nondelivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and let the other party free."

When the question is whether one party is relieved from the performance of his part of the contract by the conduct of the other in failing to make a payment when it was due, we must look to all of the circumstances of the case to see whether that conduct amounts to an out and out refusal to perform the contract. This is the substance of what is said in Withers v. Reynolds, 2 B. & Ad. 882, 885; Freeth v. Burr, cited above; Mersey Steel Co. v. Naylor, L. R. 9, App. Cases 434, 438; Norrington v. Wright, 115 U. S. 188, 210, 6 Sup. Ct. 12, 29 L. Ed. 366, and by this court in Cherry Valley Iron Works v. Florence Iron Co., 64 Fed. 569, 572, 12 C. C. A. 306, and in Monarch Cycle Co. v. Roger Wheel Co., 105 Fed. 324, 44 C. C. A. 523. Mere nonpayment of an installment when due is an element of importance, and in some circumstances may evince a renunciation of the contract. But this case, as shown by the correspondence and other evidence, was not a simple case of omission to pay as the plaintiff was bound to do, but was a positive refusal to perform the contract upon his part unless the defendants would give him a security they were under no obligation to give. That he was willing to have the contract carried out if the defendants would accede to his terms and do what they were not obliged to do does not help the case but only serves to emphasize his determination not to carry out the contract as it was writ-

ten, and justified the defendants in treating the plaintiff as having renounced the agreement.

In Withers v. Reynolds, cited above, the agreement was to deliver straw at 33 shillings per load; the purchaser agreeing "to pay 33 shillings per load for each load of straw so delivered on his premises from this day until January 24th." The straw was delivered regularly, but defendant fell behind for several loads. Payment was demanded. Defendant tendered the price of all the straw except the last load, saying "he should always keep one load in hand." The defendant objected to this, but at length accepted what was offered, and then told plaintiff he would send no more straw unless it was paid for on delivery. No more was sent, and plaintiff sued in assumpsit for not delivering pursuant to agreement. Lord Tenterden said:

"I am of the opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of nonpayment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is whether upon the plaintiff's saying, 'I will not pay for the goods on delivery' (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so."

Withers v. Reynolds has never been overruled. It was followed in Bloomer v. Bernstein, L. R. 9, C. P. 588, when the effect of a failure to pay for an installment of goods on delivery by reason of insolvency was considered. It was followed again in Stephenson v. Cady, 117 Mass. 6. In the latter case there were separate contracts for the sale of goods made on different days and deliverable at different times, price payable on delivery. The purchaser refused to pay for the goods delivered under the first contract unless the seller would give him security for the performance upon his part of the other contracts. The seller thereupon refused to make other deliveries, and was sued for damages. The Massachusetts court held the refusal to pay for the goods delivered unless the seller would give security for the entire fulfillment of the contract was enough to justify the seller in refusing to make further deliveries. Among other things, that court said:

"It was a refusal to execute a substantial part of the agreement; and an attempt, by holding on to the property without payment, to impose an onerous condition not contemplated by the original contract, and to which the defendant was not required to submit, so long as he was without default. It was something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments. It was prospective in its character, and was made with notice that such refusal would be regarded as releasing the defendant from all obligation to fulfill. Conduct less decisive has been held to justify nonperformance by the other party to the contract."

West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791, does not refer to or distinguish either Withers v. Reynolds or Stephenson v. Cady, and must rest upon its own special facts which are quite unlike the evidence here relied upon to show that the conduct of the

plaintiff was such as to evince a refusal to perform the contract upon his part.

It follows that the court erred in instructing a verdict for the plaintiff. The defendants were at liberty to treat the contract as broken in a material part, and might refuse to further perform and recover damages, for the loss sustained by such renunciation of the contract by Busch.

The refusal to go on and finish the boat under such circumstances would not constitute a technical rescission of the contract, but, as stated in Anvil Mining Co. v. Humble, 153 U. S. 540, 552, 14 Sup. Ct. 876, 38 L. Ed. 814, by Justice Brewer, would be "merely an acceptance of the situation which the wrongdoing of the other party has brought about." To same effect is our own case of Cherry Valley Co. v. Florence Iron Co., 64 Fed. 569, 573, 12 C. C. A. 306.

While the plaintiff cannot recover upon the contract, he may under the common counts recover the money paid by him in part performance to the extent that his payment was beneficial to the defendants and in excess of the damages they have sustained by reason of plaintiff having breached the contract. If the defendants have obtained money which ex æquo et bono they ought not to withhold from the plaintiff, they should refund, and the law implies a promise to that effect. Murphy v. Craig, 76 Mich. 155, 42 N. W. 1097; Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Wilson v. Wagar, 26 Mich. 452.

If the defendants had sued the plaintiff for breach of the contract, as they might well have done, the measure of damages would have been, first, their outlay and expense in carrying the work as far as they did before the plaintiff set them free, less the value of the structure as far as completed and materials, machinery, etc., bought solely to carry out this contract; second, the profits they would have realized if permitted to complete the boat; third, the value of the use of the Helen while in possession of the plaintiff under the contract. From this should be deducted the money received from the plaintiff on account of the contract. United States v. Behan, 110 U. S. 339, 4 Sup. Ct. 81, 28 L. Ed. 168; Anvil Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; McElwee v. Bridgeport Improvement Co., 54 Fed. 627, 629, 4 C. C. A. 525. The defendants did not sue, but have been sued by the plaintiff for the money paid by him in part performance. In justice the defendants have no right to more of this money than will compensate them against loss by reason of plaintiff's conduct. His action is therefore one upon the common counts for money received under an implied promise to pay back that which is in excess of the loss sustained by the defendants by reason of plaintiff's refusal to carry out the contract. It is in the nature of an action upon a quantum meruit.

Instead of having done labor or furnished materials in part performance from which the defendants have benefited, he has furnished money, and it is now well established that a plaintiff may recover to the extent that he has benefited the defendant by part performance of a contract which the plaintiff himself has failed to carry out; his recovery being subject to recoupment by the damages sustained by the defendant. Cherry Valley Iron Co. v. Florence Iron River Co.,

64 Fed. 569, 574, 12 C. C. A. 306; McDonough v. Evans Marble Co., 112 Fed. 634, 637, 50 C. C. A. 403; Clark v. Moore, 3 Mich. 55, 58; Wilson v. Wagar, 26 Mich. 452; Ward v. Fellers, 3 Mich. 281.

In Cherry Valley Iron Co. v. Florence Iron Co., the plaintiff had himself broken a contract for the purchase of a large quantity of iron ore. But he had paid for more ore than he had received. This court, speaking by Judge Severens, sustained an action by him to recover the money he had paid in excess of ore delivered to him. Upon this point the court said:

"The position of the parties, therefore, is this: The plaintiff is entitled to recover the amount which it has paid in excess of the contract price of the quantity of ore actually delivered, and the defendant was entitled to recover, by way of counterclaim, the damages which it had sustained from the plaintiff's breach of the contract," etc.

In McDonough v. Evans Marble Co., cited above, we said:

"The rule is that a party who has failed to perform his contract in full may recover compensation for the part performed, less the damages occasioned by his failure."

There was evidence tending to show that the Sintz Engine Company, one of the defendants, had substantially absorbed and acquired the property of the other defendant, the Michigan Yacht Company, when the contract involved was made, but that the contract was signed by both companies. There was also evidence that long after the breach of the contract in suit, and long after the defendants had disposed of the unfinished launch to another customer at a great loss, the Sintz Engine Company made a chattel mortgage to Mr. Wm. A. Pungs, and that the property described in that instrument was sold in a foreclosure proceeding on October 1, 1904, and bought by Pungs. Among the matters so sold and purchased were the "book accounts and bills receivable owing to said Sintz Engine Company."

Upon this state of facts the plaintiff below insisted that the money paid by plaintiff in part performance could not be diminished or effected by any damages or loss sustained by the defendants, because, as claimed, they "had parted with all their claims, accounts and property of every description," and "could not recoup damages in this action from this plaintiff." If we assume that the right of action which defendants had to sue for the loss sustained by them by reason of the plaintiff's breach of his contract passed to Pungs under an assignment which included "book accounts and bills receivable," it is clear that such a chose in action would pass subject to a credit for the $2,125 received by defendants on account of plaintiff's part performance. To that extent the defendants may be said to have been already indemnified. Section 10,054, Comp. Laws of Michigan 1897, expressly provides if that were ever necessary that the assignee of a nonnegotiable chose takes subject to every defense which existed before notice of assignment. Or, if the effect of the assignment under which Pungs holds the assets of the Sintz Engine Company was to pass the contract for the construction of this boat for plaintiff, the assignee would take it subject to every defense which the plaintiff could have made if the assignor had sued for a breach. One of these

defenses would be to recoup any recovery for a breach by the amount paid in performance. 3 Page on Contracts, § 1269; 25 Am. & Eng. Ency. (2d Ed.) 529.

This being the case, it must follow that if the assignor of a contract, not negotiable, be sued, as here, upon the common counts, in assumpsit, for benefits received by him, that the limit of such recovery must be, where the plaintiff himself breached the contract, the excess of benefit received over the damage sustained by reason of the plaintiff's nonfulfillment of the agreement. This reduction of the amount otherwise recoverable is by way of recoupment. That it exists in favor of the defendants here we have no doubt, regardless of any assignment of the contract out of which plaintiff's right of action grows. The assignors cannot escape liability for the amount equitably due to the plaintiff by the assignment, nor can the plaintiff prevent a reduction of his nominal claim by application of the doctrine of recoupment as distinguished from set-off. Recoupment in its truest sense means a right of deduction from the amount of the plaintiff's claim by reason of either a payment thereon or some loss sustained by the defendant by reason of the plaintiff's wrongful or defective performance of the contract out of which his claim originated. It has been defined to be "a keeping back of something which is due because there is an equitable reason for withholding it." Ives v. Van Epps, 22 Wend. (N. Y.) 155; Ward v. Fellers, 3 Mich. 281, 291; Wheat v. Dotson, 12 Ark. 699, 702. The word is nearly if not quite synonymous with discount or deduction or reduction. 2 Pars. on Contracts (7th Ed.) 880; Hatchett v. Gibson, 13 Ala. 587, 595.

It is accordingly well settled that, when one party brings suit to recover under a contract or upon the common counts for work and labor done or money paid to or for his benefit, the defendant may show that the plaintiff has himself broken the agreement and prove his damages for such breach, and thus cut down or wholly extinguish the plaintiff's claim. 25 Am. & Eng. Ency. Law, 549; Railroad Company v. Smith, 21 Wall. 258, 262, 22 L. Ed. 513; Allen v. McKibbin, 5 Mich. 449; Cushman Telephone Co. v. Noble, 98 Mich. 67, 56 N. W. 1100; Porter v. Woods, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153. In the case last cited the Tennessee court said:

"After the rescission and abandonment of a special agreement compensation for partial performance may be recovered, equal to, and limited by, the value and extent of the benefit conferred. And therefore the defendant in such action, in the second place, is entitled, by the very statement of the principle with its proper limitation, to abate the recovery of the plaintiff by the damages he has sustained on account of the nonperformance of the plaintiff's portion of the agreement. For the plaintiff himself being entitled to recover, not on the ground of his performance of the special agreement, but for valuable materials furnished, or beneficial services rendered, and only to the extent of benefit conferred on the defendant, the defendant must be entitled in abatement, and in ascertaining the extent of such benefit, to such damages as in a cross-action by him against the plaintiff he ought to recover for the nonperformance by the other of his portion of the agreement."

The court therefore erred in excluding evidence of the damages sustained by the defendants through the plaintiff's breach of the contract out of which the plaintiff's claim arose.

Reverse for a new trial.

SHELLABERGER v. FISHER.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1906.)

No. 2,251.

1. CARRIERS—AUTOMATIC ELEVATOR—ABSENCE OF OPERATOR NOT ACTIONABLE BY PASSENGER OF ORDINARY DISCRETION.
   The operation of an automatic, push-button, electrical passenger elevator is not negligence which is actionable by any passenger except a child of years so tender that he cannot know the danger and appreciate the risk of his contact with the door or side of the shaft when the car is moving, because a passenger of sufficient maturity and discretion to appreciate this danger and risk would be guilty of contributory negligence if he permitted himself to suffer from it.

2. SAME—ABSENCE OF OPERATOR MAY BE ACTIONABLE BY CHILD OF TENDER YEARS—FACTS.
   The operation of such an elevator to carry passengers without an operator in an apartment building where several children under 10 years of age lived, and used it, in a city in which the duty to employ an operator was imposed by ordinance and the failure to discharge this duty was made a misdemeanor, constitutes sufficient evidence of negligence actionable by a child between 5 and 6 years of age, who was injured while running the elevator by getting her leg caught between the floor of the car and the second floor of the building as the car ascended, to warrant the submission of the question of negligence and the question, whether or not such negligence was the proximate cause of the injury, to a jury.

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CHILD TOO YOUNG TO APPRECIATE HER RISK NOT GUILTY OF.
   A child of years so tender that he cannot understand or appreciate the risk he runs is not chargeable with the duty to avoid it, and hence is not guilty of contributory negligence, if he fails to do so. The duty of an infant is commensurate with his maturity and capacity.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 121–129.]

4. CARRIERS—NEGLIGENCE—OWNER OF PASSENGER ELEVATOR OWES HIGHEST DEGREE OF CARE.
   Owners and operators of passenger elevators owe to their passengers the duty to exercise the highest degree of care for their safe transportation.
   [Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1092, 1194.]

5. NEGLIGENCE—VIOLATION OF ORDINANCE IMPOSING DUTY OF CARE REBUTTABLE EVIDENCE OF NEGLIGENCE.
   The violation of a duty of care imposed by a valid ordinance or law constitutes rebuttable evidence of negligence.
   [Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 220.]

(Syllabus by the Court.)

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

Clifford Histed (James H. Harkless and Charles S. Crysler, on the brief), for plaintiff in error.

R. R. Brewster (C. E. Burnham, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. In February or March, 1904, the defendant below purchased an apartment house in Kansas City in which there was an automatic, push-button, electrical passenger elevator, which had been installed by the former owner of the property and was used to transport the tenants to and from their rooms. From November, 1903, until two or three weeks after the defendant bought the property, this elevator was in charge of an operator; but he left at the latter time and thereafter the tenants operated the elevator themselves. Dorothy Fisher, the plaintiff, was a child between five and six years of age who had lived in one of the apartments in this house with her parents from November, 1903. On May 13, 1904, although she had been forbidden so to do by her parents, she entered the car of the elevator at the first floor and pushed the button to cause it to ascend to the second floor. As it rose one of her legs was caught and crushed between the floor of the car and the second floor of the building. She sued and recovered a judgment of $4,500 against the defendant for causal negligence in that the latter failed to employ any one to guard and operate the elevator. This writ of error was sued out to reverse this judgment.

The class of elevators of which this was one was conceived and introduced to avoid the danger and expense of an operator. Elevators of this type had been placed in operation in various parts of the country during the five years preceding the date of this accident. At the time of the accident several hundred of them were in operation, some in apartment houses, some in private residences and some in mercantile establishments. They were thought to be particularly desirable for apartment houses and private residences. They were ordinarily used without operators, but the latter were sometimes employed in business houses during the hours when many people were using the elevators. The elevator on which the accident happened was a perfect one of its type. The car itself had no door, but at the opening in the elevator shaft at each landing there was a collapsible door of vertical iron rods one-half inch in width and three inches apart when the door was closed. The car was immovable unless these doors were closed and locked and none of the doors could be unlocked or opened while the car was moving. There was a push-button at each landing and pressure upon this button would cause the car to come to that landing. One who desired to use it would push back the door, enter the elevator and close the door again. Within the car there was a push-button for each floor and the pressure upon any button would cause the car to move to and stop at the corresponding floor. There was a lever by means of which the car could be stopped between the floors. The lever and all these push-buttons were within reach of the plaintiff, and she knew how to operate the car. The space between the floor of the car and the door of the shaft when closed was 2½ inches and the space between the floor of the car and the second floor of the building was 1½ inches. Several children who were less than 10 years old lived in the apartment house in which this elevator was situated. It was naturally alluring to them and they had sometimes played with and operated it. There was

an ordinance in force in Kansas City which declared it to be the duty of every person who used or operated any elevator, except hand-power elevators, to employ a competent person over 16 years of age to operate it, and which made a failure to discharge that duty a misdemeanor. Upon this state of facts the court below denied a motion of the defendant at the close of the evidence to instruct the jury to return a verdict in her favor, and this ruling is her chief ground of complaint.

The first reason why this ruling should be reversed which her counsel present is that its affirmance will constitute a judicial declaration that the operation of any automatic, push-button, electrical passenger elevator without an operator constitutes negligence and will render futile all the labor and ingenuity which have perfected this admirable machine for the express purpose of dispensing with the operator. The evidence in this case does not invoke a decision of this nature. The only danger from the operation of this elevator which the evidence disclosed was that of impact between the passenger and the closed door or side of the shaft while the car was moving. This danger was obvious to a person of ordinary discretion and intelligence. No one but a child of tender years could fail to know and to appreciate the risk of such a contact or could fail to be guilty of contributory negligence if he permitted himself to suffer from it. Therefore, the failure to employ an operator for an elevator of this character is not actionable by any passenger except a child of years so tender that he cannot know and appreciate the risk of his contact with the door or side of the shaft when the car is moving. The case in hand falls under an exception to the general rule because the ordinance of Kansas City imposed the duty to employ an operator upon the defendant and made her failure to do so evidence of actionable negligence for the consideration of the jury (Hayes v. Michigan Central R. Co., 111 U. S. 228, 236, 241, 4 Sup. Ct. 369, 28 L. Ed. 410; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 419, 12 Sup. Ct. 679, 36 L. Ed. 485; Northern Pacific R. Co. v. Sullivan, 3 C. C. A. 506, 514, 517, 53 Fed. 219, 221, 224) and because the plaintiff was too young to appreciate the risk she ran and the law in the absence of the ordinance charged the defendant with the duty to exercise reasonable care to protect such a child from any obvious danger to which the defendant exposed her. In Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, a child six years of age who lived three-quarters of a mile distant from a railroad turntable was injured while operating it with two other boys, 9 and 10 years of age, without right or license, and the Supreme Court sustained a judgment against the company on the ground that it owed to these children the duty to use reasonable care to fasten or otherwise guard an article so attractive to children in such a way that they might not operate it and injure themselves thereby. To the same effect is Keffe v. Milwaukee & St. Paul, Ry. Co., 21 Minn. 207, 212, 18 Am. Rep. 393, where the Supreme Court of Minnesota, speaking of the railroad company, said:

"When it sets before young children a temptation which it has reason to believe will lead them into danger it must use ordinary care to protect them from harm."

An automatic elevator is not a less enticing plaything and a landlord who furnishes the former for the use of a tenant and his family owes a much higher duty to one of his children than a railroad company owes to a trespassing boy. Owners and operators of elevators owe to their passengers the duty to exercise the highest degree of care for their safe transportation. Mitchell v. Marker, 10 C. C. A. 306, 309, 62 Fed. 139, 142, 25 L. R. A. 33; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, 196.

Two other reasons why the court should have directed a verdict for the defendant are urged, that the plaintiff assumed the risk of the use of the elevator and that the failure to employ an operator was not the proximate cause of her injury. The doctrine of assumption of risk is not applicable to this case because the relation of master and servant did not exist between the parties and the child was not guilty of contributory negligence because she did not possess the maturity or capacity to know the danger or to appreciate the risk to which she was exposed and therefore she was not chargeable with any legal duty to avoid it. The duty of an infant is commensurate with her age and discretion. Railroad Co. v. Stout, 17 Wall. 657, 660, 21 L. Ed. 745; Johnson v. St. Paul City Ry. Co., 67 Minn. 260, 262, 69 N. W. 900, 36 L. R. A. 586.

Nor does it conclusively appear from the evidence that the absence of the operator was not the proximate cause of the accident. It was the duty of the court at the close of the evidence with reference to this question of proximate cause, as it was with reference to every other question of fact or of mixed law and fact, to consider and determine whether or not there was any substantial evidence from which the jury could lawfully infer that the failure to employ an operator was the proximate cause of the injury, and to withdraw this question from the jury if they were not warranted in reaching the conclusion that the lack of the operator was the proximate cause of the accident. But if there was evidence from which they might lawfully reach this conclusion, the question of proximate cause was for the jury. An injury that is the natural and probable consequence of an act of negligence is actionable and such an act is the proximate cause of the injury. But an injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not the proximate cause of it. In view of the established facts that the city council of Kansas City had foreseen danger from the operation of an elevator without a competent employé to guard and direct it and had imposed the duty to employ one, that this elevator was easily operated and made an enticing plaything for children, that the plaintiff's parents had anticipated harm to her from her attempt to use it and had forbidden it, that she was not six years of age and there were several children of tender years in the house who would naturally play upon and about this elevator, and that the former owner of the building had employed an operator, this case was not without evidence from which the jury might lawfully find that a person of ordinary prudence and intelligence in the situation of the defendant would have foreseen an injury of the nature which the plaintiff sustained as the natural and probable consequence of a failure to continue

an operator in charge of the elevator. The question for the jury was not whether or not the absence of an operator was the active cause, but whether or not it was the cause without which the injury would not have taken place, for this is the legal meaning of proximate cause in this connection. In Hayes v. Michigan Central R. Co., 111 U. S. 228, 241, 4 Sup. Ct. 369, 28 L. Ed. 410, and Williams v. Great Western Ry. Co., L. R. 9 Excheq. 157, 162, the failure to construct a fence was held to be the proximate cause of an injury, and in the latter case it was said:

"There are many supposable circumstances under which the accident may have happened and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required, is to warn people of what is before them and to make them pause before reaching a dangerous place like a railroad."

The conclusion of the jury that the leg of this child would not have been caught between the floor of the car and the second floor of the building if there had been a competent operator in charge of the elevator is neither unsupported by the evidence nor irrational, and the refusal of the court to direct them to find otherwise was not error.

The court instructed the jury that it was for them, taking into consideration all the facts and circumstances of the case, to determine what a reasonable and prudent person would have done under the circumstances disclosed by the evidence, that if the defendant's conduct came up to that standard, she was free from negligence, and if it did not she was guilty of it, but that their decision of this question was not to be the product of their private or personal judgment, but of their judgment illuminated by the evidence in the case, that among other considerations which ought to have weight with them was the practice of reasonable and prudent men in the same business and that they should judge the defendant's conduct by the situation at the house where she maintained the elevator. This portion of the charge is specified as error on the ground that it left the jury to exercise their own judgment in determining what a reasonable man would have done under the circumstances of the defendant when they should have been instructed that the measure of what such a man would have done was that which the evidence disclosed that reasonably prudent men ordinarily had done in similar circumstances. No request for an instruction in these terms, however, was made by counsel for the defendant. Such a request would doubtless have been granted if it had been preferred. Nevertheless, the charge fairly called the attention of the jury to the evidence of what other prudent persons had done and directed them to consider it. In the absence of a request for a more specific instruction this part of the charge is not vulnerable to any just criticism. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Charnock v. Texas & Pac. R. Co., 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057; Southern Pacific Co. v. Hetzer, 68 C. C. A. 26, 38, 135 Fed. 272, 284.

The charge of the court that the jury might consider the ease with which the elevator could be started, that a child could start it as well as an adult, and that the building was to be inhabited by children

as well as adults, in determining whether a reasonably prudent person would have employed an operator, is assigned as error. But it was not such and it is sustained by the turntable cases which have been reviewed in an earlier part of this opinion.

Finally, counsel specify as error the fact that the court permitted these questions to be answered:

"Q. Doctor, does it ordinarily happen in the experience of the medical profession, that there may be an injury to one part of the body accompanied by a severe nervous shock, and the nerves in another part of the body be injured? A. Most assuredly. Q. Doctor, I will ask you to state to the jury if it ordinarily happens in the experience of the medical profession that the shock to the nervous system where there is an accident is more severe where no physical injury exists, than where one does exist. A. It is often our experience. We often, where there is no bruise at all on the body, no signs of an injury, find that there is an injury from the shock."

But this ruling could not possibly have prejudiced the defendant because the witness who gave these answers had already testified without exception that the shock would ordinarily impair the nervous system; that there was a reflex injury to the nerve centers and that it was reasonably certain that this reflex action would tend to injure the substance of the nerve centers themselves, and in the case in hand there were crushed flesh and a broken bone, and if the answer to the second question be true it constitutes evidence that the plaintiff was less seriously affected by the accident than she would have been if she had received a nervous shock without bruise or break.

Error without prejudice is no ground for reversal. The judgment below must be affirmed.

And it is so ordered.

THE NOTTINGHAM. THE BARGE NO. 7. CENTRAL R. CO. OF NEW JERSEY v. PENDLETON.

(Circuit Court of Appeals, First Circuit. January 26, 1906.)

No. 585.

COLLISION—SCHOONER AND BARGE IN TOW—INEFFICIENT LOOKOUT.

Evidence considered, and *held* to establish fault on the part of a tug and her tow and a schooner for a collision in Nantucket Sound at night between the schooner and tow while on nearly parallel opposite courses—the tug in running too near the easterly side of the channel, unduly crowding the schooner, which was to the eastward and near shoal water, and in not sooner discovering the schooner's lights; the tow in failing to keep a proper lookout or to change her wheel when collision was imminent; and the schooner in failing to see the lights on the tow, and negligently taking a course which brought her upon a bell buoy and made a further change of course necessary.

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

La Roy S. Gove (James J. Macklin and Edward S. Dodge, on the brief), for appellant.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The schooner Levi Hart and barge No. 7, second in tow of the steamtug Nottingham, were in collision about 10 p. m. on April 20, 1904, north of Pollock Rip Lightship and near the bell buoy on the easterly side of Pollock Rip Slue. The schooner and her cargo of coal were a total loss. The night was cloudy, but otherwise clear; the wind moderate and northerly, if not due north. The tide at or near the bell buoy was running northeast, about two knots an hour. The schooner was on a south-southwest course, with her booms well off on her port side, going about six miles an hour through the water, and about four miles an hour over the ground. Her course brought her close to the bell buoy, near which her master says he intended to go in order to give the tow a chance to get by.

The evidence from the tug and barges as to their course is not consistent or satisfactory. The answer filed June 21, 1904, alleged that the Nottingham was proceeding according to law on the easterly side of the channel. Tingle, the master of the Nottingham, says that he was on the westerly side; that when rounding buoy No. 2, near the Pollock Rip Lightship, he passed about fifty feet from it; that he straightened the tow out, and when the Nottingham was abreast of the bell buoy he first made out the green light of the Hart, and that he then had Pollock Rip Shoal Lightship bearing north-northeast, and was steering north by compass. He had at that time taken no precaution for keeping out of the way of the schooner.

The tow was made up as follows: Nottingham, hawser more than 1,000 feet; Wilkesbarre, hawser 900 feet; barge No. 7, hawser 900 feet; barge No. 5—in all, more than 3,500 feet in length; the bow of barge No. 7 being about 2,000 feet from the stern of the tug.

The sunken wreck of the Hart is marked by a buoy, described in the local notice to mariners as "placed at the entrance of Pollock Rip Slue, Nantucket Sound, Mass., Pollock Rip Bell Buoy being about 300 yds. N. ⅜ E." The schooner lies somewhat to the east of the buoy.

Making due allowance for drift and other causes which might have carried the Hart from the place of collision, it seems highly probable that barge No. 7 was about 900 feet south of the bell buoy, and the Nottingham little, if any, more than 1,100 feet to the north of the bell buoy, when the collision occurred. The speed of the tug and tow, assisted by the tide, was about 6 miles an hour. The schooner passed both the tug and the Wilkesbarre, the first barge, by a safe clearance, though, according to the captain and wheelsman of the Wilkesbarre, the schooner's course seemed to be converging upon that of the tow. This convergence, we think, does not indicate any change by the Hart from her south-southwest course. The exact location of barge No. 7 with reference to the Wilkesbarre and the line of tow at this time is a matter of doubt.

It is the contention of the claimant that the barges were all straight in line after the tug, that the tug was steering north by the compass, and that each of the barges was held up stiffly on a starboard wheel, and that the resultant course was north-northeast. Capt. Hanson, of barge No. 7, and Capt. Jones, of the Wilkesbarre, however, say that,

while on their course and straight in line with the tug, Pollock Rip Lightship bore nearly right ahead. This testimony is more consistent with the drawing of the sails of the barges in a northerly wind than is the testimony of Capt. Tingle, of the tug. If both accounts can be reconciled, it is upon the view that the tow, from the time she passed the lower lightship, was heading on a north-northeast course, directly towards the Pollock Rip Shoals Lightship, and close to the bell buoy, which she intended to leave on her starboard side by a narrow margin, and that Capt. Tingle, of the Nottingham, upon discovering the green light of the Hart when abreast of the bell buoy, made an attempt to give her more room by bearing off two points to the north, thus bringing the northerly lightship two points on his starboard bow. This would account for the fact that the tug cleared the Hart by a larger margin than that between her and the Wilkesbarre, as seems to be agreed, and would tend to show that, at the time of the collision, barge No. 7 was more to the east than either the tug or the first barge.

If, on the other hand, we should accept the view that the Nottingham's compass course was north, and that the barges followed straight in line with the stern light of the tug, then the courses were converging, and barge No. 7 probably farther to the east than the tug, which had passed the point of intersection when she made the schooner's green light.

But, whether the courses of the tow and schooner were nearly parallel, and both close to bell buoy, or slightly converging, we are of the opinion that the tug was at fault in running too near the easterly side of the channel and to the bell buoy. Considering the shoals to the eastward of the bell buoy, we think the tug gave the schooner but little chance to maneuver, and was at fault in not making an earlier discovery of the schooner's lights, and in not making an earlier attempt to perform her duty of keeping out of the schooner's way.

We are further of the opinion that barge No. 7 was at fault, in that she kept no proper lookout, did not observe the schooner's movements, and therefore made no attempt to change her wheel when a collision was imminent. While this probably would not have averted a collision, it seems a reasonable probability that the blow would have been lessened, and a possibility that the loss of the schooner might have been avoided.

The schooner came upon the hawser, broke it, and the bow of barge No. 7 struck the schooner's port quarter, cutting deeply in, so that she immediately began to fill and sank within a few minutes.

The more difficult question is as to the alleged faults of the schooner in her maneuvers immediately preceding the collision. Though the libel alleges that the schooner held her course, it is conceded by those on board that she did not do so; and there are some discrepancies in the evidence from the Hart as to when her wheel was changed, and as to the reasons for the change.

The Hart, just prior to the collision with barge No. 7, struck the bell buoy near the mizzen rigging on the port side. The master of the Hart says no change of the wheel had been made previous to this time; that upon striking the buoy, his wheel was first rolled hard

up in order to throw the schooner's stern to windward, so that the bell buoy would not sweep away the boat on the stern davits; that she fell off from a point to a point and a half to the eastward, or to port; that he then first saw the barge No. 7, without lights, coming in under his lee, possibly once and a half his vessel's length away, heading about for the schooner's main rigging; that he then ordered the wheel hard down, seeing that there was then no chance to keep off clear of the barge; that his vessel did not swing to starboard, and was heading about south half west when the collision occurred.

It is claimed by the Hart that the barge was without lights, and no lights were observed on the barge by witnesses on the Hart or upon the schooner McCann, which was following her on a similar course but slightly to the eastward.

Upon the whole evidence as to the lights upon barge No. 7, we are of the opinion that the positive testimony that the lights were burning, in connection with the probability of the observance of this legal duty, outweighs the testimony of nonobservance of the lights. Though those on the Hart had not observed the green light on barge No. 5, it was seen by the McCann in time to enable her to avoid barge No. 5 by going to the east. Moreover, there is some reason for thinking that the lights of barges No. 7 and No. 5 may have been observed by the Hart before she struck the bell buoy.

According to Burghardt, the wheelsman of the Hart, the wheel was put up before reaching the bell buoy in order to avoid the tow, and was hard up when the bell buoy was struck, and was then put down to avoid the bell buoy. It seems more probable that the Hart was brought in contact with the bell buoy by a change of course to the eastward in an attempt to avoid the tow which was crowding her, than that her compass course, taken without regard to the presence of the tow, would have brought her so far to the east as to strike the bell buoy.

We think, however, that if in fact the lights of barges No. 7 and No. 5 were not seen from the schooner, this was clearly a fault; and as the evidence from the Hart is so strongly to the effect that she did not see the lights, we must find her in fault in that particular.

We are unable to accept the view that, even after the Hart had put up her wheel so that she was heading south half west, the barge was under the schooner's lee, heading for the main rigging on her port side. We are of the opinion that such a relative position of the vessels immediately before the collision is more reasonably accounted for upon the theory that the schooner's wheel was put hard down upon striking the bell buoy, as Burghardt says it was, bringing her head back to her south-southwest course and possibly even further to the west. Hanson, master of barge No. 7, testifies that Pendleton, master of the Hart, immediately after the collision, explained the accident by saying that he thought he didn't have room enough, that the tug was too far over to the eastward, that he was too close to the bell buoy and had to haul out, and thought he would stand across between the two barges and break the hawser.

That the Hart, in clear water and while on a course well to the

westward of the bell buoy, would voluntarily have luffed across a hawser between two barges seems so extreme and unreasonable a view that we cannot adopt it. Even had the Hart failed to observe the second and third barges, there would have been no reason for a change of course of the Hart if the tow was as far to the westward as Capt. Tingle places it.

While there is reason to think that the Hart did in fact see the barges, and was crowded so far to the east that she gave way until she struck the bell buoy, and, in consequence, chose to go to the westward and risk the danger of crossing the hawser rather than risk the danger of the shoals to the east, she is not entitled to the benefit of such a finding in the face of her strong proofs to the contrary. Her own proofs compel us to find that she negligently took a course so far to the eastward that it brought her upon the bell buoy; that her lookout was in fault for a failure to discover the bell buoy and the barges No. 7 and No. 5; that she maneuvered in ignorance of the barges, and discovered them when it was too late to make any effective movements to avoid them.

We are of the opinion, however, that the faults of the schooner do not relieve the tug and barge No. 7 from the consequences of their own faults. While the schooner did not hold her course, it is probable that, had she done so, she would still have come into collision with a tow, and had she gone farther to the east she was in some danger of jibing and going on the shoals. The Mary McCann, which was some three or four hundred feet to the eastward, avoided the last barge of the tow by a narrow margin, going easterly over the shoals. While there is a doubt whether the Hart would have cleared the tow, it was her duty to be diligent in her attempt to do so, and, having failed in this duty, she must be held in part responsible.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to apportion to each party one-half of the damages and of the interest thereon, and one-half of the costs in the District Court; and the appellant recovers its costs of appeal.

CHICAGO, M. & ST. P. RY. CO. v. LINDEMAN.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1906.)

No. 2,257.

1. CUSTOMS AND USAGES—CUSTOM MUST BE UNIFORM, CERTAIN, KNOWN, OR NOTORIOUS—FACTS HELD INSUFFICIENT TO ESTABLISH.

A custom must be uniform, certain, and known, or so notorious that a person of ordinary prudence, in the exercise of reasonable care, dealing with its subject, would have been aware of it.

Where the plaintiff's witnesses testify that there was a custom of doing an act in a certain way and that they followed this custom, and defendant's witnesses testify that they performed the act at the same place during the same time in another way, and no witness contradicts the testimony of the latter or testifies that the alleged custom mentioned by the plaintiff's witnesses was either uniform or universal, it is held that the evidence is insufficient to warrant a finding by a jury

that the alleged custom was uniform, and hence the question of its existence should not have been submitted to them.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, §§ 5, 23, 24.]

2. DAMAGES—FUTURE PAIN MUST BE REASONABLY CERTAIN TO AUTHORIZE RECOVERY—THOSE WHICH MAY RESULT ARE NOT RECOVERABLE.

The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such pain and other evil effects as are reasonably certain to result from it. Possible, even probable, future effects are too remote and speculative to form the basis of legal recovery.

A charge that the plaintiff may recover damages for pain and suffering which may result from the injury in the future is erroneous.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 55–57, 552.]

(Syllabus by the Court.)

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

Frank Hagerman (H. H. Field and Burton Hanson, on the brief), for plaintiff in error.

W. F. Guthrie (L. C. Boyle, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. In the yards of the defendant below at Kansas City, Mo., there was a level platform 15 feet above the ground and 217 feet long and a trestle 293 feet long upon a grade of $5^3/_{10}$ per cent. which extended from the platform to the ground. On this platform and trestle there was a railroad which extended into the yards and was connected with other railroads. A short distance from the foot of the incline there was a switch, by means of which an engine or a car could be turned from the railroad track which extended from the platform past the switch into the yard. The platform and trestle were constructed and used for the purpose of unloading coal from cars into chutes provided for that purpose. Two empty coal cars stood upon the platform which the yardmaster had directed the plaintiff below and three of his fellow servants to "drop" down from the platform into the yard. Empty cars were "dropped" in this way: An engine was coupled to the cars which drew them out over the summit of the incline to such an extent that they could be held there by their brakes, but would, when the brakes were released, be drawn down the incline and sent along the track into the yard by gravity. When cars had been drawn to the proper place, the engine was uncoupled, moved down the incline, and sent upon another track by means of the switch, and as soon as the engine had passed the switch was closed, notice was given to the field brakeman upon the cars who released the brakes, and the cars were then dropped down the incline and passed out into the yard.

On May 23, 1903, Gage, the engineer, Smith, a switchman, whose place was upon the engine, and the plaintiff, whose station was on the top of the cars, undertook to drop two cars into the yard. The engine was coupled to them, drew them upon the summit of the in-

cline, stopped and was uncoupled, the plaintiff set one brake on the leading car, and notified the switchman, Smith, upon the engine to take it away. The engineer and Smith started the engine slowly down the incline, but the brake upon the car did not hold them, and they followed the engine. As soon as Smith saw that the cars were coming he signaled to the engineer to stop, and he did so. Meanwhile the plaintiff, who had been standing on the top of the leading car, had started toward the rear car to set another brake, and as he was stepping from one car to the other they struck the engine and he was thrown between the cars by the impact and injured. He sought to recover damages of the company for the negligence of Gage and Smith under the statute of Missouri which charges railroad companies with liability for the carelessness of fellow servants. His principal charge was that they violated a custom of stopping the engine after it was uncoupled and had moved from two to four feet away from the cars and holding it there until the question whether or not the brakes would hold the cars was determined by actual trial. The defendant denied the existence of this alleged custom, and the evidence upon this issue was this: The plaintiff testified that he had assisted in dropping cars from the platform 15 or 20 times and that such a custom existed. Metler, who had been foreman of the switching crew in the yard for many years, testified in this way:

"Q. Who cuts the engine off from the cars? A. The man following the engine. The engine slacks away, and he sits in sight there.
"Q. Who? A. The man following the engine.
"Q. What does he sit there for? A. Watching the cars.
"Q. What does the engine do during this time? A. It slacks ahead and stops.
"How far does it slack ahead? A. Three or four feet.
"Q. I will get you to state, whether this thing is done the same way day and night—or different. A. The same way day and night."

On the other hand, Smith, the switchman, testified that he probably had taken cars down this incline 50 or 75 times, that the engine never stopped after it was uncoupled at any time when he was assisting, but that it went on slowly down the incline unless the cars started. Gage, the engineer, testified that he had taken cars down from this platform four or five times and had seen them dropped frequently, that every time he had ever seen it done the engine was uncoupled and then taken slowly down the incline, and that he moved it in the usual way at the time of the accident. Fitzgerald, another engineer, testified that he had worked in the yards six or seven years, that he estimated that he had taken cars down from that platform 2,000 or 3,000 times, and that he never stopped his engine after uncoupling, and never knew it to be stopped unless the brakes on the cars failed to hold. Williams, a foreman of a switching crew, who had worked in this yard 12 years and had assisted to take cars down from this platform probably 500 times, testified that he never knew an engine to stop on the incline after it was uncoupled unless the cars started. Black, an engineer, testified that he had worked four or five years in the yards and had taken cars down from that

platform several hundred times, that he had pulled the empties out over the summit of the incline so that they would run down, then cut the engine off and had gone down; that he had seen the engine catch cars which came down when the brakes did not hold; but that he could not remember of ever stopping to see whether or not the brakes would hold.

The court charged the jury that if they found from this evidence that there was a uniform custom for the engineer to move his engine after it was uncoupled a short distance in front of the leading car and then wait and ascertain whether or not the brakes held, and, if they did not, to receive the impact of the cars, and, if they did hold, then to proceed on out of the way of the cars, and that the engineer, Gage, and the switchman, Smith, violated this custom at the time of the accident, they were guilty of negligence which, if causal, might entitle the plaintiff to a recovery. An exception was taken to this ruling, and it is specified as error. A custom has the force of law, and furnishes a standard for the measurement of many of the rights and acts of men. It must be certain or the measurements by this standard will be unequal and unjust. It must be uniform; for, if it vary, it furnishes no rule by which to mete. It must be known, or must be so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates and who exercises reasonable care would be ignorant of it; for no man may be justly condemned for the violation of a law or a custom which he neither knows nor ought to know. In short, a binding custom must be certain, definite, uniform, and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care. U. S. v. Buchanan, 8 How. 83, 102, 103, 12 L. Ed. 997; Bowling v. Harrison, 6 How. 248, 259, 12 L. Ed. 425; Collings v. Hope, Fed. Cas. No. 3,003; Parrott v. Thacher, 9 Pick. (Mass.) 426, 431; York v. Wistar, Fed. Cas. No. 18,141; Greenwich Ins. Co. v. Waterman, 54 Fed. 839, 842, 4 C. C. A. 600, 603; Robinson v. U. S., 13 Wall. 363, 366, 20 L. Ed. 653; Jones v. Hoey, 128 Mass. 585, 587.

The record in this case fails to disclose substantial evidence of one of the elements of a custom of this nature—its uniformity. Two witnesses, one of whom had taken cars down from this platform only 15 or 20 times, testified that there was such a custom, and that cars had been dropped in conformity to it. Neither of them testified that this custom either uniformly or universally prevailed, or that there was not a custom equally well established to drop them without stopping the engine after it was uncoupled to ascertain whether or not the brakes would hold the cars. Five witnesses testified that they had taken cars down from this platform thousands of times and that they had never stopped an engine or seen it stopped on the incline after it was uncoupled unless the cars started and it stopped to catch them, and that they neither knew nor followed the alleged custom of the plaintiff's witnesses. No one came to contradict the testimony of any of these five witnesses or to say that they had not taken down cars without stopping the engine upon the incline in the way and to the extent to which they had testified. The result

was uncontradicted evidence that the custom to which the witnesses for the plaintiff testified was not uniform, and hence that it was not binding. Moreover, because it was not shown to be uniform it had not that notoriety which could charge the engineer and the switchman with notice of it, and as there was no evidence that they were actually aware of it the proof of the custom failed to show the knowledge or notoriety sufficient to sustain the custom. The question of the existence of the custom should not have been submitted to the jury.

Another specification of error is that the court instructed the jury that the plaintiff was entitled to recover for such pain and suffering caused by the injury as he "may in the future suffer." In Chicago & N. W. Ry. Co. v. De Clow, 124 Fed. 142, 143, 145, 61 C. C. A. 34, 35, 37, in which this court had occasion to consider the rule applicable to this question, it said:

"The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects of the act as are reasonably certain to result from it. Possible, even probable, future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident, they are but a part of that damnum absque injuria which reaches too far into the realm of conjecture to form any part of the basis of an action at law. Filer v. N. Y. Central R. R. Co., 49 N. Y. 42, 45; Curtis v. R. & S. R. R. Co., 18 N. Y. 534, 542, 75 Am. Dec. 258; Fry v. Railway Co., 45 Iowa, 416, 417; White v. Milwaukee City Ry. Co., 61 Wis. 536, 541, 21 N. W. 524, 50 Am. Rep. 154; Block v. Milwaukee St. R. Co., 89 Wis. 371, 380, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360, 368, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; Ford v. City of Des Moines, 106 Iowa, 94, 97, 75 N. W. 630; Chicago, R. I. & Pac. R. Co. v. McDowell (Neb.) 92 N. W. 121."

The charge of the court upon this subject was not in accord with this rule, and the judgment below must accordingly be reversed. and the case remanded to the court below with instructions to grant a new trial.

JOHNSON v. MUTUAL BENEFIT LIFE INS. CO., INC., OF NEWARK, N. J.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1906.)

No. 2,144.

1. INSURANCE—CONSTRUCTION OF LIFE POLICY—DATE OF EXPIRATION BY LAPSE.
An application for life insurance made in December requested that the annual premiums should become due November 11th each year and gave the applicant's age as 44. His forty-fourth birthday was the nearest on November 11th, but his forty-fifth was nearest counting from the date of the application or of the policy, which was issued on January 15th following. The first year's premium was then paid in full but the next was made payable on the following November 11th, and was then paid and the succeeding ones on the same date each year. On each payment a receipt was given and accepted providing that the policy was thereby continued in force for one year from that date. The annual premiums on such a policy were each about $8 less when a person was insured at the age of 44 than when at the age of 45, and this policy was written at the lower rate. By its terms it was to lapse at once on the failure to pay any premium when due, but it contained a nonforfeiture clause by which in the event of a lapse the net reserve to

its credit was to be applied to the purchase of paid up insurance in the same amount for such term as the sum would pay for. After paying three premiums the insured made default, and subsequently died. Whether or not the extended term insurance, applying to its purchase the sum credited to the policy by the company, was in force at the time of his death depended on whether the policy lapsed and the term commenced on November 11th, when the default occurred or on January 15th, three years after its date. *Held*, that it was the evident intention of the parties that the yearly terms of the policy should commence and end on November 11th each year, and that the lapse took effect on that date when the default occurred, the consideration to the insured for the shortening of the first year being the lower premium rate he secured by being accepted as of the age of 44.

2. SAME—RIGHT TO CREDIT BY DIVIDENDS—EFFECT OF LAPSE.
In January preceding the lapse of the policy the directors of the insurance company adopted a resolution appropriating a gross sum of money to the payment of dividends on all participating policies which should be "continued in force on their anniversaries" in that calendar year, and a certain part of such sum was apportioned to the policy of the insured. *Held*, that the anniversary of the policy was on the ensuing November 11th, and because of its lapse on that date it was not entitled under such resolution to participate in the dividend.

3. SAME—SETTLEMENT OF INTEREST CHARGE AGAINST POLICY HOLDER—IMPEACHMENT.
A settlement of an interest charge on a preceding premium loan made between an insured and the company at the time a premium was paid cannot be impeached or opened after the death of the insured, in the absence of any showing of fraud or mistake.

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

This was an action by the administratrix of the estate of Frank C. Johnson, deceased, to recover upon a contract of extended insurance arising under the nonforfeiture provisions of a policy upon the life of the deceased after his default in the payment of the premium. The insured was born May 12, 1846, and when his application for the policy was made, December 24, 1890, and when his policy was issued and dated, January 15, 1891, he would have been 45 years of age at his nearest birthday. His application, which was made a part of the policy, contained the direction "Premiums payable November 11th, age 44." On November 11, 1890, his nearest birthday was his forty-fourth. The premium rate of the company at the age of 44 was $179.70, and at the age of 45 was $187.10. The policy, which was for $5,000, recited that the age of the insured was 44, that the annual premium rate was $179.70, that the first premium had been paid, and that the succeeding premiums should be paid on or before the 11th day of November in every year during the continuance of the policy. The course of premium settlement adopted by the parties was the payment by the insured of 70 per cent. of the annual premium in cash and the making of a loan for the remainder bearing interest at 6 per cent. Shortly before the 11th of each succeeding November until the insured made default, the company sent him a statement in which he was charged with the entire amount of the annual premium then about to mature, with the amount of the then outstanding premium loan and the interest thereon to the approaching 11th of November. In this statement he was tentatively credited with the payment of 70 per cent. of the annual premium, also with the dividend declared for the current year and with the balance which was carried as the new premium loan. An accompanying notice required him to pay in cash the 70 per cent. of the premium about to mature and advised him that upon such payment a renewal receipt would be forwarded. When the settlement and payment was made upon this basis a renewal receipt was sent him continuing his policy in force for one year.

It was provided in the policy that upon default in the payment of any premium when due the policy should cease and determine, subject, however, to certain specified nonforfeiture provisions. These provisions, which did not become effective unless payment of two full annual premiums had been made, presented two alternatives to the insured. One of these need not be further noticed as its selection required the affirmative action of the insured and that action was not taken. The other provided that upon lapse of the policy for nonpayment of any premium after two had been paid the entire net reserve of the policy less indebtedness of the insured thereon should be applied to the purchase of paid up nonparticipating term insurance. The insured paid or settled for three annual premiums including the one at the issue of the policy, but he defaulted in the payment of the one which matured November 11, 1893; the policy therefore lapsed and the nonforfeiture provisions above referred to operated to secure to the insured an extension of the insurance in the full amount of the policy but for a limited term. The insured died September 28, 1896. The plaintiff as administratrix of his estate and as such being the beneficiary in the policy, presented proofs of death and upon nonpayment by the company brought action upon the theory that the term of the extended insurance had not expired when the insured died. The company in defending claimed that the extended term had expired before the death of the insured. A jury was waived and the Circuit Court found for the company upon the pleadings and the evidence and entered judgment accordingly. This writ of error was then obtained.

John P. Breen, for plaintiff in error.

Warren Switzler, for defendant in error.

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

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

The question in this case is whether the extended insurance was in force at the death of the insured, and this in turn depends upon the ascertainment of the date from which the period thereof should be calculated, whether November 11, 1893, or January 15, 1894, and also upon the amount of the credit of the insured applicable to the purchase of such insurance under the nonforfeiture provisions of his policy. The administratrix contends that although the insured made default in the payment of the premium due November 11, 1893, nevertheless the last premium paid by him continued the life of the policy until January 15, 1894, the anniversary of its date, and therefore the period of extended insurance commenced on that day and did not expire until after the death of the insured.

The policy of insurance was issued and dated January 15, 1891, and one annual premium was then paid. The due date for the payment of subsequent premiums was fixed in the policy for the 11th day of November in each year, thus making the due date for the second premium November 11, 1891. When the application for the policy was made on December 24, 1890, and when the policy was issued, the nearest birthday of the insured was his forty-fifth. On the 11th of November, 1890, the forty-fourth birthday of the insured was the nearest by one day. The annual premium rate of the company at the age of 44 was $179.70, while the rate at the age of 45 was $187.10. In his application the insured requested that the policy be issued to him as of the age of 44 and that the premiums be made payable

November 11th. This direction was observed in the policy; the age of the insured was recited as being 44, the premium as being $179.70, and the due date thereof as being the 11th of November in each year during the continuance of the policy. That both the insured and the company regarded the first premium payment as carrying the policy only to the 11th of November, 1891, and not to the 15th of the following January, is conclusively shown by their subsequent course of dealing. Shortly prior to the 11th of November, 1891, the company sent to the insured a notice of the approaching maturity of the second premium containing a requirement that 70 per cent. be paid in cash and a statement indicating the balance to be carried as new premium loan after crediting the payment and a dividend declared by the company. The premium was settled in this way, and the insured received and retained a receipt dated November 11, 1891, setting forth the transaction in detail and providing that his policy was thereby "continued in force for one year from date, settlement of the premium having been made as per margin." The same course was pursued in the settlement of the premium due November 11, 1892, and the receipt of that date contained a similar provision continuing the policy in force for one year thereafter. Default was made in the payment of the premium due November 11, 1893. In view of all of these things we are unable to sustain the contention of the administratrix that the premium payments continued the policy in full force until the 15th of January, 1894. Such a construction is irreconcilable with that which the unambiguous conduct of the parties shows that they adopted for their own guidance. It is not of vital importance to determine their motives in the adjustment of the premium payments, but it is fairly inferable, unless we shut our eyes and ignore well-known methods employed in the insurance business, that the rule of the company was to regard the age of the applicant for insurance as being that at his nearest birthday, and that as the insured desired to obtain a lower premium rate, which was to endure during the life of the policy, he was willing to allow his first premium payment to cover a short period anterior to the date of his policy so that he might be accepted as of the age of 44.

The case of McMaster v. Insurance Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, upon which counsel rely, is not in point. There the request that the policies when issued be antedated was inserted in the application by the agent of the company for his own private purpose without the knowledge or consent of the insured, and after his signature had been obtained to the application. The policies subsequently issued provided that the due date of future premiums should correspond with the earlier date of the application, but this was neither desired nor authorized by the insured nor was he cognizant of it. On the contrary, when the policies were delivered to the insured untrue representations were made to him as to their purport in this particular. Methvin v. Life Ass'n, 58 Pac. 387, also relied upon, was decided by a department of the Supreme Court of California, but upon rehearing by the court in banc a contrary conclusion was reached and views were announced adverse to those pressed upon us by counsel. Methvin v. Life Ass'n, 129 Cal. 251, 61 Pac. 1112.

The administratrix also contends that if the insured had been properly credited with a certain dividend declared by the company the net reserve of his policy after deducting his indebtedness would have been sufficient to purchase term insurance extending beyond the time of his death. Thirty per cent. of each annual premium was carried by the company as premium loan to the insured at 6 per cent. interest. On the premium days there were credited against these loans the dividends declared by the company and apportioned to the policy of the insured; and the balance remaining on November 11, 1893, was indebtedness of the insured to be deducted from the net reserve of his policy to ascertain the amount applicable as a single premium to the purchase of term insurance. On January 30, 1893, the directors of the company adopted a resolution apportioning a gross sum of money "to the payment of dividends for the years 1892-1893 on all participating policies which shall be continued in force upon their anniversaries in 1893 according to the rules of the company and the computation of the mathematical department made in pursuance of instructions of the board." Of this gross dividend $40.60 was apportioned to the policy of the insured. The contention is that this amount should have been credited on January 30, 1893. The company claims (1) that under the terms of the resolution the insured was not entitled to tnis credit at all because his policy was not continued in force upon its true anniversary in 1893; or (2) that if the right to credit existed it should not be given until the premium settlement day in November. The dividend contemplated by the resolution was applicable only to participating policies and to those which should be continued in force upon their anniversaries in 1893. The true anniversary of the policy in question was November 11, 1893. At that time it ceased and determined as a participating policy because of default in the premium, and the limited term insurance which then automatically arose was of a nonparticipating character. But even if the insured was entitled to the dividend, it is clear that it was proper to give the credit in November, not in January. This course was pursued at the premium settlements of November 11, 1891, and November 11, 1892, when he was credited with the dividends of 1891 and 1892, respectively, and nothing to the contrary appearing, it must be presumed that it was in accord with the rules of the company, the instructions of the board of directors, and the views of the insured himself.

The remaining contention which need be noticed is that there was an interest overcharge of 58 cents at the premium settlement of November 11, 1891, a full year's interest having been charged on the preceding premium loan instead of for a period from January 15th to the 11th of November; also that had this overcharge not been made the balance of net reserve at the lapse in 1893 would have purchased term insurance extending beyond the hour of the death of the insured though expiring on the same day. It is sufficient to say that this settlement was made by the parties themselves, and remained unchallenged and unquestioned for years. In the absence of fraud or mistake, it will not now be opened up for the purpose of adding to

the term of insurance. For aught that appears the charge was part of the price paid by the insured for the lesser premium rate.

The judgment of the Circuit Court is affirmed.

THE CITY OF SAN ANTONIO.

(Circuit Court of Appeals, Fourth Circuit. January 6, 1906.)

No. 605.

1. SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL.

Libelant was employed as a stevedore in discharging a barge loaded with stone into buckets in the hold, which were then drawn up by means of a winch and unloaded into cars. A gangwayman stationed at the hatchway gave the signal to the winchman, who was furnished by the barge, whose duty it was to apply the steam gradually so that the workmen below could guide the bucket through the hatchway without its striking the sides. At the time in question he turned on the steam suddenly and the bucket was thrown against the coaming on one side with such violence that when it rebounded the rope broke and the bucket fell upon, and injured libelant. No negligence was shown on the part of the stevedores or gangwayman who were fellow servants of the libelant. *Held*, that the injury was due solely to the negligence of the winchman, for which the vessel was liable.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, §§ 349-351.]

2. DAMAGES—PERSONAL INJURY—REASONABLENESS OF AWARD.

An award of $1,750, for an injury to a stevedore who was steady and industrious, *held* not excessive where the injury was serious and probably permanent.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 372.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Admiralty.

For opinion below, see 135 Fed. 879.

T. A. Williams, for appellant.

Edward R. Baird, Jr., for appellee.

Before PRITCHARD, Circuit Judge, and MORRIS and PURNELL, District Judges.

MORRIS, District Judge. This is a libel in rem to recover damages for injuries sustained by the libelant, Andrew Williams, a stevedore who was working in the hold of the barge City San Antonio, while she was lying in the port of Norfolk discharging a cargo of crushed stone. The barge was in a dock between two piers at Lambert's Point with her bow to the river and her port side next to the wharf. The crushed stone was being taken out in buckets holding about half a ton, which were hoisted to the deck by a steam winch, and swung over to railroad cars on the pier. The barge had an intermediate deck, the crushed stone between the main deck and the between deck had been discharged, and the stevedores were working in the hold below the between deck and under the after hatch. Sufficient crushed stone had been taken out of the hold to make a pit nearly to the bottom of the hold and to

leave for a little extent around the edges of the hatch a space of about three feet between the top of the stone and the between deck.

There were four men working in the hold in pairs, two on the inshore or port side and two on the offshore or starboard side. Williams, the libelant, and his partner were on the port side and had filled their bucket ready to be hoisted. A gangwayman, who was a fellow workman with the libelant, was stationed on the upper deck just aft of the hatch opening, whose business it was to give signals to direct the operation of the winch by the winchman, who was not a fellow workman with libelant, but was an employé of the owner of the barge, who was stationed where he could not see down into the hatchway where the stevedores were working. The libelant's bucket having been filled and ready to be hoisted, the libelant and his partner attached to the ring on the handle of the bucket the two falls by which it was to be raised, and by the slackening one of which and the tightening the other the bucket could be swung inshore over the cars on the wharf and there emptied. The filled bucket was resting a little to the port side of the hatch opening and when properly hoisted the slack of the falls should be taken up slowly until they are taut and there is a moderate strain on the bucket, and then as it slowly starts the stevedores guide it towards the center of the opening and it goes up without striking against the hatch coamings on either side.

On this occasion the winchman started the steam winch too violently and jerked the bucket away from the stevedores, causing it to swing over to the offshore or starboard side, where as it ascended it struck against the between deck hatch coaming. The violent strain broke the offshore fall and the bucket swung back to the inshore side and struck the libelant. The libelant, to escape the falling bucket, sought shelter under the between deck, but there was only room to obtain protection for his head and shoulders. The bucket came down on the lower part of his body and seriously injured his hip and thigh.

These facts, which were found by the district judge, could not under the evidence be seriously controverted. The agreement of the owner of the barge was to furnish a competent winchman, and the barge owner was responsible for his defaults. The Slingsby, 120 Fed. 748, 57 C. C. A. 52; The Lisnacrieve (D. C.) 87 Fed. 570. It is clear from the testimony that the winchman provided was not careful and competent and that the power was applied to the winch by him, not slowly and properly, as is customary, but recklessly and violently. The defense relied upon by the owners of the barge, and urged in the argument, is that although the action of the winchman may have been negligent and improper, yet if he had been warned by the gangwayman that the bucket had started to swing across the hatch opening he would have shut off the steam and stopped the winch before the bucket struck the offshore coaming and that therefore the immediate fault, which was the direct cause of the accident, was the failure of the gangwayman, who was a fellow servant with the libelant, to give a timely warning to the winchman. This contention was held by the district judge not to be supported by the proof. We entirely agree with his finding.

The only witness offered by the respondent, who had any knowledge

of the occurrence, was the winchman himself. His statement is that he got the usual signal to go ahead, that he started his engine slowly, and the next thing he saw was that the fall had parted. He does not state that he could have shut off the steam, if he had got a signal, in time to have prevented the bucket from striking against the coaming, or that he looked to the gangwayman for such a signal, and he offered no explanation whatever of the actual occurrence. There is no testimony anywhere in the record tending to show that the gangwayman could have seen that the bucket was going to swing against the coaming in time to give a signal which would have enabled the winchman to shut off the steam and prevent the occurrence. The depth of the hold under the between decks was only from 8 to 10 feet and as the bucket on being snatched up violently from the port side swung rapidly to starboard, it is simply a guess to say that upon notice being given to him the winchman could have shut off the power in time to prevent the bucket striking the starboard coaming. No witness so testifies, and it does not seem probable. We think, under the proofs, the district judge was fully justified in holding that the proximate cause of the accident was the want of care and skill on the part of the winchman, and that the accident was the natural and probable consequence of his act of negligence. Chic. &c R'way Co. v. Chambers, 68 Fed. 148, 153, 15 C. C. A. 327.

The appellant contends also that the allowance of $1,750 as damages for the injuries sustained by the libelant was excessive, having regard to his earnings. The libelant was a steady reliable man and had been a stevedore from 8 to 10 years in the service of the same employers. His injuries were serious and probably permanent. The district judge saw the man and his physical condition. There is nothing in the amount that suggests that the sum allowed him is excessive.

Decree affirmed.

In re HURLBUTT, HATCH & CO.

(Circuit Court of Appeals, Second Circuit. February 1, 1906.)

No. 221.

BANKRUPTCY—LIQUIDATION OF CLAIM.

Evidence considered, and *held* not to sustain the contention of a claimant that certain stocks owned by him were converted by the bankrupts, and his claim for the value of the stocks, which remained in the bankrupts' hands, liquidated.

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

In Bankruptcy. On report of referee.

See 135 Fed. 504.

The following is the opinion of William Allen, referee, after hearing testimony for the purpose of liquidating claim of James M. Quigley:

"On the 12th day of July, 1904, James M. Quigley filed in the office of the undersigned a proof of debt in which he claims for conversion of certain securities the amount of $13,503.80 to be due him from the bankrupts. On the 4th day of April, 1905, objections were filed by the trustee to said claim, hearings were had upon due notice, and testimony taken for the purpose of liquidating said claim. On the 13th day of July, 1903, Hurlbutt, Hatch & Co. demanded from James M. Quigley additional margin for the aforesaid securities, under penalty of a sale at the market. On the morning of the 14th day of July, 1903, James M. Quigley called upon Hurlbutt, Hatch & Co., and an agreement was made for the transfer on that day of his entire account to H. I. Judson & Co. Hurlbutt, Hatch & Co., in accordance with this agreement, delivered to Judson & Co. the bulk of the securities, with the exception of the following: 800 shares T. O. & U. Pd.; 10 shares Peoria & Eastern Maine Bonds; 200 shares B. & O.—before 3 o'clock on the 14th day of July. H. I. Judson, the senior member of the firm of H. I. Judson & Co., when informed of the transaction, immediately instructed Mr. Saltonstall, the manager of the house, who had full charge of the aforesaid transaction, to refuse to receive the undelivered securities and criticised him for having entered into any such agreement; thereupon Mr. Saltonstall called up the office of Hurlbutt, Hatch & Co., and refused to receive the undelivered securities. It is claimed by Mr. Quigley that this refusal occurred about 5 or 10 minutes after 3 o'clock in the afternoon; as a matter of fact, the evidence shows that the refusal to receive the stock was made prior to 3 o'clock. H. I. Judson & Co. refused to receive the balance of said securities and thereby rendered it impossible for Hurlbutt, Hatch & Co. to carry out their contract; the securities undelivered were, on the 14th day of July, 1903, in their possession or subject to their control, and they were prepared to deliver them on that day, pursuant to their agreement. It must be remembered that about this time a panic existed in Wall street, and the evidence contains an admission of Mr. Judson that one of his reasons for refusing to receive the balance of the securities was the rapid decline in values, and it is only too apparent that this was the sole reason for stopping the delivery. Assuming that the bankrupts had agreed to deliver at 3 (which, as a matter of fact, they did not), and omitted to deliver the balance of the securities on or before the stroke of 3, and that they were able to deliver them within a reasonable time that day, there would have been only a breach of contract, and only nominal damages could be justified. The agreement, as a matter of fact, was to deliver during the day, and they were prevented from so doing by the refusal of Mr. Judson to accept delivery.

In my opinion, the contention of Mr. Quigley that these undelivered securities were converted is not borne out by the testimony. The testimony

shows that Hurlbutt, Hatch & Co. were at all times ready to deliver the securities and that the reason the securities were not delivered was the refusal of Mr. Judson to accept the same, which refusal was occasioned by the decline in stocks heretofore mentioned. There being no conversion of the securities, the sum due Mr. Quigley should be liquidated, in accordance with the situation on the 5th day of April, 1903, the day on which the petition in bankruptcy was filed. On that day the situation was as follows: Mr. Quigley was indebted to Hurlbutt, Hatch & Co. in the sum of $7,090.62; that being the balance remaining after crediting him with intermediate sales. Against this indebtedness the bankrupts hold 100 shares T. O. & U. Pd., and 10 shares Peoria Bonds; the value of the 100 shares T. O. & U. Pd. on August 5th, 1903, was $2,600, and the value of the 10 shares Peoria Bonds $5,800, in all $8,400. There was therefore a surplus in favor of Mr. Quigley amounting to $1,309.38; there was also $800 extra coupons on the Peoria Bonds. The total balance in his favor on the date of the bankruptcy was, therefore, $2,109.38.

I therefore find that the claim herein should be liquidated at the sum of $2,109.38; that upon a surrender of the securities held by the claimant he should be allowed to participate in the dividends hereafter to be declared, and that in the event of his failure to surrender such securities he shall be entitled to participate in such dividends to the extent of any deficiency that may result after exhausting his securities.

Let an order be entered herein pursuant to the above opinion."

The following is the opinion of Adams, District Judge, on the proceeding to review the order of the referee in bankruptcy:

This is a proceeding to review an order of the Referee in bankruptcy, who has liquidated a claim of James M. Quigley in the sum of $2,109.38, disallowing the remainder of the claim of $13,503.80, on various shares of the claimant's stock, described as follows: 800 shares T. O. U. preferred, 200 B. &. O., and 10 Income Bonds of the Peoria & Eastern Railroad Company. It is alleged by the claimant that the securities were converted by the bankrupts and that the damages allowed are entirely insufficient to recompense the claimant for the injury that he has sustained. The Referee, after a full consideration of the testimony, has held that there was no conversion but that the securities were duly on hand and ready for delivery, and that on this day a panic existed in Wall street, causing a rapid decline in the values of stocks, and it was for such reason that the firm of H. I. Judson & Company, then representing the claimant, refused to receive these stocks, which were the remainder of a large quantity being carried for Quigley by the bankrupts, the others having been turned over by the latter during the day, after an adjustment of accounts relating to them. Having determined that there had been no conversion, the Referee proceeded to liquidate the claimant's account, with the above result.

The matter has been very elaborately argued by the parties, on the hearing and in briefs, and many points have been raised by the claimant, but it does not seem necessary to consider them in detail, as I am satisfied that a just result has been reached. The gist of the Referee's decision is found in the latter part of his order, which correctly, it seems to me, determines the question of conversion.

The report is confirmed. The claimant's motion to strike out a portion of the Referee's order, based on the order obtained from me July 24, 1905, relating to the statement with reference to liquidating Quigley's claim, is denied. The eight questions certified by the Referee are answered in the negative.

G. R. Roe, for appellant.

B. N. Cardozo, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Order affirmed upon opinions of the referee and district judge.

CLARK v. DOERR et al.

(Circuit Court of Appeals, Fifth Circuit. March 6, 1906. Rehearing Denied April 3, 1906.)

No. 1,451.

WRIT OF ERROR—TIME FOR SUING OUT—EXTENSION BY AGREEMENT.

The time within which a writ of error must be sued out under Act March 3, 1891, c. 517, 26 Stat. 829, § 11 [U. S. Comp. St. 1901, p. 547], which provides that no writ of error shall be sued out, except within six months after the entry of judgment, cannot be extended by agreement.

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

Paul A. Sompayrac, for plaintiff in error.
A. P. Pujo and C. D. Moss, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A motion is made to dismiss this writ of error, because not sued out within six months from the entry of the final judgment in the Circuit Court. On trial before a jury in that court at Opelousas, La., a verdict was rendered May 17, 1904, and on the 23d day of May, 1904, a judgment upon the verdict was read and signed in open court at Alexandria, La., and this is the only judgment found in the transcript. On October 14, 1904, a petition for writ of error accompanied with assignments of error to review a judgment rendered May 17, 1904, was filed. On November 14, 1905, the following agreement appears to have been made:

"United States Circuit Court for Western District of Louisiana.

" W. H. F. Doerr vs. John W. Downs et al. No. 259.

"It is hereby agreed between E. M. Clark, one of the defendants and plaintiff and trustee in the above-styled case that the remittitur filed May 19th, and the judgment signed and filed May 19, 1904, shall be withdrawn and constitute no part of the record and that the judgment signed on May 23, 1904, on the verdict of the jury in this case shall be the judgment herein. However, E. M. Clark does not acquiesce in said judgment and reserves the right to have the same reversed.

"Pujo & Moss,
"Attorneys for Doerr and Trustee.
"Sompayrac & Toomer,
"Attorneys for E. M. Clark."

On the 11th day of March another agreement appears to have been made:

"United States Circuit Court for Western District of Louisiana.

"W. H. F. Doerr vs. John W. Downs et al. No. 259. Action at Law.

"Whereas, action was filed in above-entitled case for writ of error that would be also a supersedeas, together with bond; and, whereas, certain objections were made by the court to the form of the bond: Now, therefore, it is agreed between plaintiffs and defendant, E. M. Clark, that said Clark shall have the right of filing a bond, in accordance with the require-

ments of the above-entitled court, and the writ of error and supersedeas applied for by said Clark when granted shall have the same effect as if filed in time and accepted by the court.

"Pujo & Moss,
"Attys. for Doerr & Trustee.
"Sompayrac & Toomer,
"Attys. for E. M. Clark."

On March 11, 1905, a writ of error referring to no particular judgment was allowed and filed in the Circuit Court. On the same day bond for supersedeas was accepted, reciting therein: "Whereas lately at Opelousas," etc., "a judgment was rendered," etc., but giving no date for the same. In the citation in error no reference is made to the date or place of the judgment to be reviewed. The act constituting this court (Act March 3, 1891, c. 517, 26 Stat. 829, § 11 [U S. Comp. St. 1901, p. 547]) provides as follows:

"No appeal or writ of error from which any order, judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the judgment, order or decree sought to be reviewed."

According to this statute the writ of error in this case, whether intended to review the judgment alleged to have been rendered at Opelousas or the judgment rendered at Alexandria, was sued out too late to give this court jurisdiction, unless the time in which to sue out the writ of error was extended by the agreements between the parties above referred to. The agreement of November 14, 1904, was made within the six months in which the writ of error could have been sued out; but it does not in terms nor by any proper implication agree to extend the time for suing out a writ of error. The agreement of the 11th of March, 1905, is an agreement which can be construed as a consent that the writ of error sued out on that day shall have the same effect as if sued out within six months from the date of the judgment. It is considered settled that to give the appellate court jurisdiction of a writ of error the writ must be issued and filed with the court below within the time prescribed by law, and this requirement cannot be waived by the parties. See Stevens v. Clark, 62 Fed. 323, 10 C. C. A. 379, and authorities there cited.

The Supreme Court in The Lucy, 8 Wall. 307, 309, 19 L. Ed. 394, says:

"No consent of counsel can give jurisdiction. Appellate jurisdiction depends upon the Constitution and the acts of Congress. When these do not confer it, the courts of the United States cannot exercise it."

And see Mills v. Brown, 16 Pet. 525, 527, 10 L. Ed. 1055; Kelsey v. Forsyth, 21 How. 85, 16 L. Ed. 32; Ballance v. Forsyth, 21 How. 389, 16 L. Ed. 143.

If we assume, therefore, that the agreement of March 11th was an agreed extension of the time within which to sue out a writ of error, we must still hold that it was ineffectual for the purpose of giving this court jurisdiction.

The writ of error is dismissed.

HANAWAY et al. v. GUARANTEE SAVINGS, LOAN & INVESTMENT CO.

(Circuit Court of Appeals, Fifth Circuit. March 13, 1906. Rehearing Denied April 6, 1906.)

No. 1,519.

WRIT OF ERROR—RECORD—QUESTIONS REVIEWABLE.

Where an application for new trial was based on matters of fact aliunde the record, and on alleged errors not incorporated in the record by any bill of exceptions seasonably taken, the question whether plaintiff in error is entitled to a new trial on the grounds alleged is not open to review.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2416.]

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

Jas. E. Cockrell and Edward Gray, for plaintiffs in error.

Lewis M. Dabney, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges find that the only question presented for review on this writ is whether or not the plaintiff in error is entitled to have a new trial on the grounds alleged in the motion filed in the court below. The application for a new trial was based upon matters of fact aliunde the record, and upon alleged errors on the trial not incorporated in the record by any bill of exception seasonably taken on the trial.

The question presented is not open to review in this court. See Henderson v. Moore, 5 Cranch, 11, 3 L. Ed. 22; Wilson v. Everett, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286; Ætna Life Ins. Co. v. Ward, 140 U. S. 91, 11 Sup. Ct. 730, 35 L. Ed. 371; Moore v. United States, 150 U. S. 61, 14 Sup. Ct. 26, 37 L. Ed. 996.

Judgment affirmed.

ALLGAIR v. WILLIAM F. FISHER & CO.

(Circuit Court of Appeals, Third Circuit. February 28, 1906.)

No. 49.

1. BANKRUPTCY—REVIEW OF ORDER OF REFEREE—JURISDICTION OF COURT.

Where, pending action by a district court on a petition to review an order of a referee, a preliminary order was made by consent of all parties in interest, permitting certain creditors to also become petitioners, the jurisdiction of the court to set aside the order of the referee cannot be questioned on the ground that the original petitioner had no standing to make the application for review.

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

2. SAME—ORDER AUTHORIZING PRIVATE SALE OF PROPERTY—NECESSITY OF NOTICE.

Where the time fixed in an order by a referee authorizing a private sale of the property of a bankrupt at a specified upset price had expired without a sale having been made, notice to creditors and others

Interested was essential before the making of a new order of sale, and such an order, and a further order confirming a private sale made thereunder, both made without notice, will be set aside at the instance of creditors, and especially where the price obtained was materially less that the minimum price fixed by the first order of which they had notice.

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

See 135 Fed. 223.

George E. Selzer, for appellant.

Robert Adair, for trustee.

J. H. Brinton and Warren E. Schenck, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The jurisdiction vested in this court by section 24b, Bankr. Act 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], has been invoked by the petition of Joseph Allgair, wherein it is prayed that the proceedings of the District Court for the District of New Jersey, respecting a certain order in the matter of the bankruptcy of William F. Fisher & Co. (a corporation), shall be revised in matter of law. The order referred to is one by which a sale of the property and plant of the bankrupt, made by the trustees to the said Joseph Allgair, and the orders of the referee relating to and confirming that sale, were vacated and set aside. It is contended that the District Court was without jurisdiction to make the order, but we cannot assent to this contention.

The only fact asserted by the petitioner, which it would be possible to regard as a jurisdictional one, is that Medora Fisher, who applied for the order complained of, was not a creditor, and it is argued that, therefore, she had no standing to make the application. Her claim, however, had been filed with the referee, and, although it had not been either allowed or disallowed by him, we are not prepared to say that she, if not "a bankrupt creditor," was not at least such "other person" as, under General Order 27 (89 Fed. xi, 32 C. C. A. xxvii), is entitled to petition for "a review by the judge of any order made by the referee." But it is unnecessary to determine this point; for about three weeks prior to the date of the order complained of, a preliminary one was made, to the effect that the petition of certain "other creditors" should also be considered, "so that they, as well as the said Medora Fisher, shall be before the judge of this court on said referee's certificate, as petitioners for the review of the aforesaid orders of said referee." This preliminary order was consented to by the respective counsel of all the parties in interest, and it was intended to and did eliminate from the case as it stood in the District court any question as to whether the action of the Judge had been rightfully solicited; and consequently, no such question could be legitimately raised in this court. "Whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." Hanley v. Donoghue, 116 U. S. 6, 6 Sup. Ct. 245 (29 L. Ed. 535).

The order setting aside the sale properly provided for the refunding to Mr. Allgair of any sum to which he might be entitled "for disbursements made by him on account of or by reason of his said purchase, and also for moneys actually expended by him in making improvements;" and that it was not (in view of this provision) in any respect erroneous, our independent examination of the record has entirely satisfied us. It was, we think, amply vindicated by the opinion of the learned judge who made it, and upon that opinion (which, as it has not been reported, we copy at length) we are content to rest our decision.

"Application is made to review certain orders made by the referee relative to the sale of the property of the bankrupt, and particularly to set aside an order confirming a private sale of such property made by the trustees and a deed therefor made to the purchaser. The first order of the referee, dated December 24, 1904, in brief authorized the trustees to sell the property of the bankrupt at an upset price of $65,000, at private sale, within 30 days, and if such private sale could not be effected within that time, then that the same should be sold at public auction. Prior to the granting of this order the order showed that ten days' notice was given by mail to the creditors of the bankrupt, and also by publication in a newspaper at New Brunswick, and designated by the court for that purpose. The second order of the referee in the premises was dated March 11, 1905, and by it the referee, deeming it for the best intents of the bankrupt's estate, extended the time of making a private sale for 20 days. By an order bearing date May 24, 1905, the referee directed the trustees to sell and dispose of the property in manner directed by orders theretofore made by him, and that they might expose said property for sale as a whole or in parcels for such sum or sums as would amount in the aggregate to not less than $50,000. By a further order, bearing date June 1, 1905, the referee approved of a private sale made by the trustees for the sum of $55,000, and authorized them to execute a deed therefor to the purchaser, one Joseph Allgair, for said sum. And by another order, bearing date June 15, 1905, the referee modified his order of June 1, 1905, approving of said sale, so as to permit the sale of the property subject to two mortgages on the same, held by the National Bank of New Jersey and William Rowland, respectively. The orders, as above set forth, were all made upon petitions to the referee by the trustees, and the order permitting the trustees to sell at private sale was made after several ineffectual efforts by them to sell the same at public sale at an upset price of $65,000. On the last occasion when the property was offered at public sale, no bid having been received therefor, the sale was adjourned without day. No notice appears to have been given to the creditors or lienors of any of the orders made, except the first, and notice of that order was given only as above stated.

"There is nothing in the case whatever to show any fraud or collusion on the part of the trustees; so far as appears, they desired and sincerely and earnestly endeavored to obtain all that could be obtained for the property. In view of the circumstances above disclosed, however, and particularly in view of the fact that the time for a private sale of the property under the original order and the order extending the same had expired before the property was exposed at public sale, and in view of the fact that the public sale was adjourned indefinitely, without any notice or intimation that the property would not again be offered at public sale, I think the creditors and possible purchasers were misled, and that the private sale subsequently ordered, without notice of any kind, at a price $15,000 less than the upset price for the public sale, was a surprise to the creditors and the public, and that such procedure unintentionally wrought injustice to the creditors. So wide a departure in policy from that originally adopted should not have been undertaken without notice to the lienors and general creditors of the bankrupt.

"The orders of the referee of December 24, 1904, and March 11, 1905, had practically expired by the failure of the trustees to make sale of the property, pursuant to the terms thereof, either at private or public sale, and their inability to make sale thereunder was disclosed, and the public sale had been adjourned without day; I think the referee's power in the matter was for the time exhausted, and that he should then have given a new notice to the creditors and lienors. I deem such notice not only proper, but essential, under the circumstances, and hence that the orders dated May 24, 1905, June 1, 1905, and June 15, 1905, were unwarranted, and should be set aside. Orders made under the circumstances that these three orders were are plainly within the spirit of No. 23 of General Orders in Bankruptcy (89 Fed. xi, 32 C. C. A. xxvi). The language of that order is exceedingly broad, and indicates a well-defined policy to be pursued by referees. See, also, in re Potelkow (D. C.) 92 Fed. 901; also in re Saxton Furnace Co. (D. C.) 136 Fed. 697. Furthermore, the Sayre & Fisher Company, a creditor of the bankrupt, has filed a petition and a supplemental petition setting forth therein its willingness, in case the sale of the property already made is set aside, and the property is again exposed at public sale, to bid the sum of $60,000 therefor, and to deposit with the clerk of this court, as an evidence of its good faith in the matter, a certified check for $60,000; and further agreeing, in case it shall become the purchaser of the property at a resale, to repay to Allgair, the purchaser at the private sale, such amount as he may have actually expended for improvements upon said plant since he became the purchaser thereof. A considerable number of the other creditors of the bankrupt have likewise petitioned to have the sale set aside.

"I will therefore sign an order setting aside the three orders of the referee, bearing date May 24, 1905, June 1, 1905, and June 15, 1905, respectively, together with the sale made thereunder, and directing Allgair, the purchaser, to reconvey the property to the trustees upon their returning to him the amount paid by him therefor, which they will also be directed to do; and further directing them to expose the property again at public sale to the highest bidder, at an upset price of $60,000, after notice given by them to the creditors, lienors and all parties interested, and further directing the clerk of this court to hold the certified check above referred to undeposited, to await the result of such resale and the further order of this court."

The order to which this petition for review relates is affirmed, with direction for such further proceedings in connection therewith as may be requisite or proper and accordant with law.

WESTINGHOUSE ELECTRIC & MFG. CO. v. CUTTER ELECTRICAL & MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 27, 1906.)

No. 38.

PATENTS—INFRINGEMENT—AUTOMATIC ELECTRIC CIRCUIT BREAKER.

The Wright & Aalborg patent, No. 633,772, for an automatic electric circuit breaker, claims 2 and 5, construed, and *held* not anticipated, but to disclose patentable novelty and utility; also *held* infringed.

Gray, Circuit Judge, dissenting.

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

For opinion below, see 136 Fed. 217.

Thomas W. Bakewell, Thomas B. Kerr, and Wesley C. Carr, for appellant.

Joseph C. Fraley, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was a suit in equity brought by the Westinghouse Electric & Manufacturing Company against the Cutter Electrical & Manufacturing Company, for infringement by the defendant of letters patent No. 633,772, granted on September 26, 1889, to the complainant, as assignee of Gilbert Wright and Christian Aalborg, the inventors. The invention relates to devices employed for automatically opening electric circuits, when the current passing therethrough is materially in excess of that which the circuit is intended to carry. The specification states the object of the invention thus:

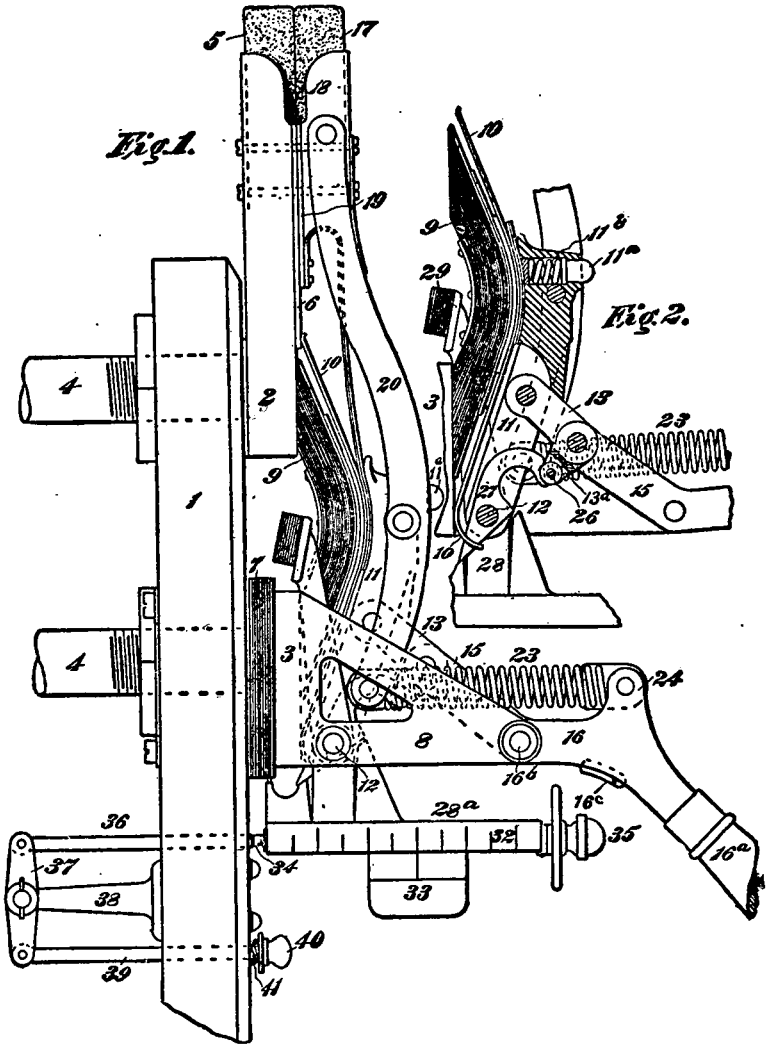
"The object of our invention is to provide a circuit-breaker that shall have a large current-carrying capacity in proportion to the mechanical dimensions of the device, which shall be easily brought into operative position and locked therein, which shall be certainly and quickly opened whenever the current in the circuit exceeds that for which the locking mechanism is set, and which shall serve to interrupt the circuit without danger of injury to the main contact terminals."

The bill charges infringement of the second and fifth claims of the patent, which are as follows:

"(2) In an automatic electric circuit-breaker, the combination with a base and stationary main and shunt contact-terminals located in approximately vertical alignment thereon, of a movable laminated contact member pivoted to said base, a movable shunt-contact member pivoted to said laminated contact member, toggle-levers for operating said movable members, means for locking the breaker in closed position, and a tripping device projecting into a magnetic circuit."

"(5) In a circuit-breaker, the combination with main stationary contact-terminals and a stationary shunt-terminal located above the same, of a pivoted main contact member, a shunt-contact member pivoted to said main member at a distance from its axis of movement, means for yielding holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position, toggle-lever mechanism for closing the breaker, a latch and electromagnetically-actuated means for tripping the latch; said toggle-lever latching the tripping mechanism being located below both the main and the shunt separable terminals."

We here insert, as illustrative of the circuit breaker in closed position of the patent in suit, figure 1 of the patent drawings:



We extract from the specification some paragraphs descriptive of the apparatus and its mode of operation:

The main movable contact member, 9, of the circuit-breaker consists of a body of thin copper plates of curved form rivited or otherwise fastened together, but having free ends which are beveled with reference to the body portions of the laminæ, so that when the circuit-breaker is closed or nearly closed, they are in a plane that coincides with or is parallel with the plane of the faces of the stationary contact-terminals, 2 and 3. A thicker plate, 10, of greater length than any of the main laminæ is riveted to said main laminæ and is of such form and dimensions that its upper end makes contact with the plate, 6, on the face of the upper stationary contact-

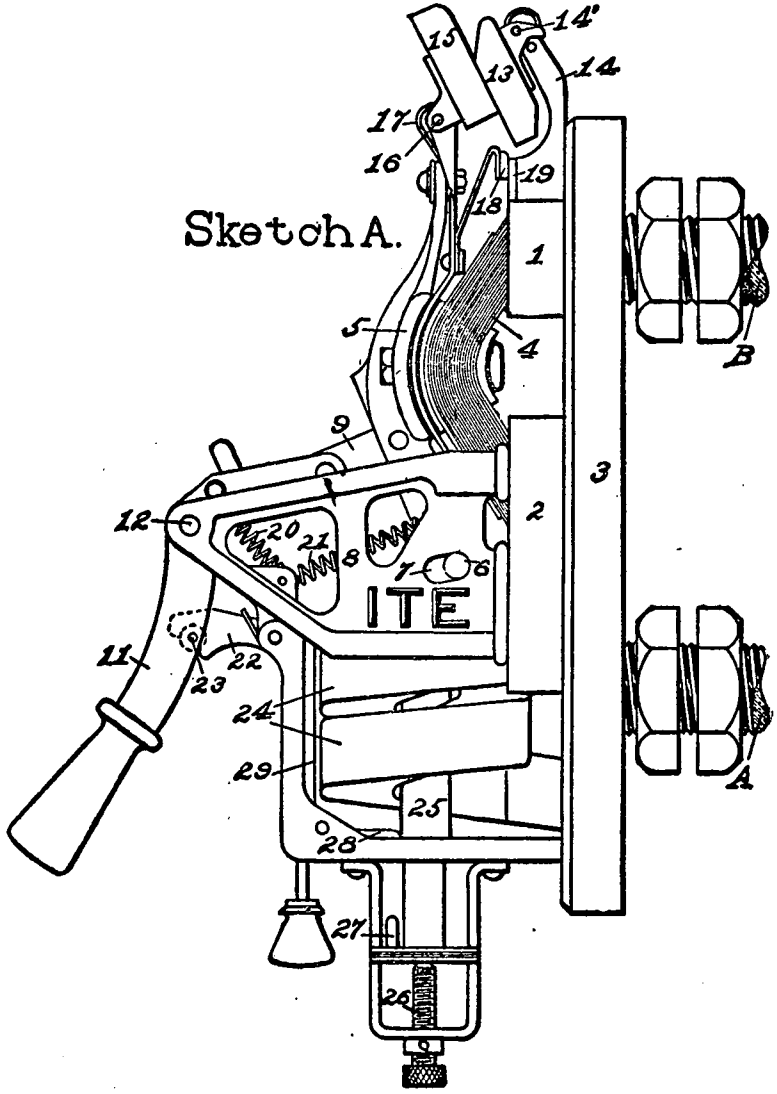
terminal, 2, when the circuit-breaker is closed, and its lower end is permanently in engagement with the face of terminal, 3. The member, 9, is rigidly fastened by any suitable means, such as bolts or rivets, to the upper end of a supporting frame, 11; the lower end of such frame being bifurcated and pivoted between the brackets, 3 at 12. Pivoted between the arms of frame 11 is one arm, 13, of a toggle-lever, 14; the other arm, 15, of such lever being part of a casting. 16, which is provided with an operating-handle, 16a. The casting, 16, is mounted upon rod 16b, which is supported by the outer ends of brackets 8. The arms 13 and 15 of the toggle-lever, 14, are so located and proportioned with reference to the brush-contact member, and the contact-terminals 2 and 3, that the former will be brought to its closed or operative position by a degree of movement that falls a little short of bringing the centers of the three pivots of the toggle-lever into alignment; this adjustment being desirable in order that, when the movable member of the breaker is released, the toggle-joint may act readily and quickly under the action of the opening means to be hereinafter described."

"The movable shunt-contact member comprises a block, 17, of carbon or other substantially infusible conducting material mounted in a suitable metal frame, 18, and having a metal plate, 19, the face of which constitutes a continuation of the face of the infusible block, 17, so as to engage with the face of the plate, 6, on the stationary terminal when the circuit-breaker is closed. This frame, 18, carrying the infusible block, 17, is pivoted between two arms, 20, a spring, 21, being fastened to said frame and extending downward, so as to bear against a cross-piece or other suitable stop, 22, and thus tend to throw the upper end of the block, 17, inward slightly toward the co-operating stationary block, 5. The two arms, 20, are pivoted to the upper end of the frame, 11, at a point corresponding to the middle of the member, 9, and project downward beyond this point to corresponding points between the pivot, 12, and the point at which the toggle-lever arm, 13, is pivoted to frame 11."

"The operation of the circuit-breaker is as follows: Assuming that the breaker is in open position, arms 20 will be held against the stops, 20a, on frame 11 by the coiled springs, 23, and the other parts will be in the position indicated in Fig. 3. The operator will now grasp the handle and press downward upon it, thus moving the toggle-joint upward, and at the same time carrying the laminated contact member inward toward the stationary terminals; the shunt-terminals and its supporting-arms being carried with the laminated contact member, so that the shunt terminals will be first brought into engagement, and thereafter the movable terminal will slide on the stationary terminals and thus tend to keep it clean and make good contact. As the movement is continued until the toggle-lever pivots are brought nearly into alignment, both the shunt-terminals and the main terminals will be brought into close engagement; the ends of the laminæ of the latter being deflected sufficiently to make good contact with the faces of the terminal blocks. When this final position is reached, the frame, 28, and its weight acting through the projection, 31, on the lower end of the latch, 27, will cause the notched end of the latter to engage the roller, 26, and thus hold the parts in this locked position. If the current through the circuit-breaker exceeds the amount for which it is set by the adjustment of the weight, 33, in its frame, such current will produce a magnetic flux through the body, 7, of the magnetizable material, which will have sufficient strength to draw the armature, 20, inward and downward. When this action takes place, the projection, 30, in the frame, 28, strikes against the latch and throws its recessed or notched end upward away from the roller, 26, whereupon the coiled springs, 23, will throw the toggle-joint downward, and, supplemented by the action of gravity, will throw the circuit-breaker completely open. The laminated contact member will obviously first leave the stationary terminal, 2. Hence the current will be shunted through the strips, 10 and 25, and the carbon blocks; the final interruption being affected by the separation of the blocks. By reason of interrupting the circuit at a single point—that is, making a single break and locating that break above the main terminals—the resulting arcs cannot by any possibility do any damage to the circuit-breaker; they being broken upward at a single point and away from all of the metal parts of the device."

In support of the defense of lack of patentable novelty, the defendant has put in evidence over 60 prior patents. We fail, however, to discover that any of these prior patents contains all the elements of either of the claims here in suit. We are entirely satisfied from the proofs that these claims (2 and 5) show patentable novelty and utility. While the invention of Wright and Aalborg was not a primary one, we think it was a distinct advance upon the prior art, producing new and valuable results.

The defendant's circuit-breaker alleged to infringe is illustrated, in closed position, by the following cut:



The complainant company maintains that the defendant's circuit-breaker has all the elements of the second and fifth claims of the patent in suit, namely, a base, 3, stationary main contact-terminals, 1 and 2, a stationary shunt contact-terminal, 13, located in approximately vertical alignment on the base, a movable laminated contact-member, 4, pivoted at 6 to the base, a movable shunt contact-member, 15, pivoted at 16 to the laminated contact-member, toggle-levers, 9, 10, for operating the movable members, means, 23, for locking the breaker in closed position, and a tripping device, 25, projecting into a magnetic circuit, and that in other particulars the defendant's device conforms to the description of claim 5; the shunt contact-member, 15, being pivoted, at 16, to the main member at a distance from its axis of movement, and the spring, 17, being the means for yieldingly holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position.

The defendant, however, contends that its circuit-breaker lacks the element, "a movable shunt-contact member, pivoted to said laminated contact-member," of claim second of the patent in suit, and also lacks the element, "a shunt-contact member pivoted to said main member at a distance from its axis of movement," of claim 5 of the patent in suit. This contention is based upon the opinion of the defendant's expert as to the meaning of the above-quoted language of these claims, a point upon which the experts upon the one side and the other differ. The position of the defendant's expert is that the language used in claims 2 and 5 requires the pivoting of the shunt-contact member to the laminated contact or main member at the point marked B on the above drawing of the complainant's patented device. Thus the defendant's expert testifies: "The movable shunt-contact member referred to in claim 2 means the movable carbon block, 17, along with its supporting arms, 20." And again he says: "In view of these facts, the pivot, referred to in claim 2 as joining the movable shunt-contact member to the laminated contact member, must refer to the pivot, B, and to no other." And referring to claim 5 he testifies: "The pivot of the shunt-contact member referred to in claim 5 is the pivot, B." He further testifies that this pivot, B, is absolutely wanting in the defendant's structure.

We are not able to give to the claims 2 and 5 the limited meaning contended for by the defendant. Certainly nothing is expressed to restrict these claims to a pivoting at the point B. The language used is satisfied by the pivoting of the shunt-contact member at the point A, and the shunt-contact member cannot be said any more truly to be pivoted to the laminated contact member or main member by a pivotal connection at B, than by a pivotal connection at A. Moreover, we think it clearly appears that the pivotal connection at A is essential to the practical operation of the patented apparatus, and therefore the construction of the claims 2 and 5 should be such as to include this indispensable feature. The function of the movable carbon block is not simply the adjustment of contact between the carbons 17 and 5, but also to permit the main contact to close after the carbon contacts are closed, and to open before the carbon contacts are opened.

Furthermore, the interpretation on which the defendant insists brings into claims 2 and 5 as an element the pivoted arm, 20, which is expressly made an element of claims 1 and 3, but which was omitted from claims 2 and 5 and presumably was intentionally so omitted.

Turning to the defendant's circuit-breaker, we find that the movable carbon block (15) is pivoted directly to an arm forming an upward extension of the main movable laminated contact member. The defendant, however, insists that it has wholly dispensed with the pivotal connection of the long arm, 20, of the patent in suit with the laminated contact-member, and thus has eliminated from its structure the loose and yielding connection at point B. Is this so? As we have seen, the movable laminated contact member of the defendant's apparatus is pivoted to the base, and the pivot, 6, it is shown, moves in a slot, 7, thereby affording loose motion to the laminated contact member independent of the motion of the carbon shunts. Now, in answer to the question, "Will you please state the functions of the slot marked 7 in your cut A of the defendant's circuit-breaker?" the defendant's expert replied:

"The function of the slot marked 7 in the cut A is to permit a motion of translation of the pivot, 6. This permits a motion of translation of the laminated member, 4, before its simple motion of rotation about pivot, 6, during the opening of the switch."

And the witness further states that:

"In closing defendant's circuit-breaker the carbons come first into engagement and then, by a motion of translation, permitted by the slot, 7, the main laminated member and the movable carbon move together toward their respective complimentary contacts; after the carbons have once touched in the closing movement they continue in engagement."

Obviously the two devices for securing loose motion to the laminated contact-member independent of the motion of the carbon shunts are equivalent mechanical arrangements.

But, in support of the defense of noninfringement, the defendant further contends that there is no combination in its apparatus of stationary main and shunt-contact terminals located in approximately vertical alignment. It seems to us, however, in view of the purpose to be subserved and function to be performed, that these parts are in vertical alignment in any practical sense. They are in line with each other, and one above another in a vertical direction. Whatever difference in alignment in this regard there may be between the complainant's apparatus and that of the defendant is immaterial for practical purposes. With reference to function the defendant's contact, we think, is in approximately vertical alignment upon any fair reading of the patent in suit.

Again, it is contended by the defendant that its device differs from that of the complainant, by reason of the absence of means for yieldingly holding the movable shunt-contact in a position in advance of the plane of the faces of the main movable member when in open position. The arrangement of the patented apparatus is one which permits the surfaces of the carbon contact to meet in advance of the meeting of the main contact surfaces, and to break contact last. Now, whilst the defendant's device does not employ precisely the arrange-

ment described in the patent, the purpose to be attained is accomplished by the defendant in substantially the same way. The defendant's movable shunt terminal is set back, but the stationary companion terminal is set correspondingly forward. That the complainant pivots only one of its carbons, while the defendant pivots both of them, is an immaterial difference. Either one or both may be pivoted to secure the desired yielding and turning motion.

Upon the whole case we are of opinion that there is substantial identity of operation between the complainant's and the defendant's devices, accomplished by substantially the same means and securing the same results. We think, therefore, that the court below should have entered a decree in favor of the complainant upon the second and fifth claims of the patent in suit.

We have not overlooked the argument based upon the contents of the file wrapper. We are not able, however, to find anything therein inconsistent with the interpretation which we have given to claims 2 and 5 of the patent in suit. Claim 2 stands as originally formulated, save by the insertion of the word "located" after "terminals," and the word "approximately" before "vertical alignment." Claim 5 was not amended so as to include the long arm, 20, or with reference to it at all. The changes made in that claim do not touch the controlling questions before the court.

The decree of the Circuit Court is reversed, and the cause is remanded to that court, with instruction to enter a decree in favor of the complainant upon claims 2 and 5 of the patent in suit, in accordance with the views expressed in this opinion.

GRAY, Circuit Judge, dissents.

STANDARD ELEVATOR INTERLOCK CO. v. RAMSAY et al.

(Circuit Court of Appeals, Third Circuit. March 6, 1906.)

No. 27.

PATENTS—PRIOR USE—LOCKING DEVICE FOR ELEVATORS.

In the Muckle and Teamer patent, No. 555,825, for a locking device for passenger elevators, claims 1 and 2 are void; being so broad as to include a device previously in use by others on which the invention of the patent is an improvement, but fully covered and protected by the other and more specific claims. Also *held* not infringed if conceded validity.

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

For opinion below, see 139 Fed. 28.

Charles Howson, for appellant.

Horace Petitt, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This suit in equity was brought in the court below by the Standard Elevator Interlock Company (here the appellant) against Joseph Ramsay and Isaac Alloways, copart-

ners, trading under the firm name of Excelsior Elevator Company, for the alleged infringement by the defendants of letters patent No. 555,825, dated March 3, 1896, for improvements in elevators, issued to John S. Muckle and William H. B. Teamer, assignors to M. R. Muckle, Jr. Co., of which patent the complainant-appellant became the owner by mesne assignments. The object of the invention as stated in the specification "is to prevent accidents on passenger elevators due to the carelessness of the operator in starting the car while the door is open and leaving the door open after the car has passed the floor." This object, it is stated, is attained "by positively locking the car on the opening of the door and locking the door on the movement of the mechanism to start the car." The patent in suit contains 7 claims, only 2 of which (claims 1 and 2) the complainant-appellant asserts have been infringed by the defendants. The other 5 claims embrace specific features of the invention described in the specification, and it is not alleged by the complainant-appellant that the defendants have infringed any of these 5 claims. The claims in controversy are as follows:

"(1) The combination of an elevator car, the motor-controlling mechanism, a movable well-door at the landing, a latch adapted to lock the door in the closed position, with mechanism on the car adapted to release the door from the latch when the mechanism is operated to stop the car so that the door can be opened, and connections on the car between the last-named mechanism and said motor-controlling mechanism, substantially as described.

"(2) The combination of an elevator-car, motor-controlling mechanism, a sliding door, a latch adapted to engage with the door when closed, a device secured to the wall of the elevator-well, mechanism on the car connected to the motor-controlling mechanism, said mechanism operating to release the door from the latch and in turn to be locked by the device secured to the wall of the elevator-well so as to prevent the car from moving when the door is opened, the said device being held clear of the mechanism on the car by the door when it is closed, substantially as described."

The court below held that claims 1 and 2 of the patent in suit could not be sustained in view of the prior use at the Bingham House in the city of Philadelphia, of an apparatus accomplishing the same result as the combinations of claims 1 and 2. And in its opinion the court, speaking of the Bingham House apparatus, said: "The patentees knew of this device, and their own invention was an improvement thereon, which is amply protected by the more specific claims of the patent." Accordingly the court below entered a decree dismissing the bill of complaint. From that decree the complainant took this appeal.

It is contended on behalf of the appellant that the Bingham House structure was not proved by that measure of evidence necessary to establish an anticipation. This view, however, we are not able to accept. Upon a careful examination of the evidence we think it satisfactorily appears that the Bingham House construction (of the second form) was of the character claimed by the defendants and was installed and in use in the year 1895, prior to the invention of the patent in suit. The conclusion of the court below upon this branch of the case, we think, was clearly right under the proofs. But it is further contended on behalf of the appellant that the Bingham House structure "assuming it to have been what the defendant-appellees con-

tend, did not anticipate the combinations of the complainant's first and second claims." To this branch of the case, then, we address ourselves. It is certainly shown that the Bingham House elevator locking apparatus attained the object of the invention of the patent in suit by means of co-operating devices which securely locked the car on the opening of the door and securely locked the door on the movement of the mechanism to start the car. The following description of the object to be attained given by the complainant's expert we think is as applicable to the Bingham House construction as to the device set forth in the patent in suit:

"It is the particular object of the device set forth in the patent in suit to so connect the device on the car which controls the motor with the device at the landing which secured the door in its closed position, as that the door will not be released until the motor-controller has been brought to that position which results in stopping the car, and also so that the motor-controller will be locked until the door has been moved to its closed position."

From the testimony of the complainant's expert in his examination in chief and in answer to a question propounded by complainant's counsel, we here quote his general description of the Bingham House apparatus and of the differences between it and the apparatus described in the patent in suit:

"The Bingham House elevator as represented by the various exhibits referred to in the question, contains an elevator car and a sliding door for each landing of the elevator well with a latch secured to the landing for preventing the door from being thrown open. This latch is a long, awkward lever, extending from the doorway to the side wall of the elevator well, and is operated by a complication of mechanism, including another lever and rollers and an inclined cam, which are also secured to the wall of the well. One of the levers is in the path of movement of a roller on the car. This roller on the car is connected with the motor-controlling mechanism on the car so that when the controller is placed in a position to stop the car, the roller will be moved outward, so that it can engage the swinging lever secured to the wall of the well, which in turn acting through another roller secured to it and acting upon a cam on the long latch lever, moves the latter so as to permit the door to be opened. This device of the Bingham House elevator differs from the device set forth in the patent in suit, and also from the defendants' device in the fact that there is no 'mechanism on the car operating directly to release the door from the latch.' There is in the Bingham House structure a 'device on the car' which operates a complicated system of levers and cams which are secured to the well wall, and which system of levers and cams it is that in turn operates 'to release the door from the latch.' In the Bingham House elevator there is a device on the car which serves to lock the motor-controlling mechanism, and which is operated by the well-door when the car is stopped opposite to that door. There is no direct connection, however, between the door-releasing mechanism and the controlling-locking mechanism, nor any device secured to the wall of the well which locks the door-releasing mechanism on the car."

Accepting these statements of the complainant's expert, we still are of opinion under the undoubted proofs that the apparatus shown in the patent in suit differs from the Bingham House apparatus (of the second form) only in structural details, and not in the object accomplished or in principle of operation. It is to be observed that the two claims here in controversy are for combinations and are very general in their terms. They do not embrace (as do the other claims) combinations covering specific structural details, but

these two claims, according to the interpretation contended for by the complainant, purport in the broadest sort of terms to cover any combination of the named elements without qualification. And it is by virtue of the broad scope of the claims in suit, and not because of any adoption by the defendants of the special structural features of the complainant's patented device, that infringement on the defendants' part is sought to be established. Undoubtedly, the Bingham House apparatus and that of the complainant differ in the specific form of the parts, but each exhibit in combination the elements broadly described in the claims in suit. So that, if the Bingham House construction had not preceded the patent in suit, but had followed it, we think it plain that that construction would have infringed the first and second claim. But that which would infringe must be held to have anticipated.

Not only was the Bingham House structure a part of the prior art as respects the invention described in the patent in suit, but the patent to Thomas W. Jenkins, No. 540,813, dated June 11, 1895, granted upon an application filed November 30, 1894, is also a part of the prior art. The invention therein disclosed is of the same general character as that of the patent in suit, its object is the same, and that object is accomplished by analogous means. The complainant's patent discloses, indeed, specific improvements on the prior art as shown by the Jenkins patent and the Bingham House structure, and to that extent the complainant should be protected. But its patent should not be allowed to dominate the industry. As to its specific improvements ample protection can be accorded the complainant under the last five claims of its patent. Moreover, the defendants are manufacturing their alleged infringing mechanism for automatically controlling the car at landings under letters patent No. 718,230, dated January 13, 1903, granted to them as assignors of William H. B. Teamer. This latter patent also discloses its own specific features of construction and it stands to the art in the same relative position as the complainant's patent. Both cover improvements of a known apparatus. The differences between the complainant's patent and the prior art, we think, are no greater than are the differences between the patents of the complainant and defendants. To these two patents we think is properly applicable under the proofs the rule laid down by the Supreme Court in McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930:

"But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form of combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

For the foregoing reasons, the decree of the Circuit Court dismissing the bill of complaint is affirmed.

SAWYER SPINDLE CO. OF MAINE v. CARPENTER.

(Circuit Court of Appeals, First Circuit. February 23, 1906.)

No. 619.

1. PATENTS—TERM—EXPIRATION OF PRIOR FOREIGN PATENT.
   The amendment of Rev. St. § 4887, by Act March 3, 1897, c. 391, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382], did not affect patents previously issued, either as to their validity or length of term, and such a patent covering an invention previously patented in a foreign country remained as to length of term governed by the original section, and not by section 4884 [U. S. Comp. St. 1901, p. 3381].
2. SAME.
   The amendment of Rev. St. § 4887, as previously amended by Act March 3, 1897, c. 391, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382], by Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1905, p. 663], does not affect the term of patents for inventions previously patented in a foreign country, but only their validity, and did not operate to revive such a patent which had previously expired under the provisions of the section as it originally stood.
3. SAME—SPINDLE SPOOL FOR SPINNING MACHINES.
   The Sherman patent, No. 363,425, for a spindle support for spinning machines, expired in 1897, with the expiration of the Bristol patent, for substantially the same invention.

Appeal from the Circuit Court of the United States for the District of Rhode Island.

For opinion below, see 133 Fed. 238.

William K. Richardson (J. L. Stackpole, on the brief), for appellant.

James M. Morton, Jr. (Jennings, Morton & Brayton, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 363,425, issued to Sherman for an improved spindle spool. The answer set up the expiration of the patent before suit brought, by reason of the prior expiration of a British patent, No. 2,510, of 1883, alleged to have been issued to Sherman for the same invention.

The patent in suit was applied for July 3, 1882, and was issued May 24, 1887. The provisional specification of the British patent was filed by Clark, Sherman's agent, May 19, 1883, which is taken as the date of the British patent. This expired May 19, 1897.

The first four claims of the patent in suit are admitted to be substantially identical with the first four claims of the British patent, and to have expired with them. Only one claim of the American patent is here in suit, viz:

"(5) A spindle, a supporting-tube closed at its bottom and having a chamber to contain oil, and a detached bolster placed in the chamber of the supporting-tube and moving with the spindle as its foot seeks its true center of rotation, combined with means to connect the tube and bolster and positively prevent the rotation of the bolster with the spindle, substantially as described."

The complainant contended that this claim differed from any claim of the British patent—from claims 1 and 3 of the latter, for example, which read as follows:

"(1) The combination with the bolster-case having a closed bottom of the bolster having a step for the spindle and fitted loosely in the bolster-case peripherally throughout its whole length whereby an oil-cushion is formed between the interior of the bolster-case and the exterior of the bolster throughout its entire length and the bolster is left free to vibrate as a whole against said oil-cushion laterally in all directions substantially as described and for the purpose set forth."

"(3) The combination of a sleeve wheel spindle, a bolster-case having a closed bottom, a bolster fitted loosely within the bolster-case throughout its entire length whereby it is made capable of motion in a lateral direction as a whole, and means for positively restraining the bolster from turning substantially as and for the purpose described."

The complainant argued that the claim in suit was generic; that it did not call for "a bolster fitted loosely within the bolster-case throughout its entire length," as set out in claim 3 of the British patent, nor for an oil cushion "between the interior of the bolster-case and the exterior of the bolster," as set out in claim 1; but that the claim was broadly for a lock in combination with a flexible bolster of any sort. If the claim in suit were limited to the combination of this lock and an oil cushion, the complainant admitted that the claims above quoted of the British patent covered it, and that the American and British patents were for the same invention. On this point the disclaimer found on the second page of the American patent, lines 63 to 72, is conclusive:

"In regard to the feature of positively locking the bolster to the bolster-case, to prevent the former from turning, this I do not claim, broadly, but only said feature when combined with the bolster-case with a closed bottom, and a bolster having a loose peripheral fitting with an oil-cushion, the presence of the oil-film on the exterior rendering it more liable to turn, and hence the greater necessity for a positive restraint."

This language proves that the positive lock which the complainant asserted to be the essential feature of the invention patented by Sherman was, by Sherman's disclaimer, limited in the patent to a lock in combination with an oil-cushion. See, also, page 2, line 18, of the specifications:

"The essential features of my invention, therefore, are the peripheral loose fitting of the bolster in its case throughout the entire length of the bolster in connection with the closed bottom of the case, which together forms an oil-cushion between the bolster and its case throughout the entire length of the bolster, and in connection with this the means for positively restraining the bolster from turning."

And to the same effect are page 1, lines 73, 74, 87-91, page 2, lines 15-17, 33-35. Claim 5 must be taken to be substantially identical with the claims above quoted of the British patent.

At the time the patent in suit was issued section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] was in force in its original form. By virtue of that section, the patent was limited to expire with the British patent May 19, 1897. The complainant contended that since the passage of Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1905, p. 663], every patent whenever

granted is limited only by the term expressed in its grant, and is governed by Rev. St. § 4884 [U. S. Comp. St. 1901, p. 3381]. Under this contention, the patent expired May 24, 1904. In order to understand the legislation under consideration it is here printed in full.

Revised Statutes:

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

Act March 3, 1897, c. 391, 29 Stat. 692 [U. S. Comp. St. 1901, p. 3382]:

"Sec. 3. That section forty-eight hundred and eighty-seven of the Revised Statutes be, and the same hereby is, amended by inserting on line one, after the words 'no person,' the words 'otherwise entitled thereto,' and on line three, after the words 'cause to be patented,' the words 'by the inventor or his legal representatives or assigns,' and by erasing therein all that portion of the section which follows the words 'in a foreign country,' on lines three and four, and substituting in lieu thereof the following: 'unless the application for said foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country' so that the section so amended will read as follows:

"'Sec. 4887. No person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country.'"

"Sec. 8. That this act shall take effect January first, eighteen hundred and ninety-eight, and sections one, two, three, and four, amending sections forty-eight hundred and eighty-six, forty-nine hundred and twenty, forty-eight hundred and eighty-seven, and forty-eight hundred and ninety-four of the Revised Statutes, shall not apply to any patent granted prior to said date, nor to any application filed prior to said date, nor to any patent granted on such an application."

Act March 3, 1903, c. 1019, § 1, 32 Stat. 1225 [U. S. Comp. St. Supp. p. 663]:

"That section forty-eight hundred and eighty-seven of the Revised Statutes is amended by changing the word 'seven' to 'twelve,' and by inserting after the word 'months' the words 'in cases within the provisions of section forty-eight hundred and eighty-six of the Revised Statutes, and four months, in cases of designs,' and by adding the following words: 'An application for patent for an invention or discovery or for a design filed in this country by any person who has previously regularly filed an application for a patent for the same invention, discovery, or design in a foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States shall have the same force and effect as the same application would have if filed in this country on the date on which the application for patent for the same invention, discovery, or design was first filed in such foreign country, provided the application in this country is filed within twelve months in cases within the provisions of section forty-eight hundred and eighty-six of the Revised Statutes, and within four

months in cases of designs, from the earliest date on which any such foreign application was filed. But no patent shall be granted on an application for patent for an invention or discovery or a design which had been patented or described in a printed publication in this or any foreign country more than two years before the date of the actual filing of the application in this country, or which had been in public use, or on sale in this country for more than two years prior to such filing'; so that the section so amended shall read:

"'Sec. 4887. No person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than twelve months, in cases within the provisions of section forty-eight hundred and eighty-six of the Revised Statutes, and four months in cases of designs, prior to the filing of the application in this country, in which case no patent shall be granted in this country.

"'An application for patent for an invention or discovery or for a design filed in this country by any person who has previously regularly filed an application for a patent for the same invention, discovery, or design in a foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States shall have the same force and effect as the same application would have if filed in this country on the date on which the application for patent for the same invention, discovery, or design was first filed in such foreign country, provided the application in this country is filed within twelve months in cases within the provisions of section forty-eight hundred and eighty-six of the Revised Statutes, and within four months in cases of designs, from the earliest date on which any such foreign application was filed. But no patent shall be granted on any application for patent for an invention or discovery or a design which had been patented or described in a printed publication in this or any foreign country more than two years before the date of the actual filing of the application in this country, or which had been in public use or on sale in this country for more than two years prior to such filing.'"

Let us consider how the law stood regarding patents like that here in suit at every stage of the legislation, bearing in mind the necessary distinction between the validity of a patent and its term. Act July 4, 1836, c. 357, § 8, 5 Stat. 121, provided that prior foreign patenting within six months of the application here should not invalidate the domestic patent, which was left in force as expressed on its face. Act March 3, 1839, c. 89, § 6, 5 Stat. 354, did not affect patents validated by the act of 1836, but, in addition thereto, validated American patents for inventions which had been patented abroad more than six months before the application here. It first gave to foreign patenting an effect upon the term of an American patent for the same invention by reckoning the statutory term of the American patent from the foreign rather than from the American issue. The general codification of the patent laws in Act July 8, 1870, c. 230, 16 Stat. 201, materially changed the effect given to foreign patenting, and in this respect did not merely codify existing legislation. Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 41, 15 Sup. Ct. 508, 39 L. Ed. 601. The American patent was made to expire with the foreign patent of shortest term, and not at the usual statutory period reckoned from the date of the foreign application. The provisions of section 25 of the act of 1870 were substantially like those of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382]. The latter was expressed

in two sentences. In substantial accordance with the Acts of 1836 and 1839, as amended by the act of 1870, the first sentence declared that no patent should be deemed invalid because of prior foreign patenting. This sentence dealt with validity as affected by foreign patenting, and with that subject only. The second sentence dealt with the term of an American patent as affected by prior foreign patenting, and not at all with its validity, carrying out the radical alteration of the term which was introduced by the act of 1870.

When granted, the patent in suit fell within the purview of both sentences of section 4887. The first saved it from invalidation by the prior British patenting. The second limited its term by that of the British patent; i. e., May 19, 1897. Had the legislation remained unchanged to the present day the defense to this bill would undoubtedly be complete.

The act of March 3, 1897, was passed before the expiration of the patent in suit. Section 3 amended both sentences of Rev. St. § 4887. The only important amendment to the first sentence invalidated American patents where the foreign application was filed more than seven months before the American application. The second sentence of section 4887 was stricken out altogether. As thus amended, section 4887 dealt solely with the invalidation of patents by reason of foreign patenting, and in no way affected their term. As no legislation remained to give to prior foreign patenting any effect upon the term of an American patent for the same invention, that term stood as fixed by the grant issued under Rev. St. § 4884.

In order to save earlier patents from the operation of the act of 1897 as to their term or validity, section 8 expressly provided that the amendment of Rev. St. § 4887, should not apply to patents granted before January 1, 1898. These were left to be governed by section 4887 in its original form. Therefore the patent in suit was left by the act of 1897 unaffected either as to its validity or as to its term, governed as to the latter by the second clause of section 4887, and not by section 4884. By this saving of rights, some patents were left valid which would have been invalidated had the act of 1897 been made retroactive; e. g., cases in which the foreign patent had been applied for more than seven months before the domestic application. Other patents were left invalid which would have been validated had the act of 1897 been made retroactive; e. g., cases in which the American patent had expired by reason of the expiration of the British patent. The general saving of rights to individuals and to the public made by section 8 applied alike to both cases. The patent in suit, therefore, expired May 19, 1897, as it would have done had the act of 1897 never been passed.

The act of 1903 amended section 4887 as amended. It did not purport to affect the term of patents in any respect, but only the requisites of their validity. Before its passage, as has just been said, the patent in suit was controlled as to its term by section 4887 in its original form. The act of 1903 manifested no intention to change this control, or in effect to revive a patent which had expired six years before its passage. Complainant has referred to statutes

which repealed earlier legislation imposing penalties or working forfeitures. These repealing statutes have often been given a retroactive effect. But the second sentence of Rev. St. § 4887, imposed no penalty, and worked no forfeiture. Moreover, the case does not stand as if the second sentence of Rev. St. § 4887, had been repealed without qualification. Legislation will not easily be construed to destroy by mere implication rights expressly saved to the public or to individuals in earlier legislation from its retroactive operation. As the act of 1897 expressly left the patent in suit to expire in 1897, and as the act of 1903 manifested no contrary intention, it follows that the Sherman patent expired before this suit was brought.

We find no sufficient reason to vary the order of the court below respecting costs.

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

STREIT v. KAIPER et al.

(Circuit Court of Appeals, Sixth Circuit. March 16, 1906.)

No. 1,472.

1. PATENTS—INVENTION.
   An increase in the size of an existing device to more completely fulfill its purpose does not constitute patentable invention.
   [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 19.]

2. SAME—FOOT REST FOR CHAIRS.
   The Streit patent, No. 668,268, for a foot rest for chairs, which slides on ways under the chair seat and when not in use turns down on hinges against the front of the chair frame and becomes in appearance a part of the chair front, is void, for lack of patentable invention in view of the prior art.

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

W. F. Murray, for appellant.

A. M. Allen, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The bill in this case was filed by the appellant for the purpose of obtaining a decree restraining the appellees from infringing the rights secured to him by letters patent No. 668,268, issued February 19, 1901, upon an application filed October 2, 1899, for improvements in foot rests in chairs, and for damages and profits. The answer denied that there was invention in the device which was the subject of the patent, and also denied infringement. Upon the pleadings and proofs, the court at the hearing held the patent void for lack of invention, being of opinion that the device for which the patent was issued had been anticipated by previous public uses by other parties.

The subject of the patent was a foot rest for chairs. It will be most readily understood by exhibiting figure 1 of the drawings with a short explanation.

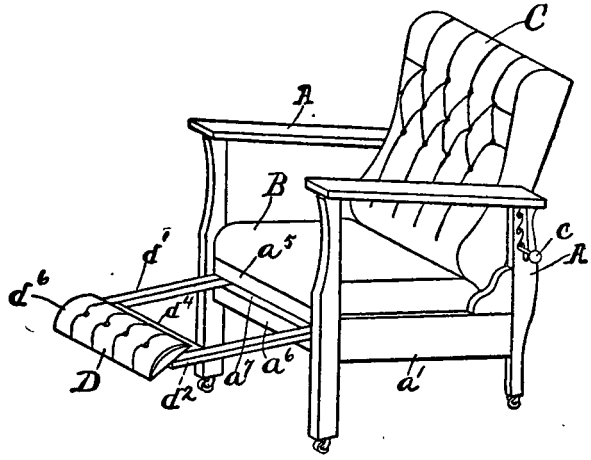


Fig 1

The side rails, d1 and d2, of the frame of the rest slide through the slot, a7, and in ways between cleats fastened lengthwise of the inside of each of the side frames, a1, of the chair. Cross-bars, of which d4 is one, hold the side rails of the foot rest in place, and stiffen it. On the front of the frame is hinged a foot rest upholstered on one side to conform to the upholstering of the chair. As seen in the figure, the foot rest and its frame are drawn out and ready for use. When not in use the frame is pushed back under the seat, the foot rest is turned back on its hinges until its flat back is parallel with the front piece of the chair frame, and is then pressed close upon the latter. When this is done, the foot rest is not apparent, and the whole impression is of a chair simply.

Prior to the application for this patent many other patents had been taken out of the patent office for foot rests and improvements thereof. There were foot rests hinged to the front of a frame extending forward from the chair seat. Some foot rests were upholstered like the chair and some of them were so constructed as to turn up and lie flat against the front of the chair frame. Some foot rest frames were provided with ways under the seat of the chair for sliding back out of sight, and some of the frames and ways were of wood and some of metal. The ways themselves were sometimes built upon the inner side of the chair frame, or consisted of long slots in the body of the chair frames. It is not necessary to go further in this enumeration of old features.

The proceedings in the Patent Office are shown by the evidence, and it therefrom appears that the application was repeatedly rejected upon references to former specified patents. The difficulty which

the office apparently found was this: While the specification seemed to show a foot rest extending at its ends beyond the front ends of the sides of the frame, and beyond the ends of the slot, or way, in the front piece of the chair frame, so as to completely hide them from view, yet the claims did not require a foot rest sufficiently long to subserve that purpose; and it was held by the examiner that the invention as described by the claims was anticipated by the references given. On the fourth rejection which referred to a patent to Petry, the solicitor for the applicant distinguished his invention from Petry's by pointing out that when Petry's foot rest "is pushed in, all these elements can be seen, the ends of the slot, the ends of the bars, and the foot rest hanging between them," adding, "Does it then look like a chair without a foot rest?" On the fifth rejection the commissioner of patents sent to the applicant the following communication:

"The claims in this case have been reconsidered and no reason is seen for changing the position heretofore taken by the office. The claims are again rejected on the references and for the reasons of record. Applicant argues that in the device shown by Petry, when the parts are folded the ends of the bars, 8, and the ends of the slat may be seen, and the nature of the part 22 [foot rest] is apparent to any one. While this seems to be correct, it is no argument, because applicant has not, except by functional statement, if at all, pointed out the construction and relation of parts whereby he gets the advantages claimed for his device. If these differences are brought out by language properly setting forth the construction and relation of parts, such claims will be further considered."

Acting on this last suggestion the applicant amended all his claims so as to make the combinations to include a foot rest of a length equal to, or greater than, the slot or way in the front of the chair. This seems to have satisfied the examiner, and the patent was allowed. The result is that the patent is limited to combinations which include a foot rest equal in length to, or longer than, the slot in the front of the chair frame, a device intended, as the patentee says, to improve the appearance of the chair and make it look like an ordinary chair. Thomas v. Rocker Spring Co., 77 Fed. 420, 26 C. C. A. 211. This conclusion does not depend necessarily upon any estoppel arising upon the concession of the applicant in order to obtain his patent. It results from the very terms of the claims, each of which contains as an element in the combination a rest thus specifically described. But the conclusion of the examiner in the patent office that the earlier patents took away all ground for claiming novelty in foot rests not of a length sufficient to cover the opening in the chair frame and the ends of the side rails of the foot rest frame was perfectly correct.

If, as these proceedings seem to show, and as the state of the art seems to show, the only novelty in this invention was the extending of the length of the foot rest so as to cover completely (what had theretofore been done only in part) the frame of the foot rest and the slot in the front of the chair, we should be of opinion that there was no invention apparent and that the issue of the patent was unauthorized. If it would be desirable to entirely conceal the frame and slot, in order to make the chair more neat and artistic, the commonest mechanic, having the former structures before him, would see that

a very feasible way would be to lengthen the foot rest. It was a mere question of extent or degree, of an increase of the size of an existing device to more completely fulfill its purpose. The case falls within the rule of which there are numerous illustrations in the reports of the Supreme Court and of this court. Some of these are Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552; Market Street Railway Co. v. Rowley, 155 U. S. 621, 15 Sup. Ct. 224, 39 L. Ed. 284; Fox v. Perkins, 52 Fed. 205, 3 C. C. A. 32; Galvin v. City of Grand Rapids, 115 Fed. 511, 53 C. C. A. 165; Eames v. Worcester Polytechnic Institute, 123 Fed. 67, 60 C. C. A. 37.

A patent to Brennan, No. 128,459, dated July 2, 1872, shows a foot rest pivoted to the front of its frame which turned up and rested against the front of the chair when the foot rest was pushed back. A patent to Lambert, No. 155,524, dated September 29, 1874, shows a foot rest, to the front of which is secured a strip wider than the thickness of the frame, obviously intended to overspread the slot in the front of the chair when the foot rest was pushed back. And Petry's foot rest above referred to, when pushed back covered the slot within the sides of the frame, but did not cover the ends of the sides of the frame. A still earlier patent to Bauder in 1842 shows in the drawing a foot rest running out of the front of the chair, on the front of which is secured a strip which when the rest is pushed back covers the opening in the chair, though this feature is not mentioned in the specifications or claims.

But, although there was nothing in the earlier patents which precisely met Streit's patent in the respect of affording a cover for the frame of the foot rest and the opening in the front of the chair, it is shown that his device had been known and in public use more than two years before his application was filed. Frank B. Wersel, Jr., of Cincinnati, as early as July, 1897, made and sold at that place one or more chairs which had a foot rest sliding upon ways under the chair when closed. The foot rest frame extended quite to the sides of the chair frame, and covered the vacant space under the front end of the chair frame, so that when the seat was pushed in, the frame of the foot rest became in appearance a part of the front of the chair. Wersel testified in the case and produced one of the chairs, his sale book kept at that time, showing the sale of such a chair, and a catalogue used and circulated in his business, containing a picture of the chair. The foot rest was hinged to the front of its frame, but when not in use, it was turned down inside the frame, and passed under the chair with the frame; the upper edge of the latter meeting the upholstering of the seat of the chair above it. The only difference between that and Streit's was that in the Wersel chair the front of the frame filled the blank space in front of the chair, while in Streit's the seat itself performed that service. This chair and another like it made and sold by another manufacturer about the same time, called the "Eureka" chair, of which an original sample was produced, are fully authenticated by the testimony, and formed the basis of the opinion of the court below, in which it was held that they embodied

the essence of the Streit invention. We agree with the court below in thinking that it did not require invention to turn the foot rest up for a front instead of using its frame for that purpose.

The judgment must be affirmed.

LOCKE INSULATOR MFG. CO. v. LEY et al.

(Circuit Court of Appeals, First Circuit. May 10, 1906.)

No. 639.

PATENTS—INVENTION—INSULATOR PIN.

The Locke patent, No. 493,434, for an insulator pin, is for a mechanical structure only, and as such is void far lack of invention.

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

For opinion below, see 143 Fed. 911.

Howard P. Denison, for appellant.

George A. Rockwell, for appellees.

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

PER CURIAM. We agree with the conclusions of the Circuit Court in this case, and with the reasons given therefor in the opinion of the learned judge of that court.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

MUNROE v. RITER & CONLEY.

(Circuit Court, W. D. Pennsylvania. August 12, 1895.)

No. 13.

PATENTS—INFRINGEMENT—MANHOLE FOR BOILERS.

The Munroe patent, No. 339,998, for a manhole for boilers, having an integral flange and an internally applied cover with a circumferential groove therein for the reception of the flange, was not anticipated and discloses patentable invention. Also *held* infringed.

In Equity. On final hearing.

John H. Roney, for complainant.
Wm. L. Pierce, for defendant.

BUFFINGTON, District Judge. This bill in equity is brought by Robert Munroe against Riter & Conley for alleged infringement of the single claim of letters patent No. 339,998, granted said Munroe April 13, 1886, for a manhole cover. Manholes are openings in boilers to permit entrance for cleaning or repairs. In the ordinary prior construction, a hole of the desired size was cut in the boiler head, and to stiffen or strengthen the structure around this opening, a heavy iron ring was internally fastened by countersunk rivets. Against this ring a plate or cover with flat face was placed, and adapted to be drawn to it by screw bolts supported in arches which straddled the exterior side of the opening. A gasket of lead was put between the ring and cover to form a steam tight joint when pressure was applied. This system was confessedly faulty. The placing of the reinforcing ring was expensive. When done, it presented a broad, rough, and uneven surface for making a joint, and this required great straining of arches and bolts to perfectly unite the two surfaces. Hence the arches or bolts were often broken, boiler heads strained, and the manhole opening became untrue. Pounding, which then had to be done to prevent leakages, loosened the rivets.

Complainant, by an ingenious combination, and placing in new relation of elements in themselves old, produced a manhole which overcame these difficulties. The simplicity, efficiency, and saving capacity of it have commended it to boiler constructors, and it has gone into general use in the building of new boilers. His device is embodied in the patent noted above. He cut in the boiler head an opening smaller than the manhole desired, and increased it to the required dimension by flanging up the edge. This edge, trimmed to a smooth, uniform surface, was well adapted to making a perfect joint, and the flanging so stiffened the boiler head as to wholly dispense with the old reinforcing ring. In the manhole cover near the outer edge was a circumferential groove, less in depth than the height of the flange, in which a lead gasket or other suitable packing was seated. On the outer face of the cover were handles and lugs engaging with securing bolts by means of which cover and flange were drawn together and a tight joint ensured. The claim is for:

"A metal plate or head for boilers, etc., having a manhole therein, said hole or opening being surrounded by a flange integral with the head, as described, in combination with a cover having a circumferential groove therein for the reception of the flange, substantially as set forth."

While the claim is not expressly limited to an interiorly placed cover, we are clearly of opinion it is impliedly so limited and must be so read. The specification calls for lugs and handles on the outer face of the cover and necessarily refer to a cover attached from within. Such cover alone is shown in the drawings and the device, if capable of exterior use at all, would virtually have to be reconstructed to fit it for such use and would then lose one of its most efficient factors, viz., the pressure of the steam tending to close instead of open the joint. To a person versed in boiler construction, and in the light of the knowledge of such persons in the art, the patent must be read, the cover suggested could mean no other kind.

This devise served to effectually stiffen the boiler head by the simple operation of flanging, while the narrow and even edge of the flange as compared with the broad and uneven surface of the old reinforcing ring permitted it to imbed itself deeply and regularly in the groove-confined lead gasket, and insured in the groove in which it was thus seated a more perfect and lasting joint by the use of much less pressure and consequent strain than under the old system. The substantial advantages of this device are testified to by several witnesses for complainant and denied by none of respondents. Without discussing these in detail, we may say that the device is one of decided merit, it is less expensive to construct, more efficient in service, more durable in character than the prior construction, and is made with much less pressure and consequent strain on the parts. It is strongly contended, however, that in view of prior constructions the device is void of novelty and patentability.

A close inspection of the most pertinent of these refutes the charge of lack of novelty. While it may be conceded that each element of Munroe's device is found singly in some of them, yet in none is his combination found in its entirety or in the functional capacity peculiar to it. The British patent of Watkins, No. 5,089 of 1882, goes no further than the general idea of flanging a manhole opening; there is no suggestion of the kind of cover to be used, or whether the cover is used externally or internally. Indeed, it contains in substance no more than that which Munroe's specification concedes was then old in the art, viz., flanging in making boiler flue openings, obviously an analogous use. In the British patent of Sinclair, No. 2,004 of 1877, we find a door frame formed by an angle-section cast iron frame externally riveted around an opening in a supplemental boiler used for boiling rags with steam generated in another boiler. A cast iron door with a groove and containing a gasket, engages therein with the projecting edge of the frame and form a male and female joint. These parts are kept in engagement by means of exterior bridles, screws and bars. This particular device was intended for low pressures in these supplemental boilers and when the highest pressure was used the patentee provided a strengthening interior frame attached by rivets passed through it, the shell and the outside frame. The

device radically differs from Munroe's in this: Sinclair's purpose is to overcome the steam pressure by external restraint, while Munroe utilizes the steam pressure itself to tighten the joint by internal pressure. In addition to this, it lacks the simple and effective method of strengthening by flanging. It will thus be seen that while the device shows, in certain species of supplemental boilers, a joint formed by a projecting edge from an external riveted frame, a groove in the cover and an inlaid gasket, yet, if applicable at all to generating boilers with high pressure, it lacks two elements essential to the functional success of Munroe's device, viz., a flanged opening and a grooved cover internally applied. The Jutte manhole, while a step in the direction of the Munroe device, stopped far short of it. In it, a broad reinforcing band of the ordinary size was riveted internally and presented the rough, broad, uneven surface of that construction. The cover, which was applied internally, had two circumferential flanges between which a lead gasket was placed. The inner flange was stationary; the outer a movable ring.

Without discussing the voluminous testimony on the subject, all of which we have examined with care, we may say the weight of it is that this ring was not of such size as to slip over the strengthening gasket, but impinged upon it and receded as the two came in contact or as the lead was pressed out between them. While, therefore, in connection with the inner flange, the ring formed a temporary groove to keep the lead from spreading, yet this was its sole function. It did not and could not form a seating or stay for the reinforcing gasket, nor was it adapted to conjoint use with a narrow, flanged, manhole edge, for the proofs; and there is no evidence to the contrary, show the narrow flange would cut through the gasket in a short time. While it showed an internal application, it lacked the elements of a flanged opening and a male and female joint, which are essential to the success of the Munroe device. If the differences between the two was such as to be met by mere mechanical skill, it is a significant fact that in spite of all the confessed imperfections of the older manhole, mechanical skill failed for upwards of 30 years to make the change.

The door and joint of the kettles in use by the dyeing company, at Boston, have also been considered. In a general way they are in a type similar to the Sinclair device. What we have said, therefore, in considering that device, will apply to them. We refrain, therefore, from a detailed comparison of them with the Munroe structure. After a full consideration of these and the several other devices disclosed in the proofs, and of the advance made in boiler construction by Munroe's device, we are clearly of opinion it involves both novelty and patentability, and his patent is valid. If the construction placed by us on the claim is correct, infringement has been shown. That the manhole for boiler heads manufactured and sold by respondents infringes is too clear for discussion. It is surrounded by a flange integral with the head, and the internally applied cover has a circumferential groove therein for the reception of the flange. In fact, it is identical in construction with complainant's save in one immaterial detail, viz., the groove is curved in cross-section in respondent's; in complainant's it is square.

So, also, respondent's saddle construction must be held to infringe. It seems that, owing to the tensile strain on the shell of a boiler being different from that upon the head, it is necessary to use a heavier plate when a manhole is located in the shell. In respondent's construction, to avoid using an entire heavier plate, an oval section is cut from the center of the ordinary plate, and an oval plate of the required heavier weight, having a manhole with internally flanged edge and called a saddle, is riveted to close the opening thus made. This smaller plate is in reality one of the boiler plates. If no manhole were in it, it would be integral with and a part of the boiler itself. The placing of a manhole in it does not make it less so. The cover is similar to that used by respondent in its boiler head construction. We are therefore of opinion it embodies all the elements of the claim of the patent in suit and infringes thereon.

Let a decree be drawn accordingly.

MUNROE v. ERIE CITY IRON WORKS.

(Circuit Court, W. D. Pennsylvania. March 5, 1906.)

1. PATENTS—INFRINGEMENT—MANHOLE FOR BOILERS.
   The Munroe patent, No. 339,998, for a manhole for boilers, *held* not anticipated, valid, and infringed.
2. SAME.
   The Munroe patent, No. 446,151, for a manhole cover, *held* not infringed.

In Equity. On final hearing.

John H. Roney, for complainant.
Hugh C. Lord, for respondent.

BUFFINGTON, District Judge. This is a bill in equity charging infringement of two patents, brought by Robert Munroe against the Erie City Iron Works. The first patent is No. 339,998, granted April 13, 1886, to said Robert Munroe for a manhole cover. The defenses are invalidity and noninfringement. Despite the large record the case falls within a comparatively narrow compass. The validity of this patent was sustained by this court in the case of Munroe v. Riter (No. 13, May Term, 1893) 143 Fed. 986. We find nothing in the additional proofs in this case to change our holding in the former case. Much insistence is placed on the French patent to Frogier of November 2, 1820, for a steam cooking vessel, but we cannot regard it as sufficient to invalidate this present patent, which, within its bounds, we regard as a material addition to the boiler art. As noted in our opinion, the elements of a flanged boiler opening, a male and female joint to effect closure, and the use of a manhole cover from within a boiler, so as to gain the advantage of steam pressure to make a closer joint, were all old, but Munroe was the first to unite these elements in a novel combination which is described in his claim, viz.:

"A metal plate or head for boilers, etc., having a manhole therein; said hole or opening being surrounded by a flange integral with the head, as des-

cribed, in combination with a cover having a circumferential groove therein for the reception of the flange, substantially as set forth."

Now obviously, if Frogier were using his cooking vessel today, it would not infringe this claim of Munroe's patent. He had no manhole in his vessel and had no occasion to use a flange integral with the material from which the head was constructed, in order not to weaken the structure by making so large an opening. There is substantial controversy as to just what his structure did consist of, whether of one lid or of two and whether the top of his vessel was removable simply by lifting. We do not regard the disclosure of his patent as sufficiently clear to show with certainty just what his device was. The metal which formed one side of his joint would seem not to be integral with that section to which it was attached. It could not, therefore, be held an infringement of Munroe's claim. The problem of making a cover for a steam cooker working under low pressure is also widely removed from putting a manhole sufficiently large for access to its interior in a regular boiler adapted to work under high pressure in such a way that the boiler shell was not weakened by the opening, while at the same time, a close tight joint was provided. The same thing may be said of the patent for a soda water tank to Puffer, No. 226,195. Conceding it has elements akin to those Munroe used, the novelty of the latter's device did not lie in the novelty of his elements, but in taking elements that were old and well-known, and combining them in a way, and for a use that was novel. Manifestly, Puffer's soda water tank does not infringe Munroe's claim, and therefore does not anticipate. Of McNeil's publication, it is sufficient to say it discloses neither a flanged opening or a grooved joint. Adhering then to our former ruling that Munroe's patent was valid, it is clear the respondent's construction embodied in Exhibit X infringes. It has in a boiler head a manhole which is formed by an inward flange integral with the head, and, in combination therewith, it has a cover with a circumferential groove for the reception of the flange.

The other patent of which infringement is charged is No. 446,151, of February 10, 1891, for a manhole cover. This patent purports to be an improvement on the device covered by the preceding patent. Such improvement is wholly in the cover. This consists in lengthening the inner ring of the joint groove so as to "afford a continuous lateral bearing for the flange, 3, of the head on its inner side; such function being wholly independent of and additional to that of forming the wall of a recess for the reception of packing, as in my patent, No. 339,998, before referred to." On this device two claims were allowed as follows:

"(1) A manhole cover having a circumferential groove adapted to receive a flange surrounding a manhole opening, and provided with a flange at the inner side of said groove of contour similar thereto and of sufficient depth to fit against the manhole opening flange from its face to or near its turn, substantially as set forth.

"(2) The combination of a metal sheet having a flange turned upon it around a manhole opening, and a cover provided with a circumferential groove receiving the flange of the sheet, and a flange at the inner side of said groove fitting against the flange of the sheet to or near the turn thereof, substantially as set forth."

Now none of the alleged infringing devices has a circumferential groove with a flange on its inner side, and, therefore, of a contour to fit against the manhole opening flange from its face to near its turn. A flange of that character on the cover being an element of each claim manifestly there is no infringement. The contention that such a shoulder is made by imbedding the manhole flange in the gasket is to urge what the patent neither disclosed, suggested, or claimed.

Finding no infringement the bill must be dismissed as to this patent. Under the facts and findings of this case we do substantial justice in dividing the costs.

Let a decree be prepared.

NEW YORK & ORIENTAL S. S. CO. v. NEW YORK, N. H. & H. R. CO.

(District Court, S. D. New York. January 4, 1906.)

1. COLLISION—TUG AND TOW AND STATIONARY VESSEL—DEFENSE OF INEVITABLE ACCIDENT.

Where a collision occurred between a car float on the side of a tug and a steamship, which was being docked and was at the time stationary, the defense of inevitable accident is not made out by the tug by evidence that she and her tow were forced against the steamship by a large body of floating ice, which was not seen until within 50 feet, and when too late to avoid it, where it appears that there was no lookout on the tug, and the pilot's view was obstructed by the cars on the float, that the attention of the lookout stationed on the float was directed entirely to the piers, and that a lookout properly stationed and attentive to his duties would have seen the ice in time to have avoided it.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 95, 101, 141.]

2. SAME—INSUFFICIENT LOOKOUT.

Where the attention of a lookout on a vessel is necessarily absorbed in a special direction, it is the duty of the vessel to detail another man for the general duty.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 141–144.]

In Admiralty. Suit for collision.

Butler, Notman & Mynderse, for libellant.

William Greenough and Joseph H. Choate, Jr., for respondent.

ADAMS, District Judge. This action was brought by the New York & Oriental Steamship Company, the owner of the steamer Shimosa, to recover from the New York, New Haven & Hartford Railroad Company, the damages sustained through an injury to the said steamer caused by a collision with Car Float No. 26, in tow on the port side of Transfer No. 5, both owned and operated by the respondent, on the 6th day of January, 1904, about 3 o'clock p. m. The Shimosa was engaged in the Oriental trade, and having taken on board a part of her cargo at pier 33, East River, was towed by three tugs to pier 36, East River, to complete her loading. While the steamer was engaged in docking upon the north side of said pier, under the control of the tugs, having no steam in her boilers, the collision took place, the port side of the float being brought in violent

contact with the stern and rudder of the steamer. No fault is charged against the latter, and the sole question to be determined is whether the respondent's claim that the accident was inevitable should be sustained, or whether the respondent should be held liable for negligence, in any of the following respects charged against it, viz.:

* * * * * * *

"3. In not avoiding the steamer Shimosa and in taking no steps whatever calculated to avoid said steamer by reversing her engines, or by putting said engines at full speed in forward motion under a port wheel.

"4. In not keeping a vigilant lookout.

* * * * * * *

"6. In not taking steps before backing out from pier 51 to ascertain whether her intended berth on the upper side of pier 48 was free."

On the general features of the case, there is not very much conflict in the testimony. The tide was ebb, of about the strength of two miles and at the place in question ran true along the ends of the piers. The wind was about E. S. E. but not of great force.

It appears that the Shimosa put out a line to the end of pier 36 and was by the efforts of the tugs in charge of her pushed around the north side of the pier and slowly, by reason of the presence of ice there, worked in, so that at the time of the collision, her stern was only a few feet, if at all, outside the end, although she had not yet succeeded in getting alongside of the pier.

The No. 5 took Float No. 26 in tow at pier 50, so that the sterns of the vessels were about even, for the purpose of delivering her at the lower side of pier 49, the second pier below. The float was about 210 feet long and the tug 95 feet. The float was loaded with 12 cars. Pier 36, where the Shimosa was lying, was the second pier below 49. The tug backed out until the float was about 100 feet clear of pier 50. She backed and filled, drifting down with the tide, and somewhat angling towards the piers, until the end of pier 48 was reached, the next pier to 36, when the float's stern being about half way between 48 and 36, and her bow 75 to 100 feet out, she waited under one bell, until a small tug, called a pogey boat, should move a tow from the upper side of pier 48.

I had occasion to consider the situation somewhat in an action against the respondent company and the tug Robert Burnett. The latter was towing some vessels astern down the river. The float No. 26 there came in contact with one of these vessels and both the tug and the respondent were held in fault for want of lookouts on the vessels. The Robert Burnett (C. C.) 134 Fed. 700. This collision happened a few minutes later. After the Burnett collision, the No. 5 and float approached nearer to the piers so that they were practically helpless, if the ice was such a factor as contended for, and without fault if due precautions were observed by those on No. 5.

It seems to me doubtful if such a quantity of ice as claimed was encountered. It was said that the floe was twice the size of the float and that it was set free from a collection on the Brooklyn side of the river by a large unknown steamer passing down and not seen by those on the tug or float until within 50 or 60 feet of the latter, then too late for No. 5 to take adequate measures to prevent trouble from it.

Assuming that the contention with respect to the ice is true, nevertheless the tug has not brought herself within the provisions which would entitle her to escape liability by the plea of an inevitable accident.

That is defined by the Supreme Court in The Mabey and Cooper, 14 Wall. 204, 215, 20 L. Ed. 881, as follows:

"Where the collision occurs exclusively from natural causes, and without any negligence or fault on the part of either party, the rule is that the loss must rest where it fell, as no one is responsible for an accident which was produced by causes over which human agency could exercise no control. Such a doctrine, however, can have no application to a case where negligence or fault is shown to have been committed on either side. Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together.

* * * * * * *

"Palpable error is shown to have been set up in the original answer filed by the owners of the ship, and the court is not satisfied that the defence set up in the amended answer is entitled to any more credit. Such a defence as that set up, that a ferryboat suddenly and improperly crossed the bows of the steam tug, if founded in fact, could easily be proved by those who were on board the ferryboat and know what occurred. Instead of that, not even a name of the ferryboat is given, either in the answer or in the proofs, and not a witness is called except the pilot and the master of the ship, and their statements in that behalf are not satisfactory. No such defence is set up in behalf of the steam tug, and nothing of the kind was alleged in the original answer filed by the owners of the ship shortly after the suit was commenced. Neither of the courts below appear to have given that defence much credence, and this court concurs with the subordinate courts that the defence is not established."

The language there used applies with considerable force to this case. In the action in which The Robert Burnett was a party, no such plea was put forward as is attempted to be established here. There it was simply denied that the collision took place, which was overruled because the proofs established the fact and it appeared that the tug and float had no adequate lookout. Such seems to be the fact here, so that even if the ice in such quantities as claimed were there and had the effect contended for, still there was no proper lookout upon the implicated vessels. A plea of inevitable accident should be supported by more evidence of proper care on the part of a moving vessel, colliding with a stationary one, than a claim that a large moving field of ice, which must have been in view for several minutes, was not seen until within a space of about 50 feet, when it was too late to take any measures to avoid its effect.

The pilot on the tug was practically useless as a lookout. His view of objects on the surface of the water was obstructed by the cars on the float. If there was a lookout stationed on the cars as contended, he was obviously not attending to his duty to keep the river in view, so that the approach of this danger could be seen in ample time to cause measures of precaution to be taken. If his whole attention was absorbed by the necessity of keeping a close watch upon the piers, then another man should have been detailed to the general duty. Kennedy v. Steamer Sarmatian (C. C) 2 Fed. 911; Greenwood v.

The William Fletcher and The Grapeshot (D. C.) 38 Fed. 156; The Nevada, 106 U. S. 154, 159, 1 Sup. Ct. 234, 27 L. Ed. 149.

Decree for the libellant, with an order of reference.

In re PATTEE.

(District Court, D. Connecticut. March 5, 1906.)

No. 1,511.

1. BANKRUPTCY—EXPENSES IN MANAGEMENT OF PROPERTY—ASSIGNEE ACTING AS TRUSTEE.

Where a general assignee for creditors, after an adjudication of bankruptcy against his assignor, with the approval of the referee, continued in the management of the bankrupt's business until the appointment of a trustee, and conducted the same successfully, he is entitled to payment for his services rendered during such time, and the trustee should also be required to pay bills properly and legitimately contracted by him in the conduct of the business after the adjudication, but not those previously made.

2. SAME.

Where a general assignee, continued in the management of the business after his assignor had been adjudged a bankrupt until the appointment of a trustee, incurred bills for lights, which, if he had paid at the time, as he might have done, with funds in his hands, would have been subject to a large discount, he is entitled to be allowed from the estate only the amount which would have been required if he had so paid them.

In Bankruptcy. On review of decision of referee ordering trustee not to pay certain claims charged against him as trustee.

Burpee & Carmody, for creditors.
Wilson H. Pierce, for trustee.

PLATT, District Judge. On August 26, 1904, the bankrupt made a common-law assignment to John W. Smart, of Boston, for the benefit of his creditors, of his property rights in two hotels, viz., the Hotel Russwin, in New Britain, and the Hotel Connecticut, in Waterbury. Mr. Smart disposed of the Hotel Russwin property for about $4,000, paid all the expenses connected with managing the hotel and disposing of the property, and delivered to the trustee in bankruptcy $2,766.67, which was the net amount received after such payments, retaining nothing, so far as appears, to compensate himself for services. Mr. Pattee was adjudicated bankrupt on October 29, 1904, and the trustee was appointed November 15, 1904. At the time of adjudication Mr. Smart was found in possession of what remained of the bankrupt's property, holding under the common-law assignment. With the consent and approbation of the referee, he continued in possession until the trustee was appointed. The claims which the referee has ordered not to be paid arise out of the treatment of the property by Smart during the interim between October 28, 1904, when be began to act as a quasi trustee for the creditors, and November 15, 1904, when the appointment of the lawfully chosen trustee terminated such condition.

The referee admits that Smart ran the Hotel Connecticut at a profit during that time, and that he earned what he demands, and that he would order it paid, if it were not for the way Smart has acted in the matter. The referee says that Smart did not do the best that he could for the estate, because he did not turn over to the trustee a lease of the hotel, which he had taken in his own name, and which contained a provision that it could not be assigned without the consent of the lessor. No other reason is given for refusing payment of Smart's claim for services. It appears, however, that the lessor Haase would not consent to the acceptance of the trustee as the assignee under the lease. The court ought not to permit itself to surmise that the position taken by Haase was due to a scheme concocted by himself and Smart. The fact that Haase did not and would not consent to the turning over of the lease to the trustee made such a turning over impossible. The referee, therefore, proposes to punish Smart because he did not perform an impossibility.

Smart's claim for services rendered the trustee, and ordered not paid by the referee, was $500; but in the argument of the review he only insists upon $319.65. The latter amount appears to have been fairly earned, and must be paid by the trustee. The only other item in Mr. Smart's bill which requires attention is "money advanced to pay for electric light," $231. As a matter of fact, the electric light bills were not paid by Smart, and the sum of $231 is, as appears by the bills in evidence, due from John W. Smart, assignee to the Connecticut Railway & Lighting Company. It also appears that the account begins either on September 17 or on October 17, 1904. In either event, it was incurred by Mr. Smart while acting as common-law assignee, and before his acceptance by the referee as a quasi trustee. That disposes of the first bill. The second bill is for $120, and is within the time when Smart acted as quasi trustee, but there are two grave objections to the allowance of that part of the electric light account. Smart claims it from the trustee as "money advanced to pay," etc., but it is admitted that no part of the entire bill for $231 has been paid by anybody. That is one trouble, and the other is this: If Smart had paid the bill for $120 which is the only part of the account which he can logically expect the trustee to repay, he would have received from the company a rebate of $48, leaving his actual disbursement only $72. I think that the trustee ought to pay over to the Connecticut Railway & Lighting Company from the funds of the estate the sum of $72, to be applied by that company upon the bill for $120, which Smart, assignee, owes.

The next matter sought to be reviewed is the order directing the trustee not to pay the Burbank-Hanley Company $335.99. It is agreed on all sides that the supplies which that account represents were furnished the Hotel Connecticut during the time when Smart acted as quasi trustee, and that it has not been paid. The referee gives two reasons for ordering the trustee not to pay it: First. That Smart was a stockholder in the company, acted as agent for it, and is attorney for it in this bankrupt matter. This line of reasoning is not persuasive. Second. That he received, while acting as quasi trustee, more than enough money to pay it, and therefore he ought to pay it

himself. It seems that Smart turned over to the trustee all books and accounts kept by him while acting as quasi trustee, and a certain sum in cash which appeared to be the profit made by him while running the hotel. The referee reports that the books balanced, and compliments Smart upon his good management in all respects, save that of not performing the impossible feat of delivering a nonassignable lease. Smart undertook to give up all that he had except the lease. If the trustee has reasonable grounds for believing that Smart retained any moneys which he ought to have turned over, he should ask permission of the court to take action in the matter. The goods in question were furnished by the Burbank-Hanley Company, to the Hotel Connecticut during the time when Smart was in charge, with the knowledge and consent of the referee, and have not been paid for. The trustee must pay this bill.

The claim of W. S. Quinby Company was ordered not paid. The larger part of it was contracted by Smart while acting as common-law assignee. With regard to that part of it, I agree with the referee that Smart must pay it, and present the claim against the estate. The rest of the bill comes within the quasi-trusteeship period, and the referee disposes of that part for the latter line of reasoning urged against the Burbank-Hanley Company claim. The view which I have expressed in that matter applies to this. The trustee must pay this balance, which, as I figure it from the original bill, is $26.50. The other grounds for review are not pressed by the creditors.

To recapitulate: Let the trustee pay from the funds in his possession $319.65 to John W. Smart. Let the trustee also pay to the Connecticut Railway & Lighting Company $72, to be applied by that company upon the second bill of the two which makes up the amount which Smart, assignee, owes the company. Let the trustee also pay the Burbank-Hanley Company $335.99, and let him pay the W. S. Quinby Company the sum of $26.50; the last two claims having been incurred while Smart was acting as quasi trustee, with the knowledge and approval of the referee.

THE RICHMOND. THE IOWA. THE JAMES W. ELWELL. THE BOSWELL.

(District Court, S. D. New York. February 9, 1906.)

COLLISION—MEETING TOWS AND OVERTAKING SCHOONER—FAULT OF TUG.

The tug Boswell, with four barges in tow tandem, the whole being over 5,000 feet in length, proceeding from Boston to Newport News, when off the New Jersey coast, at night, sighted nearly ahead the tug Richmond, with two tows approaching on nearly an opposite course and also the lights of the schooner Elwell to the right of the Richmond. The Boswell was on about a southwest course, and her tows, which were light, sagged to port on account of a northwest wind; the last being from one-fourth to one-half a mile off the tug's course. The Boswell either maintained her course or ported and passed on the port side of the Richmond and of the Elwell, which was overtaking and passing the Richmond's tow, the result being to pocket the Elwell owing to the sagging of the Boswell's tow, and to escape she crossed the tow line of the Richmond, which had stopped, coming in collision with the bow of the first

tow, and also bringing about a collision between the Richmond's second tow and the last tow of the Boswell. *Held*, on the evidence, that the Boswell was solely in fault in that, under the circumstances, she did not pass to the starboard of the Richmond and so keep out of the schooner's way.

[Ed. Note.—Collision—Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

Admiralty. Collision off Tucker Beach Light, New Jersey coast, between a schooner and a barge in tow of the tug Richmond and a subsequent collision, due to the first, between a barge in a tow of same tug and one in tow of the tug Boswell. Held, that the Boswell was in fault for all the damages, for failing to avoid the schooner with her tow.

Wing, Putnam & Burlingham, for the Baker Transportation Company.

Butler, Notman & Mynderse, for the Boswell.

Moen & Kilbreth, for the Richmond, the Iowa and the Indiana.

Robinson, Biddle & Ward and William S. Montgomery, for the Elwell.

ADAMS, District Judge. These actions arose out of a double collision which occurred off Tucker Beach Light, New Jersey, about 10 o'clock in the evening of the 22d of October, 1904. The tug Boswell, with 4 light barges in tow tandem, the Annie, Daisie, Dempsey and Powel, was proceeding from Boston to Newport News. The length of the tow was about 5,047 feet. The tug Richmond, with two coal laden barges in tow tandem, the Indiana and Iowa, was proceeding from Newport News to Providence and Boston. The length of this tow was about 2,693 feet. The 4-masted schooner James W. Elwell, laden with coal, was bound from Philadelphia to Portland, Maine. The wind was about north-west. The general course of the Boswell was the same as the trend of the shore, at that point, about south-west. The general courses of the Richmond and of the Elwell were about north-east. The Boswell was making about 4 miles per hour. The Richmond was making 6½ miles per hour and the Elwell, under full sail, about 8 miles. The latter was overtaking the Richmond and passing her, to the westward, at about the rate of 1½ miles an hour. There is some dispute as to the positions of the vessels with relation to each other, the Boswell and Richmond contending that they were so situated as to pass safely port to port, without change of helm, and that the Elwell by maintaining her course, would have passed safely to the westward of all the vessels but that she changed to the starboard and crossed the course of the Boswell. The Elwell contends that the Boswell and Richmond were to the starboard of each other and changed to pass port to port, thus creating an embarrassing position for her when she was only a short distance, ¼ of a mile, distant from the Richmond's tow, and to escape collision with the Boswell's tow, she was obliged to sail over the hawser leading from the Richmond to the Indiana, the former having stopped and allowed the hawser to sink, whereby a collision was caused between the starboard side of the Elwell, near the stern, and the bow of the Indiana

and a further collision between the Iowa and the Powel, the stern barges of the respective tows, caused by the Iowa changing to port and getting ahead of the Powel, which struck the Iowa with her stem on the Iowa's starboard side. It was a clear moonlight night.

1. The litigation was commenced by the Baker Transportation Company, the owner of the Powell, filing a libel against the Richmond and the Iowa, alleging fault against the Richmond in not keeping a good lookout, in not giving the Boswell's tow a wide enough berth, in not standing by and in not heeding the hails of the Powel, and against the Iowa in not keeping a good lookout, in starboarding her helm and taking a rank sheer to port, in not heeding the hails of the Powel, and in not giving her name as required by law.

The Seaboard Transportation Company, the owner of the Richmond and of the Iowa, filed an answer alleging:

"About 10 P. M. the tow was off Tucker Beach Light heading on a course about northeast by north. Shortly before a southbound tow, which subsequently proved to be the tug Boswell with four barges, of which the Powel was the last, in tow in tandem, was made out, bearing about northeast. The Boswell passed the Richmond and her tow to port close to, but meanwhile the schooner James W. Elwell, which had been overtaking the Richmond and her tow, under full sail and at a high speed, attempted to proceed and pass on between the Boswell and her tow and the Richmond and her tow. In so doing and apparently in order to avoid a collision with the Powel, which had taken a rank sheer to port. the Elwell suddenly changed her course, heading toward the Indiana. The engines of the Richmond were stopped and the Indiana put her wheel hard over in order to avoid or make the blow of the the imminent collision as light as possible. The Elwell struck the Indiana on the bluff of her port bow causing serious damage, and passed on across her bar stem and over the slack hawser to leeward. In order to avoid collision with the Indiana or the Elwell, the Iowa changed her course to port and upon seeing herself clear of them put her wheel hard over to resume her original course again. Meanwhile the Powel having taken a rank sheer to port instead of continuing on her proper course struck the Iowa head on on the starboard side forward of the fore-rigging, causing serious damage."

The Seaboard Company also filed a petition, alleging the same facts, and that:

"Fifth: On information and belief your petitioner further alleges that the collision complained of in the libel was caused or contributed to by the fault of the said tug Boswell, in the following particulars: (1) in that she did not keep a good lookout: (2) in that she did not pass the Richmond and her tow to starboard: (3) in that she did not give the Richmond and her tow a wide enough berth: (4) in that she did not stay by after the collision: (5) in other respects which will be shown at the trial.

Sixth: On information and belief your petitioner further alleges that the collision complained of in the libel was caused or contributed to by the fault and negligence of those in charge of the navigation of the said schooner James W. Elwell in the following particulars: (1) in that she did not keep a good lookout: (2) in that she did not pass to starboard of the Richmond's tow: (3) in that she attempted to pass between the tows of the Richmond and Boswell: (4) in that as an overtaking vessel she did not keep out of the way of the Richmond and her tow: (5) in that she did not stay by or give her name after the collision: (6) * * *."

The Boswell and the Elwell were accordingly brought into the action.

This action is the first of those entitled above.

2. An action was also brought by the Seaboard Company against the Powel, the owners of the Elwell (the Elwell afterwards came in and she was proceeded against instead of the owners) and the Boswell, in which the facts alleged as above in the proceedings by that company were again set forth, claiming damages for the injury to the Iowa.

This is the second of the above entitled actions.

3. An action was also brought by the Seaboard Company against the Elwell for the damages sustained by the Indiana in the collision. In this it was also alleged that the Boswell's tow was seen bearing north-east while the Richmond's tow was heading north-east by north. The claimants of the Elwell brought in the Boswell by petition, alleging:

"About 10 P. M., when between Absecon Light and Tucker Beach Light, the Elwell being under all sail, and steering a course about N. E. by N. those in charge of the Elwell saw the lights of a northbound tow, which afterwards proved to be the Richmond, with the barges Indiana and Iowa in tow, in the order named, on hawsers about 200 fathoms long. These lights were to starboard of said schooner, and the Elwell was overhauling them, as she was proceeding faster than the northbound tow.

'After the Elwell had passed the stern barge of the northbound tow, being to the westward of said tow, and expecting to pass along the port side of said tow, those in charge of her discovered the towing lights of a tug and tow bound south, which tug and tow afterwards proved to be the tug Boswell with four barges, the last of which was the Powel, in tow tandem on hawsers about 200 fathoms long. Shortly after, those in charge of the Elwell saw the green light of the Boswell showing that said southbound tow would pass the northbound tow starboard to starboard.

Shortly thereafter the southbound tug shut in her green light and showed her red light, crossing the bows of said northbound tug and tow, thereby pocketing the schooner Elwell.

The barges of said southbound tow being light were very high out of water, and the wind being fresh and nearly abeam of them, had the effect of sagging the barges of the southbound tow towards the northbound tow and the Elwell.

Thereupon the northbound tug, the Richmond, ported her helm, and stopped her engines, thus causing the hawser between said tug and the barge Indiana to trail in the water.

Those in charge of the Elwell, seeing that by the action of the southbound tug and tow in crossing the bows of the northbound tow she was pocketed, and that as a result of this and the wind's sagging the light barges to leeward there was great danger of the schooner's colliding with one of the after barges of the southbound tow, immediately, and in order to avert such collision, put the Elwell's helm up, and passed over the towing hawser and between the Richmond and Indiana, thus by an admirable piece of seamanship averting what would have been a disastrous head-on collision between herself and the stern barge of the southbound tow, the Powel, arriving to leeward of both tows without injury to herself, touching with her starboard quarter the stem of the Indiana, doing comparatively little damage to the latter.

Third: Said collision was not caused or in any way contributed to by any negligence on the part of those in charge of said schooner, but was caused by the negligence of the steamtug Boswell in the following among other particulars which will be shown at the trial:

(1) In that she did not keep a good lookout;

(2) In that she did not pass the Richmond and her tow starboard to starboard;

(3) In that she did not give timely warning of her change of course to cross the Richmond's bows;

(4) In that after crossing the Richmond's bows she did not see the position in which she had placed the Elwell, and did not take timely measures to pull to the northward and westward so as to allow the Elwell to pass clear of her stern barge;

(5) In that having a tow of four barges tandem on hawsers 200 fathoms long, she did not use the extreme caution and prudence necessary in handling such a tow."

The Boswell answered as follows:

"Ninth: Further answering, this claimant alleges that the circumstances preceding and attending the collision aforesaid were as follows:

On night of October 22nd, 1904, the steamtug Boswell was bound south from Boston for Hampton Roads, having in tow the barges Annie, Daisie, J. A. Dempsey, and Powel, in the order named, tandem. The wind was W. N. W. The Boswell was well manned, with a competent master and crew, and a lookout properly placed. The tug and barges had regulation lights properly placed and brightly burning.

When opposite Tucker's Beach Light and four miles from shore or thereabouts, and proceeding on a S. W. course, the towing lights of a tug were seen on the port bow, which proved to be the Richmond having in tow the barges Indiana and Iowa bound on a N. E. by N. course.

Shortly after sighting the Richmond, the green light of a four masted schooner was seen about two points on the Boswell's starboard bow. This schooner proved to be the James W. Elwell on a Northeasterly course making nine or ten knots an hour and gaining on the Richmond.

The Boswell held her course and passed abeam of the Richmond at a distance of nearly half a mile. Shortly thereafter, the schooner wrongfully and negligently altered her course so as to bring into view both her side lights. As soon as it became evident that she would not resume her former and proper course, the Boswell put her wheel hard a port and signalled to her tow to do the same. The schooner Elwell passed the Boswell port to port, electing apparently to follow the avenue of water between the two tows, where, as the claimant is informed and believes, there was sufficient, but not much more than sufficient space for the schooner to pass. But subsequently the schooner, when in close proximity to the Indiana, the Richmond's head barge ported her wheel in an attempt to cross the tow line of the Richmond and collided with the Indiana. Meanwhile the Iowa, the Richmond's tail barge, in seeking to avoid the schooner, wrongfully and negligently put her wheel hard a starboard and threw herself across the course of the barge Powel, the Boswell's tail barge, which, as claimant is informed and believes, had ported her wheel somewhat tardily after the Boswell's signal aforesaid.

In consequence of the manœuvres aforesaid, the bluff of the starboard tow '(bow)' of the Iowa was brought into collision with the port bow of the Powel, causing injuries, the extent of which is unknown to this claimant.

Tenth: The collision aforesaid was not due to any fault or error on the part of those in charge of and navigating the steamtug Boswell, but was due to faults and negligence on the part of the barges Iowa and Indiana, the tug Richmond, the schooner James W. Elwell, and the barge Powel, and the following particulars, among others, that will be shown at the trial.

As to the tug Richmond and the barges Iowa and Indiana:

(1) In failing to keep a good lookout.

(2) In not porting, when the schooner was plainly seeking to pass through the avenue of water between the two tows and thereby widening the same.

As to the barge Iowa:

(1) In putting her wheel hard a starboard to avoid the Elwell and the Indiana instead of hard a port or slightly a starboard.

(2) In not avoiding the Powel.

As to the tug Richmond:

(1) In not discharging the duties of a burdened vessel by providing so ample a margin of clearance between the two tows, as would provide for the contingency of the schooner Elwell attempting to pass between.

As to the schooner James W. Elwell:

(1) In failing to keep a good lookout.

(2) When she overtook and lapped the tow of the Richmond, in not taking a course to port or starboard thereof by so ample a margin as would enable her easily and safely to pass the Boswell and her tow, then already in sight.

(3) In that after lapping the tow of the Richmond, and seeing the Boswell's green light on her starboard bow, she did not hold her course and pass the Boswell starboard to starboard; and in that she ported and crossed the course of the Boswell and attempted to pass between the two tows.

(4) In that after passing the Boswell, port to port, she did not direct her course to the open avenue of water between the two tows and in that she attempted to cross the Richmond's towing hawser.

(5) In not reducing her speed by shortening sail, letting go her sheets or some of them or otherwise.

(6) In that when she attempted to cross the line of the Richmond's tows, she did not choose a point of crossing just abaft the Richmond or the Indiana, instead of a point just forward of the Indiana, rendering a collision with the Indiana inevitable.

(7) In that she did not, immediately upon clearing the Powel, starboard her wheel and luff up into the wind.

As to the barge Powel:

(1) In failing to keep a good lookout.

(2) In failing promptly to port her wheel when signaled by the Boswell to do so."

This is the last of the actions.

The principal controversy in the case seems to be whether the collisions were produced by an improper change of course on the part of the schooner, or whether she was forced to change her course to avert a collision with the Boswell's tow through the Boswell crossing the course of the Richmond and thus pocketing the schooner between the tows.

It appears that the Boswell's tow being light, was not following directly behind the tug, but was swung off to the eastward by the wind, so that the first barge was a little on the port quarter of the tug, the second and third each a little more and the fourth still more, the last barge being probably from a point to a point and a half to the leeward of the tug or from ¼ to ½ a mile. The course of the tug was southwesterly, as stated above, but, it is said, she was making good a course of S. W. by S. ¼ S.

The Richmond was steering a general northeasterly course but more exactly N. E. by N. ¾ N. The Elwell was also steering a general northeasterly course but more exactly N. E. by N.

According to the account of the matter given by the master of the Boswell, the Richmond and tow were seen slightly, ½ point to a point, on the Boswell's port bow 2 or 3 miles away and shortly thereafter the lights of the schooner were made from 1½ to 2 points on the starboard bow. The Boswell continued her course and when she reached a point abreast of the Richmond, and about ½ mile away, the schooner was from 1½ to 2 miles away, bearing 1½ to 2 points on the tug's starboard bow. At this time the Richmond saluted the Boswell but she did not answer because about this time the schooner yawed, giving a glimpse of her red light, whereupon the Boswell gave a signal of two blasts to the schooner, intending her to understand that the tug intended to keep her course and the vessels would pass starboard to starboard but the schooner kept off and showed both her red and green light and steered directly for the tug.

The Richmond's witnesses did not testify in conformity with her pleadings but sustained the contention of the Boswell that those vessels were in positions to pass port to port.

The schooner produced but one witness who was on deck, that was the mate, who was in charge of her navigation at the time. He testified in conformity with her pleadings.

Regarding the Richmond's testimony, it may further be observed that in the pleadings she several times puts forward the claim that the Boswell at first was bearing north-east while the Richmond was heading north-east by north, consequently on the latter's starboard side, and the former was charged by the latter with fault for not passing on the starboard side. These pleadings not only discredit the subsequent testimony of the Richmond but sustain the schooner's contention with respect to the original positions of the vessels and must be considered in ascertaining the facts. The pleadings were verified by the treasurer of the Seaboard Company, who says in his affidavit that the sources of his information are statements made by the officers and crews of the Richmond, the Indiana and the Iowa. These statements were called for by the schooner but not produced. The pleadings of the Richmond do not, in giving its account of the matter, allege the change of course on the schooner's part, which is the principal subject of her contention with the Boswell. Altogether, the testimony given on the part of the Richmond does not aid very much in the solution of the difficulty.

The Boswell's testimony seems to be consistent with her pleadings in the general aspects of the case but is it reliable? Her contention is that the Elwell was far enough on her starboard hand so that if she kept her course, she would pass the Boswell safely starboard to starboard, yet in that situation changed to port, seeing which manœuvre, and persistence in it, the Boswell changed to the starboard, with the effect of getting a heading well to the westward. It is not probable but is sustained in some respects by the testimony of witnesses from her barges Annie and Dempsey and possibly the Daisie, while the Elwell has but one to directly support her story that the Boswell changed from a position to pass the Richmond to the eastward and thus cut off the Elwell. That was the mate of the schooner who was on deck in charge. The testimony from the Boswell's tow is not to be relied upon to a great extent because the barges were so far to the leeward of the tug that those on her did not have the same view. The witness from the Powel did not see the schooner in time to determine her relative positions to the Boswell before the latter changed her course to the westward.

It is evident that it would not have been possible for the Elwell had she been on the Boswell's starboard bow, to have overtaken the Indiana at the time claimed by the Boswell even if the Elwell were going at the rate of 10 knots, the utmost speed claimed for her, after all allowance made for the change of the Boswell's course and the stopping and reversing of the Richmond, whose tow kept going ahead, but under reduced speed, up to the time of the collision between the Elwell and the Indiana.

Another account of the matter given by the Boswell is that when the Elwell changed her course to the eastward, the Boswell was somewhere near the Iowa. Assuming that the Elwell passed very close ahead of the Boswell it would apparently have been impossible for the Elwell to have reached and collided with the Indiana, while the tows were still passing each other, yet that the first collision took place while such was the situation is not questioned.

The Elwell's navigation is severely criticized by the advocates of the Boswell and of the Richmond and there is much in their astute arguments to claim attention. It is urged that the Elwell had no lookout. It is testified on her part by the mate that she had one properly stationed and that he duly reported the approach of the Boswell, giving, on cross examination, the lights in the order in which they were seen, white, then green and then red, but he made no further reports, and the mate says that he did not need them and he was looking himself. He, however, admits that he did not see the Powel until the vessels were close together and explains it by saying that he did not expect there would be a fourth barge and the Richmond at first obscured the Powel. Even assuming the truthfulness of the testimony, it is evident that there was not such a fulfilment of the schooner's duty in this respect as might strictly be expected, as it is shown that it is not unusual for tows of 4 barges to be navigated, and everything ahead should have been seen and reported by the lookout, but did it actually affect the matter? It seems not, because when the vessels were in such a situation that it strictly became incumbent upon the Elwell to know of the presence of the Powel, she was already pocketed by the tows and there was apparently no escape for her except by endeavoring to get to the eastward over the hawser leading to the Indiana. The report of the Powel by the lookout at any time when it appeared that there was danger of collision with her would not apparently, in the exercise of ordinary skill and care on the Elwell's part and the due performance of her duty as a sailing vessel, have made any difference in the result. She saw the Powel in time to avoid collision with her, though not to avoid the Indiana, and bring about the other collision. It is also urged that the first false manœuvre on the part of the vessels was a change of course by the schooner, which exposed her red light to those on the Boswell, no prior change having been made by that vessel. If the Elwell's account of the matter is to be accepted, this is not true, the first change having been made by the Boswell for the purpose of crossing the Richmond's course from starboard to port. It is also urged that the Elwell was in fault for crossing the Richmond's hawser and should have passed astern of the Iowa. Of course, the Elwell was bound as an overtaking vessel to keep clear of the Richmond's tow but it was the Boswell's duty as a steam vessel to keep away from the Elwell and not to unduly embarrass her in pursuing her course. It is further urged, that those on the schooner concealed the fact of the collision. They apparently made no report of it because the master said he did not consider it of importance, but it was subsequently discovered by the Seaboard Company that the Elwell was the sailing vessel concerned in the matter, and an affidavit

was submitted to that Company showing the Elwell's account of the matter. This has not been offered in evidence and presumably it does not vary very materially from the account here given. Of course, the concealment on the part of the master and owners of the Elwell of her part in the matter was not consistent with perfect frankness, but the mate's testimony should not be affected by an apparent desire on their part to keep out of litigation, if that should be deemed a fault.

After giving the case the best consideration I can, I have concluded that the Elwell's version of the matter is entitled to be adopted for the reasons already given and because I was impressed with the truthfulness of the witness on her behalf.

It remains to be considered whether the Boswell alone or any of the other vessels should be held for the damages suffered. The Boswell contends that the Elwell was primarily in fault but that the Iowa should be condemned because she had no lookout and therefore did not know a fact which could easily have been ascertained, namely: that there was a 4th barge in the Boswell's tow. It does not appear how the presence of a lookout could have made any difference. Further, it is contended that she was in fault because she starboarded instead of porting, and to an unnecessary extent. As it appears now, very likely there were errors, but judging from the situation as it apparently existed at the time, they should not be so regarded, so as to throw any responsibility upon the Iowa, who did what appeared to be necessary at the time as the vessels were so close together.

The Richmond is perhaps subject to criticism for assenting to the Boswell's crossing her bow under the circumstances, but she could not know that the barges were following from ¼ to ½ a mile to leeward of the Boswell and at the time deemed the manœuvre safe as far as she herself was concerned. In any event, she stopped in time to permit all to get safely across so that no fault could be established against her, and the Boswell does not contend that she should be implicated.

Those suffering damages by the collision are entitled to a decree against the Boswell, with an order of reference. All the other libels and petitions will be dismissed.

OREGON R. & NAV. CO. v. SHELL.

(Circuit Court, D. Washington, S. D. August 8, 1904.)

COURTS—JURISDICTION OF FEDERAL COURTS—BURDEN OF PROOF.

An averment in a bill in equity in a federal court that the amount or value in controversy exceeds $2,000, exclusive of interest and costs, does not give the court jurisdiction, unless sustained by proof, where it is put in issue, and such issue may be taken by answer.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 897.

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.]

In Equity. On rehearing on the question of jurisdiction.
For former opinion, see 125 Fed. 979.

HANFORD, District Judge. After hearing the reargument and giving consideration to an exhaustive review of the subject in the elaborate brief filed on behalf of the complainant, my belief is strengthened that the amount and value at stake in this case is not greater than the value of the real estate situated within the boundaries of that section of the two parallel lines of the complainant's railroads extending across the defendant's premises; and, although by an amendment to the bill of complaint the value of the land is alleged to be in excess of $2,000, the court cannot exercise jurisdiction resting upon that averment alone, without proof to sustain it, because the answer makes an issue. The act of Congress defining the jurisdiction of United States Circuit Courts comprehends both law and equity cases, and makes the same limitation with respect to the amount involved applicable to both systems of jurisprudence, and the courts are required to apply the same technical rules in equity cases that are applied in actions at law for the purpose of being assured of jurisdiction, and the appellate courts do not hesitate to reverse decrees and judgments when jurisdiction has been exercised by the Circuit Courts if the jurisdictional facts do not appear affirmatively in the record. It is true, as shown by the brief of counsel for the complainant, that by collusion of parties causes were litigated in the federal courts which were not in fact cognizable therein, and such abuses led to an amendment of the law, whereby the courts are required to dismiss or remand a case whenever satisfied that it does not really involve a controversy within its jurisdiction; and it is my opinion that the court must be so satisfied when a fact essential to the jurisdiction, averred in the pleading of the party invoking the jurisdiction, is controverted by the pleading of the opposite party, and the affirmative averment is not supported by evidence. This must be so, because it is illogical to cast the burden of proof upon the party having the negative side of a material issue.

The case of Anderson v. Watts, 138 U. S. 694, 701, 11 Sup. Ct. 449, 450, 32 L. Ed. 1078, relied upon by complainant's counsel in their argument, does not appear to me to support their contention that the burden of proof rests upon the defendants to disprove the averments of the bill with respect to jurisdictional facts, nor to deny the duty of the court to dismiss a case for want of jurisdiction which has been submitted without proof to sustain essential averments, traversed by an answer. In its opinion in that case, the court said:

"Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the Circuit Court to dismiss the suit; and this court, on appeal or writ of error, must see to it that jurisdiction of the Circuit Court has in no respect been imposed upon."

If an inference might be drawn from the quoted sentence detached from the body of the opinion that the duty of the court to dismiss would arise only when it shall be made to appear affirmatively that an averment of a jurisdictional fact is untrue, nevertheless any such inference is unwarranted after due consideration of the opinion in its

entirety. That case was a suit in equity, and the court held that since the act of 1875 the defendant in an equity case is not restricted by the rules of equity practice to a demurrer or plea as the only means available to test the jurisdiction of a circuit court, but may make objection to the exercise of jurisdiction in the answer; and the opinion reiterates what has been frequently declared by the Supreme Court:

"The jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that the case is without its jurisdiction unless the contrary affirmatively appears."

It is my opinion that this presumption of a lack of jurisdiction must be controlling when the pleadings make an issue as to any fact essential to jurisdiction, and there is no evidence to sustain the affirmative allegation of such fact.

There is an abundance of evidence proving that the complainant may sustain immense losses if animals are permitted to stray upon the tracks of its railroads, but the right to operate the railroads free from obstruction by animals upon the tracks is not the subject of controversy in this case. The real controversy comes into view most clearly by a recital of its history. The defendants have possession of land which is divided by the railroads located across the same, and they have the right to enjoy the use of the portions of land on both sides of the railroads and of a way of necessity crossing the tracks. When the complainant fenced its right of way, the right of access was recognized, and swinging gates were placed in the fences to afford necessary access, and the complainant assumed that the defendants were obligated to render the service of opening and closing the gates. The defendants did not at first dispute the right of the complainant to inclose the right of way, but objected to the swinging gates, and insisted that cattle guards should be constructed to protect the right of way, the same as at public highway crossings, and they objected to the imposition upon them of the services required to keep the right of way inclosed by operating swinging gates. This dispute as to whether the crossing should be protected by gates made to swing upon hinges or by stationary cattle guards led up to another controversy with respect to the sufficiency of the right of way deed to vest in the complainant the title to all of the land which the complainant claimed by virtue of said deed. The object of this suit appears to me to be twofold: First, to correct an apparent ambiguity in the deed, so as to vest in the complainant a perfect title to a strip of land wide enough to extend 50 feet from the center line of both tracks; and, secondly, for a mandatory injunction to compel the defendants to perform the service of keeping the swinging gates closed. The first controversy involves only the ownership of the amount of land claimed by the complainant. The title to the land is the subject of controversy, and the value of the land is necessarily the amount involved in that controversy; for by the decision one party will gain and the other will lose so much land, or its value, and nothing else.

The second controversy is what I have indicated, viz., insistence on the part of the complainant upon maintaining swinging gates for the purpose of closing necessary openings in its right of way fences, and

upon requiring the defendants to keep such gates closed, except when necessarily open for the use of the crossway over the tracks, and opposition on the part of the defendants to such gates, not disputing, however, the right of the complainant to have the free and unobstructed use of its tracks for the operation of trains thereover, and they make no objection to protecting the tracks by the maintenance of fences along the side lines of the roadbeds, which they concede to be the property of the complainant, with the usual standard cattle guards at the necessary openings in such fences. There is merit in the arguments on both sides of the question whether swinging gates or standard cattle guards afford the best security against such casualties as may be caused by animals straying upon the tracks. It is probably true that it is impossible to construct stationary cattle guards so as to constitute an absolute barrier against passage over the same by all animals, and it is equally true that a train may be wrecked by coming in contact with an animal finding its way upon the track through a gate left ajar by any careless or mischievous person. To make the gates effective requires vigilant watching. The evidence shows that there is a public highway across the defendants' land parallel with the railroad, so that animals other than such as may be controlled by the defendants may go upon the tracks at the crossway in question unless an effective barrier shall be maintained. Therefore an injunction merely restraining the defendants from demolishing the gates or mischievously leaving them ajar, and from intentionally permitting their animals to go upon the tracks, will not add much to the safety of trains running upon the tracks, and it is impossible to estimate the value which will be added to the railroad by the granting of an injunction in that form. It will strain the powers of a court of equity to render a decree granting a mandatory injunction to compel the defendants to render the services as gatekeepers which will be necessary to make gates effective. If the complainant has a paramount right, so that its choice of means for protecting its railways must be controlling in the determination of the controversy, and it is entitled to invoke judicial authority in aid of its will in this matter, the basis of such right is necessarily proprietorship of its right of way, and the right is a mere incident to ownership, and the value of the right cannot exceed the value of the fee-simple title to the land involved in the controversy. Supposing that the court should find from the evidence that the complainant paid nothing for the right of way strip, and that the deed is a grant of only one strip of a total width of 100 feet, and so indefinite that it is impossible to locate the strip by reference to either track, and on that state of facts should decree that the defendants convey to the complainant the double right of way claimed, and that the complainant pay them the value thereof; would the value be ascertained by estimating the immense loss which the complainant would sustain by cutting its lines and deprivation of the use of so much of its roadbed and tracks as are constructed upon defendants' premises, or would anything be added to the estimate of value as special consideration for the dominant right to inclose the right of way by any particular style of fence? I think that this query affords

a fair test of the question as to the amount involved, and that common sense dictates a negative answer.

For lack of evidence proving that the value of the land in controversy exceeds $2,000, the court is not sure that it has jurisdiction to render a decree granting any relief to the complainant.

KLENK et al. v. BYRNE et al.

(Circuit Court, W. D. Washington, N. D. February 17, 1906. Supplemental Opinion, March 5, 1906.)

No. 1,303.

1. COURTS—JURISDICTION OF FEDERAL COURTS—BURDEN OF PROOF.
   Where a jurisdictional allegation in a bill filed in a federal court is put in issue by the answer, it must be proved, or the court must decline jurisdiction.
2. JUDGMENT—VALIDITY—WANT OF JURISDICTION.
   A decree foreclosing a tax lien and confiscating property, without actual or legal notice to the owner, rendered by a court previous to the formal entering of any suit or action by one of the methods prescribed by the law of the state, is not a judicial determination of legal rights, and is absolutely void for want of jurisdiction.
3. EQUITY—PLEADING AND PROOF—ALLEGATIONS NOT DENIED.
   Facts well pleaded in a bill, and not denied nor controverted by the answer, are not required to be proved, unless the answer demands proof; and general denials in the answer are not entitled to consideration, where they are inconsistent with facts affirmatively alleged.
4. COURTS—FEDERAL PRACTICE—EFFECT OF STATE STATUTE.
   A state statute, requiring a payment or tender of the amount justly due to a purchaser of property at tax sale as a condition precedent to the maintenance of a suit to recover the property, is not controlling on a federal court of equity; and a bill is sufficient in such court which offers to do equity and pay such sum as the court may adjudge to be due the defendant, where defendants claim title and deny complainant's right to recover on any terms, and a tender would therefore have been a useless formality.
5. SAME—JURISDICTION OF FEDERAL COURT—SUIT TO REDEEM FROM TAX LIEN.
   A suit to redeem real estate from a tax lien which is admitted is not one to quiet title or remove a cloud, nor within the rule of the federal courts that equity is without jurisdiction of such suits against a defendant in possession.
6. EQUITY—PLEADING—SUFFICIENCY OF DENIAL.
   An averment in a bill that land which is the subject of the suit was at the time of its commencement unoccupied is not denied by an affirmative allegation in the answer that defendants "are now in the quiet and peaceable possession" of the same.
7. SAME—ADMISSIONS.
   In a suit in equity, submitted on bill and answer, the complainant's title to real estate will be deemed to be admitted by an answer in which the defendant pleads an adverse claim of title, deraigned from a void judicial decree in a proceeding against the complainant to foreclose a lien for taxes, notwithstanding a denial of the complainant's title in the same answer.

In Equity. Suit by the owner of unoccupied land to have an adjudication of an adverse claim to the title asserted by the defendants under a sale pursuant to judicial proceedings foreclosing a tax lien.

Heard on bill and answer. For lack of proof to establish diversity of citizenship, jurisdiction of the case disclaimed.

Austin E. Griffiths, for complainants.

S. P. Richardson, L. R. Byrne, and Bogle & Spooner, for defendants.

HANFORD, District Judge. Upon an examination of the pleadings, the court finds that the answer, in its entirety, fully admits all but one of the facts essential to entitle the complainants to the relief prayed for in their bill of complaint. The jurisdiction of the court appears to have been invoked on the ground of diversity of citizenship of the parties. The answer requires proof of the averment that at the time of commencing the suit the complainants were citizens of the state of Pennsylvania, and without proof to establish that fact affirmatively the court cannot assume jurisdiction to render a decree in their favor.

Formerly, in the practice of the federal courts, jurisdiction of a case commenced originally in a Circuit Court of the United States attached if the bill of complaint contained sufficient averments of the jurisdictional facts, and to oust the court of jurisdiction the defendant was required to contest the jurisdiction by a special plea; but under the statutes now governing the practice the federal courts are required on their own motion to disclaim jurisdiction at any stage of a case, if satisfied that any essential fact does not exist. Therefore, whenever the record shows upon its face that there is a controversy as to a jurisdictional fact, the court must require proof to support a finding to eliminate such question, or else assume that it does not have jurisdiction. Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; Anderson v. Watts, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; Steigleder v. McQuesten, 198 U. S. 141, 25 Sup. Ct. 616, 49 L. Ed. 986; O. R. & N. Co. v. Shell (C. C.) 125 Fed. 979. In the case last referred to, on a rehearing, the court filed a memorandum decision which sets forth my settled convictions on this subject. 143 Fed. 1004.

Before rendering a final decree the court will consider an application to submit proof as to the citizenship of the complainants, if such an application shall be made promptly.

Supplemental Opinion.

The objection to the jurisdiction which was sustained by the court in an opinion heretofore filed in this case, having been obviated by a stipulation of the parties, the duty now devolves upon the court of deciding other questions upon consideration of the bill and answer.

1. In the bill of complaint the complainants deraign title from the government of the United States by a patent duly issued which vests in them the full fee-simple title to and right of possession of the premises in controversy, unless the same has been divested by the proceedings to foreclose a lien for delinquent taxes, under which the defendants claim title and right of possession adverse to the complainants. It is not necessary for the complainants to prove their title, because the adverse title asserted is deraigned through them.

McDonald v. Hannah, 59 Fed. 977, 8 C. C. A. 426. The accuracy of the record of the judicial proceedings set forth in the pleadings is not disputed, and there is no controversy to be determined with respect to the facts relied upon to support the jurisdiction of the superior court to render its decree foreclosing the tax lien.

2. The legal questions are very simple, and it is only necessary to state my conclusions and the grounds upon which they are based. The Code of Procedure of this state provides two methods of commencing civil actions in the courts of the state, viz.: One method is by the service of a summons, which may be issued by the attorney for the plaintiff, and some of the preliminary steps in a suit or action commenced in that way may be taken before any papers are filed with the clerk of the court. The other method is by the filing of a complaint with the clerk of the court and the issuance of a summons. By the record exhibited to this court it appears that the proceedings to foreclose the tax lien were not initiated by either method, there was no service of a summons upon the owners of the estate, and the application for a decree foreclosing the tax lien, which is the only pleading, and therefore must be deemed the complaint, was not filed with the clerk of the court until several days after the rendition of the decree. I deem it unnecessary to assign any other reason for holding that a decree confiscating property, without actual or legal notice to the owner, rendered by a court previous to the entering of a suit or action, formally, by one of the methods prescribed by law, is not merely an irregularity, but absolutely void for want of jurisdiction, than this: That by the fundamental principles of jurisprudence in this country such a decree is not a judicial determination of legal rights, and is not entitled to respect in any other tribunal. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914; McManus v. Morgan, 38 Wash. 528, 80 Pac. 786.

There remains to be considered only the technical points of pleading and practice relied upon by the defendants to defeat the complainants in a hearing upon the bill and answer.

3. It is erroneously assumed that all averments of the bill of complaint not expressly admitted by the answer must be taken to be untrue. I say erroneously, because I consider that facts well pleaded in a bill of complaint and not denied nor controverted by the answer are not required to be proved, unless the defendant by the answer demands proof. The defendants were distinctly warned that this rule would be applied in the determination of this case upon the merits, when the court overruled exceptions to the answer for alleged insufficiency, on the ground that material averments were neither admitted not denied. I hold, also, that the answer must be read in its entirety, and fairly interpreted, in order to ascertain the sense of it, and that general denials which are inconsistent with facts affirmatively alleged are not entitled to consideration. This rule eliminates a clause in the answer in which the defendants say "they deny that plaintiffs are the owners or entitled to the possession of the" tract of land described in the bill of complaint; for by the same answer they attempt to deraign a title to the same land, by virtue of a tax deed executed pursuant to the same foreclosure proceedings referred to in the bill

of complaint, and admit the accuracy of the record of said proceedings showing that the delinquent tax upon the property was assessed to the plaintiff John Klenk, who was also named as the respondent in said proceedings, and thereby admit that the title was vested in said plaintiff, and rest their entire claim to the property upon a supposed divestiture of the complainants' title by judicial proceedings which, for the reason above stated, are null and void.

4. The bill tacitly, at least, admits that the defendants did acquire a valid lien upon the property for a delinquent tax, and that no actual tender of payment to the defendants was made before commencing this suit, and the answer denies an averment of the bill that an offer of payment was made. In this connection the defendants rely upon a statute of the state which requires the complainant, in any suit for an injunction to interfere with proceedings for the collection of taxes or for the recovery of property sold for taxes, to allege and prove that before commencing suit the amount justly due was paid, or tendered, and refused. 2 Ballinger's Ann. Codes & St. §§ 5678-5680. It is the opinion of the court, however, that, in so far as this statute extends the rule of equity which requires a suitor in equity to do or offer to do equity on his part, it is not controlling in a court of the United States, which cannot be hampered, in the exercise of its chancery jurisdiction, by local statutes. The bill contains a clear and unconditional offer on the part of the complainants to submit to such terms as the court may impose, and to pay whatever sum the court may adjudge to be due to the defendants; and as, by the answer, the defendants deny absolutely the right of the complainants to recover the property on any terms, it appears that a tender of payment would have been a useless formality, and therefore unnecessary. 28 Amer. & Eng. Encyc. Law (2d Ed.) 5; 17 Encyc. Pl. & Pr. 965 et seq.

5. The defendants rely firmly upon an averment of their answer to the effect that they "are now in the quiet and peaceable possession of the same" (meaning the property which is the subject of the litigation), as a complete bar to a suit in equity in a United States court to recover possession of, or to try questions affecting the title to, the property. The argument in support of this contention is based upon an assumption that the suit is in the nature of a bill quia timet. It is undoubtedly true that a suit of that description cannot be maintained, under the equity system of the federal courts, against a defendant in the actual possession of real estate; but there are two answers sufficient to refute the defendants' argument. One is that the answer contains no denial of an averment of the bill to the effect that the property at the time of commencing the suit was unoccupied and not in the actual possession of any one. That averment being undenied, the affirmative allegation of the answer amounts to nothing more than the statement of a legal conclusion, based upon the defendants' assertion of title by which they assume that, having the legal title, they have also legal possession, as contradistinguished from actual possession. If the averment quoted may be treated as an affirmative denial of the complainants' averment that the property was unoccupied when the bill was filed, it is evasive and sham, because it

is qualified by the word "now," and justifies the inference that the defendants did not have possession until after they had received notice of the pendency of the suit. The argument, however, is founded upon false premises, in this: that, instead of being a suit for an injunction to quiet the title, or to remove a cloud, the bill admits the existence of a lien, and the object of the suit is to redeem the property, by payment of the amount due to the defendants, and restore the complainants to their full rights as the owners of the property, with an unincumbered title. Of such a suit, when the right of the complainants to redeem is disputed, a court of equity alone has jurisdiction to adjust differences between the parties with respect to the amount legally and equitably due, and to afford adequate relief by the exertion of the power necessary to extinguish the lien. 17 Encyc. Pl. & Pr. 944 et seq.

It is the opinion of the court that the complainants are not required to pay any of the costs of the void judicial proceedings, but they should pay into court for the defendants the full amount paid for the assignment of the tax certificates, and the full amount of all taxes paid by the defendants upon the property, with interest at the rate prescribed by the revenue statutes to be paid to redeem property sold to purchasers for delinquent taxes; and, if they are unable to agree upon a computation, the case will be referred to the master in chancery to ascertain the amount due, and, upon payment being made as indicated, a decree will be entered, canceling the tax lien and requiring the defendants to relinquish all claims to the property.

THE WILLIAM E. REIS.

(District Court, N. D. Ohio, E. D. February 15, 1906.)

Nos. 2,380, 2,383, 2,386

COLLISION—VESSEL DRIFTING FROM MOORINGS—NEGLIGENT INATTENTION TO LINES.

The William E. Reis, a steam propeller weighing with the cargo of ore on board about 8,000 tons, was moored for the winter at a dock in Cuyahoga river at Cleveland being fastened to the wharf by a number of lines. A flood due to heavy rains and melting snow occurred during the winter, and for two or three days the water rose and when it had risen five feet the Reis broke from her moorings by reason of the parting of all of her lines, and drifted against and injured a number of vessels moored below. It appeared by a preponderance of evidence that the fastenings would have been reasonably sufficient if they had been properly adjusted, but that they were not, and, in consequence, they were probably broken by the unequal strain to which they were subjected by the lifting of the vessel. The only person left on board in charge during the rising of the water was a boy without experience, and physically unable to properly adjust the lines. It also appeared that no other of the numerous vessels moored in the river broke loose. *Held*, that the vessel had not sustained the burden resting on her to show that her drifting was the result of inevitable accident or of a cause which due care and nautical skill could not have provided against, and that she was liable for the resulting damages.

[Ed. Note.—For cases in point see vol. 10, Cent Dig. Collision, § 85½.]

In Admiralty. Suits for collision.

Roger M. Lee, for F. M. Osborne, and Kelley Island Transport Co. and others.

Hoyt, Dustin & Kelley, for Pittsburg S. S. Co.

Goulder, Holding & Masten, for The William E. Reis.

TAYLER, District Judge. About 8 o'clock on the morning of January 22, 1904, the steam propeller William E. Reis, which had been tied to the dock with her bow upstream, broke away from her moorings in the Cuyahoga river, a few hundred feet above the Columbus Street Bridge, Cleveland, and drifted, stern first, toward Lake Erie. A short distance below the bridge she struck the stem of the steam propeller John W. Moore, and broke her adrift; the Moore struck the steam propeller James B. Eads, which was tied up immediately below, broke her adrift, and all three vessels drifted down the river and brought up against the Superior Street Viaduct. The Reis also struck and damaged the barge Fanny Neil.

Libels were filed by the owners of the Moore, the Eads, and the Neil, against the Reis, alleging in substance, among other things, the facts above stated, and charging against the Reis the following faults: (a) That the Reis did not have out proper or sufficient winter moorings for such a position as she occupied in the river. (b) That those in charge of the Reis negligently failed to take proper and seamanlike precautions to prevent her breaking adrift from her moorings in view of the rising water and the threatening conditions impending prior to the morning of January 22d. (c) That those in

charge of the Reis negligently failed to look after and properly care for such moorings as the Reis had out. (d) That the person or persons in immediate charge of the Reis were incompetent, and inattentive to their duties. (e) That the anchor equipment of the Reis was negligently permitted to be and remain in such condition that both of said vessel's anchors could not be promptly put in use. (f) That the person or persons in charge of the Reis negligently failed seasonably and properly to use her anchor or anchors in order to prevent her drifting down with the current after she had so broken adrift.

The damage sustained by the Moore is alleged to amount to the sum of $18,204.82; by the Eads, $6,000; and by the Neil, $485.36. An order was made consolidating the cases.

The Reis was a vessel of nearly 5,000 gross tons burden. She had brought down a load of ore, part of which had been unloaded, but the greater part of her cargo remained on board. At the time of breaking away, she weighed, with her cargo, nearly 8,000 tons. When laid up, early in December, 1903, her fastenings were, according to the testimony of her master and crew, as follows: An 8-inch manila line, leading ahead some 30 feet from her forward starboard tow chock, to a pile on the dock. The first fastening abaft of this was six parts of a 6-inch manila line, leading from the breast chock in the windlass room to the dock timbers on the dock; three of these parts leading quartering ahead, and three parts about 45 degrees forward of abeam. From her forward deck engine, a short distance abaft of her forward house, she had a ⅞-inch steel cable leading ahead, and one astern; also three parts of a 6-inch manila line leading ahead. From her amidships timberhead, abreast of her amidships deck engine, she had a ¾-inch wire cable leading ahead. From her after deck engine, she had a ⅞-inch steel cable leading ahead, and another one astern; and from the same chock she had two parts of a 6-inch line leading ahead. From the after chock she had three parts of a 6-inch line, two leading ahead, and one leading astern. These lines were all made fast to dock timbers and piles on the dock; and, where bights were put out, these were fastened around dock timbers with toggles. The lines had various leads, some short, and some long, but it is impossible, from the testimony, to give their definite length.

There is a serious conflict in the proof as to whether the Reis was shifted, after being tied up by her master in December. I am inclined to the opinion that she remained in the same position, with the same fastenings. In any event, it is not contended that her fastenings were any more secure at the time when she broke away than when she was tied up. Early in January, 1904, there had been a heavy fall of snow, followed by cold weather, which formed much ice, and also prevented the melting of the snow. About the 18th, the temperature rose rapidly, the ice and snow melted, and a heavy fall of rain accompanied it, continuing for three or four days. The result was a very unusual—perhaps an unprecedented—winter flood. There had been, however, much greater floods in the spring and summer months. Owners and masters were warned, through the newspapers and otherwise, that a freshet was impending; and the evidence shows that such

a general sense of alarm was felt as to cause the taking of extra precautions by the owners, and those in charge, of vessels. Nothing was done by those in charge of the Reis to make her more secure, but her "shore captain," who lived aboard another vessel some distance away, claims that he examined her fastenings two days before the accident, and found them secure and sufficient. It also appears that several masters of the Corrigan boats, one of which was tied up immediately below the Reis, made some examination of her fastenings the afternoon before she broke away, and they testify that, in their opinion, the fastenings were sufficient, in view of the high water then and to be expected. The water rose gradually, but somewhat more rapidly Thursday night and Friday morning. At the time the Reis broke loose, the water was about five feet higher than it stood before the thaw set in. It is difficult to say just which of her lines first parted, but it does appear that her stern swung out before she had drifted any distance, because the Case which lay only 20 or 25 feet below the Reis, was not touched by her. Certain it is that every one of her lines and cables parted, and that no dock fastening gave way. The management of these lines and cables, by the shipkeeper of the Reis, will be referred to later on.

The rule of law applicable to this case is stated in The Louisiana, 3 Wall. 164, 18 L. Ed. 85, as follows:

"The collision being caused by the Louisiana drifting from her moorings, she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major which human skill or precaution and a proper display of nautical skill could not have prevented."

An examination of the testimony with reference to the application of this rule of law to the facts of this case discloses two duties laid upon the owners of the Reis: (1) That her fastenings should be secure and suitable to sufficiently hold her to the dock, in view of any flood or force which might reasonably be apprehended as likely to affect her; and (2) that these fastenings should be kept in such adjustment, between the boat and the dock, as to prevent any undue strain from coming upon them in consequence of the lifting of the vessel by reason of the rising of the water.

1. As to the character of the fastenings, there is great conflict. I think it is fair to say that taking the testimony of the master of the vessel and those who originally tied her up, and the testimony of those who examined her fastenings the day preceding the accident, and giving full weight to the contrary testimony of libelants' witnesses, these fastenings were such as would satisfy a prudent navigator that they were sufficient, if kept in proper adjustment, to repel the force of any flood reasonably to be apprehended. On this subject, a large amount of testimony was taken, and much argument expended. In view of the conclusion to which I have come respecting the other duties of those in charge of the Reis, it is not necessary to devote further time to this branch of the case.

2. An examination, however, of the testimony, and a disclosure of the facts, which are reasonably well established, connected with the management of this vessel during the night and immediately before

the vessel broke away, satisfy me that her owners were wanting in such care as ordinary prudence would dictate in respect to the manipulation—the easing and taking in the slack—of these fastenings, during the critical hours preceding the accident.

The Reis was a vessel weighing, with her cargo, nearly 8,000 tons. If we assume that she was securely fastened to this dock, we discover that she was left there, with this stupendous weight, in a rising river, which, in fact, rose about five feet, in charge of a mere boy, less than 20 years old, whose experience as a sailor comprised four trips on the lakes, with a preliminary training of one season as a second cook. This large vessel, with her heavy cargo, lifting with the rise of the water, and, lifting, subjecting her cables and lines to an enormous strain, was not only left in charge of one person, but of a boy wholly inexperienced in such matters, and certainly not possessed of capacity or experience to meet a serious emergency like this.

He testifies that the evening before the accident the bow of the Reis stood out some 8 or 10 feet from the dock, and that during the night, on account of the rise of the water, she had gone in until she was three or four inches, at the turn of her bow, from the dock. Thus, such slack as there was in her lines was being rapidly taken up by the lifting of the vessel; and, the moment that a severe strain came upon these lines, due to the lifting, they would almost immediately, of necessity, part. If she had had twice as many lines out as the respondents claim she had, and they were not properly adjusted so as to distribute the strain through them all, and, indeed, so as to wholly relieve them from any strain due to the rise of the vessel with the rising water, they would have parted just the same. In my opinion, this is the way this accident occurred. He claims that during the night he eased up three lines—the last one at 2 o'clock or before; yet the river continued rapidly to rise from that time until after the breaking away of the vessel, a period of six hours. He did not ease these lines up more than a few inches, some six or eight inches, or thereabouts. But here were many lines and cables, of various lengths, leads, and angles. If it is at all essential to the safety of a vessel, under circumstances such as existed at this time, that lines and cables should be slacked off in order to make provision for the rising of the water and the consequent lifting of the vessel, then it was to the last degree necessary that that work should be done on a heavy vessel like this, with the greatest care, and many times; and this could only be done by a competent person or persons. The expert navigators called by the libelants insist that it would take several men to accomplish this work; and that it ought to be done frequently. But, however that may be, it is apparent that this young and inexperienced boy was incapable of knowing what to do, and, if we believe the witnesses for the libelants, physically incapable of doing what was necessary to be done.

As Mr. Justice Grier said, in the case of The Louisiana, that "it requires no assumption or affectation of any very great nautical skill in this court to point out the defects of the management of this vessel," so it may be said here that it requires no assumption or affectation of any very great nautical skill in this court to point out that, under

the admitted circumstances of this case, it required the highest degree of care throughout the night of the 21st and 22d of January, 1904, while this flood was rapidly rising, to adjust and readjust, as the need might be, the lines and cables by which this vessel was made fast to the dock. The shore captain, whose duty it was to look after the Reis, was aboard another vessel, which was in his charge, safely moored in the quiet waters of the old river bed, where there was little danger; and left the Reis, with the grave necessities of the situation, to the care of an inexperienced keeper. It is apparent that it was due to the failure to properly slack or take in the slack of these lines, so as to distribute the strain upon them, or to relieve them from any strain from the rising vessel, that this accident occurred. If it was the force of the flood, as distinguished from the pull of the vessel due to its being elevated by the rising waters, which caused it, then it was caused by reason of the fact that the strain was not distributed throughout the fastenings, but was concentrated on one or more of them, wherefore they gave way. In either event, it would be due to the failure of the shipkeeper to properly attend to the fastenings.

In the case of the Louisiana, the court says:

"The drifting of this vessel was not caused by any sudden hurricane which nautical experience could not anticipate. None of the other numerous vessels, at that time in the harbor, were driven from their moorings."

The same fact appears in this case. None of the other vessels tied up along the Cuyahoga river—and there were many of them—escaped from their moorings. It is true the claim is made that a vessel broke away at Lorain, and another or two at Buffalo; but it cannot be contended that any certain comparison can be made between those cases and this, because conditions may not have been, and probably were not, the same. The suggested fact, which seems to have had weight with the Supreme Court in the case of the Louisiana, is that no other vessel, similarly situated, did break from her moorings. I am satisfied that the weight of the testimony establishes the fact that the owners of the Reis were grossly negligent in their failure to suitably care for the handling of this vessel during the period of the rising flood; and this is true, whatever may have been the sufficiency of the fastenings. She broke away either because the strain on her lines was not suitably distributed, so as to withstand the force of the flood's current or because they were not suitably slacked to correspond with the lifting of the vessel due to the rising of the water.

Complaint is made as to the anchors on the Reis, and the failure of the shipkeeper to promptly handle them after the vessel broke loose. The weight of the testimony discredits the statement of the shipkeeper, that he dropped the starboard anchor immediately after the Reis broke loose. Whether this be true or not, it is too speculative to enquire as to what would have happened if the anchors had been properly dropped. The fault for which the Reis must be held responsible had already occurred.

A decree may be drawn in favor of the libelants, and against the respondents, with the usual reference for the assessment of the damages to which each libelant is entitled.

In re CASTLEBERRY.

(District Court, N. D. Georgia, N. W. D. December 2, 1905.)

1. BANKRUPTCY—EXEMPT PROPERTY—JURISDICTION OF COURT OVER.

A court of bankruptcy has no jurisdiction over exempt property of the bankrupt, except to set the same aside, and where the exemption is claimed in money in the hands of the trustee, upon which a creditor claims an equitable lien superior to the exemption right the bankruptcy court can do no more than to set aside the exemption, direct the trustee to hold the fund until proceedings to determine the right thereto can be instituted in a court of competent jurisdiction, and in the meantime to withhold a discharge.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 672-674.]

2. SAME—RIGHT TO EXEMPTION—GEORGIA STATUTES.

The good faith required of a debtor by Code Ga. 1895, § 2830, to entitle him to his homestead exemption, as such section is construed by the Supreme Court of the state is in making a full and fair disclosure of his property, and a court of bankruptcy is not justified in denying his exemption because of his fraud in other respects.

In Bankruptcy. On objections to allowance of bankrupt's exemption.

Payne & Payne, for bankrupt.
R. J. & J. McCamy, for creditors.
King, Spalding & Little, for surety company.

NEWMAN, District Judge. It is unfortunate, perhaps, that the machinery of the bankruptcy court is not such as would authorize the court to turn over the money in the hands of the trustee, less expenses, to the authorities of the county of Dade, at least so much of it as has been derived from a sale of the real estate.

It seems entirely clear from the evidence that this real estate was bought with the money of the county; the checks given to pay for the same appearing to have been signed by the bankrupt as "county treasurer." What may be the truth as to the money realized from a sale of the stock of merchandise, seems rather more difficult to determine. The bankrupt, it is conceded, owes over $17,000 to mercantile creditors. The rights of Dale county and the mercantile creditors, respectively, can be determined hereafter, in a court of competent jurisdiction. The trustee in bankruptcy takes no title to exempt property, and the only jurisdiction that a court of bankruptcy has, as to exempt property, is for the purpose of setting it apart, and after hearing any question raised as to the right of exemption, to either refuse or approve the exemption, and have it turned over to the bankrupt. Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451].

It is thoroughly settled now that the bankrupt court will not undertake to enforce debts claimed to be good against the homestead or exemption. Such is the ruling of this court in Re Camp (D. C.) 91 Fed. 745; In re Wright (D. C.) 96 Fed. 187, following In re Bass, 3 Woods, 382, Fed. Cas. No. 1,091, the opinion being delivered by Mr. Justice Bradley. This is now thoroughly settled by the Supreme

Court in Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

The decisions referred to were all with reference to notes containing a waiver of homestead exemption, but the same rule would be applicable in a case like this, where it is claimed that it is subject to an execution issued by the ordinary of the county, for the amount of the defalcation of the county treasurer. I do not differ at all with the referee in holding that the rights of the county of Dade are superior to the right of the bankrupt to his exemption in the sense that the county's claim against the amount of the exemption can be enforced, and the money paid ultimately to the county, rather than to the bankrupt. The same is true, however, of a note waiving homestead and exemption; but that is no reason why the exemption should not be set apart. But under the ruling of the Supreme Court in Lockwood v. Exchange Bank, the court will refuse a discharge until opportunity can be given to the creditors whose debts are good against the exemption, to enforce the same in a court of competent jurisdiction. Of course, where the exemption claimed, as in this case, is in money held by the trustee, the bankruptcy court would hold the fund and protect it until proper proceedings can be instituted and the money sequestered by a court of competent jurisdiction, for the benefit of parties at interest. The referee having inadvertently found that the equitable title to this fund in the hands of the trustee was in the county of Dade, by an amendment to his decree, found that the title was in the bankrupt, subject to an equity, under the facts, in favor of the county. This being true, and the only ground upon which the exemption was denied being, it would seem, the outrageous character of the transaction, and the strong equity in favor of the county, it seems to me wholly insufficient, under the well-established practice to refuse to approve the exemption.

I have hesitated considerably, in view of the peculiar facts in this case, as to whether a case was not made under section 2830 of the Code of Georgia of 1895, for denying the homestead on the ground that the bankrupt has not acted in perfect good faith. I think, however, a careful examination of the section referred to, and the decisions of the Supreme Court of the state on the question, that the first part of section 2830, which requires the bankrupt to act in perfect good faith, is qualified by what follows in the section, and that the good faith required is in making a full and fair disclosure of his personal property. The whole language of the section, I think, shows this, and it is especially shown by the following:

"The debtor guilty of willful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed," etc.

It is in the making of a free and fair disclosure of property that good faith is required. I do not see how the ordinary could have refused to set apart the exemption, the county and other creditors having the right, of course, to enforce their claims against it in the proper manner. If this be true, the court of bankruptcy should do the same.

In Lockwood v. Exchange Bank, supra, Mr. Justice White, delivering the opinion of the court, says:

"We think that the terms of the bankruptcy act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt, generally exempted by state laws, should remain in the bankrupt, and not pass to his representative in bankruptcy, as did the provisions of the act of 1867, considered in Re Bass. The fact that the act of 1898 confers upon a court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act, in unambiguous language, declares shall not pass from the bankrupt, or become part of the bankruptcy assets. The two provisions of the statute must be construed together, and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is, besides, shown by the context of the act; since throughout its text, exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration. The act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen, with reference to the act of 1867, on the contrary, exhibits the intention to perpetuate the rule, since the provision of the statute to which we have referred in reason is consonant only with that hypothesis."

It seems to me clear, therefore, that the bankruptcy court only took the property in this case, as in cases of all property claimed as exempt, for the purpose of setting it aside, and it never became, except in that limited way, a part of the assets in bankruptcy. No other reason for refusing the exemption is shown except that Dade county has a lien of the highest character on the fund so set apart. This it can readily enforce by instituting proper proceedings for that purpose.

The action of the referee is disapproved, but he is directed to require the trustee to hold the fund claimed as exempt, to allow the county of Dade, and all other creditors, a reasonable opportunity to enforce against such funds in proper courts their respective claims.

In re CASTLEBERRY.

(District Court, N. D. Georgia. March 8, 1906.)

1. BANKRUPTCY—PAYMENT OF COSTS FROM EXEMPT PROPERTY—RIGHTS OF LIEN CREDITOR.
   The right to pay the costs and expenses of a bankruptcy proceeding from money set aside to the bankrupt as exempt, to which he assented, *held* superior to the right of a creditor claiming an equitable lien on the fund.

2. SAME—TRUSTEE—RIGHT TO COMMISSIONS.
   A trustee is entitled to commissions on money realized by him from the sale of property of the bankrupt, which is claimed by the latter as exempt, and also claimed by a creditor, and which has been paid over by the trustee to the receiver of a state court in which such claims are being litigated where no objection to such commissions is made by the bankrupt.
   [Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 571.]

3. SAME—COUNSEL FEES—SERVICES RENDERED TO BANKRUPT.
   A court of bankruptcy will not fix the amount to be paid to counsel for a bankrupt for services in procuring the allowance of his exemptions which is a matter for agreement between the parties.

In Bankruptcy. On allowance of costs and expenses.

Payne & Payne, for bankrupt.
R. J. & J. McCamy, for creditors.
King, Spalding & Little, for surety company.

NEWMAN, District Judge. The bankrupt is making no objection to the payment of the costs and expenses in the bankruptcy court out of the exemption allowed him. On the contrary, in his application filed with the referee on June 23, 1905, he expressly asks that he be allowed his exemption "subject, however, to the costs, and expense and attorney's fees which may be legally incurred and allowed in this proceeding." The county of Dade is objecting to it. It appears that the county of Dade when it originally appeared in court against the allowance of the homestead, asked that the funds of the bankruptcy court be turned over to it, less "the costs and expenses thereof." But without seeking to estop the county of Dade in any way by this statement of its former pleading here, it seems to me that in this issue between the county of Dade's claim against Castleberry and the costs of the bankruptcy court, the costs should be preferred. It is not a question now, as to allowing the expenses out of the bankrupt's exemption; but it is a question between the county against Castleberry as defaulting tax collector, and the costs and expenses of this court, and, on that issue, I think the costs and expenses should prevail. The expense attached to the administration of this estate is rather large, and yet, on an examination of the statement of the various items, I do not see how any one of them could be lessened. The amount allowed the receiver and the attorneys is very reasonable; and the other items cannot be objected to.

I think the referee erred in confining the compensation, that is, the per cent. allowed the trustee to the amount disbursed by him less the amount paid over to the receiver of the superior court. As I under-

stand it, the bankrupt himself is not objecting to these commissions, and it is like the other expenses, a contest between the county and the expenses of the court. The language of the bankruptcy act is "all moneys disbursed by them;" that is, by trustees. This money unquestionably is all disbursed by the trustee. The trustee sold the property of the bankrupt and realized from it the cash in his hands. The referee's refusal to allow him his commission on the amount to be paid over to the receiver of the state court, was based upon the idea that he was not entitled to his commissions out of the exemption. How this might be usually, where the trustee with the consent of the bankrupt reduces the personalty to cash, is not the issue here, because the bankrupt has expressly agreed, as I understand it, to the allowance of all costs and expenses in this court. I think the trustee should be allowed his commission on the entire amount disbursed. I do not feel justified in interfering with the amount allowed by the referee as counsel fees. It appears from the referee's certificate with reference to the allowance of the fee of Payne & Payne, attorneys for the bankrupt, that in fixing the amount of the fee, he considered the fact of their representation of the bankrupt in the matter of his exemption. I do not think that this court could undertake to fix a fee for this service. Legal services to a bankrupt in having his exemption allowed is a matter between the bankrupt and his attorneys.

The amount which counsel admit they will receive net, after paying certain expenses, seems to me to be a sufficient fee for filing the schedules, and attendance at the examination of the bankrupt at the first meeting of creditors.

UNITED WATER WORKS CO., Limited, v. STONE.

(Circuit Court, D. Massachusetts. March 6, 1906.)

No. 162.

COURTS—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—ATTACHMENT—SPECIAL ATTACHMENT PENDING ACTION—MASSACHUSETTS STATUTE.

Under Rev. Laws Mass. c. 167, § 80, which authorizes an attachment at any time during the pendency of an action where one would have been authorized when it was commenced, no ground is necessary to be shown for such special attachment other than lack of security for any judgment plaintiff may recover, which is in general sufficient ground for an attachment under the law of the state.

At Law. On motion to dissolve special attachment.

See 127 Fed. 587.

Anson M. Lyman, for plaintiff.

L. S. Dabney and Robert B. Stone, for defendant.

LOWELL, Circuit Judge. This was an action of contract begun by a chip attachment. On February 27, 1906, the plaintiff filed a motion for a special precept as follows:

"And now comes the plaintiff in the above-entitled action and says that suit was begun on the 29th day of November, 1902, and that the amount claimed by the plaintiff is twelve thousand one hundred ninety-three and 33/100 ($12,193.33) dollars, with interest; that no attachment of any kind

whatever was made in said action to secure whatever judgment the plaintiff might recover; that the court has directed that said case be referred to an auditor to hear and pass upon the defendant's memorandum of charges against this plaintiff, and that said case is likely to continue for some time before final judgment can be entered.

Wherefore it prays that a special precept may issue for the attachment of the goods and effects of the defendant in the sum of twenty thousand ($20,000) dollars."

This motion was based upon Rev. Laws Mass. c. 167, § 80, which reads as follows:

"At any time during the pendency of an action, suit, libel, petition or other proceeding at law or in equity, upon the commencement of which an arrest or attachment is authorized by law, the court or trial justice for cause may, on motion ex parte, order such arrest of the defendant or such attachment of his property by the trustee process or otherwise to secure the judgment or decree which the plaintiff may obtain in said cause; but no arrest of the defendant shall be authorized unless the plaintiff or a person in his behalf makes affidavit and proves to the satisfaction of the court or trial justice the same facts as are required to be proved to authorize an arrest on mesne process. Such arrest or attachment shall be subject to all the provisions of law relative to arrest and attachment upon mesne process, so far as applicable."

The precept was issued ex parte, and thereafter the defendant filed the following motion:

"Now comes the defendant and moves that the order in said action, by which a special attachment of defendant's property was authorized, be revoked; and says that no cause for such attachment was alleged in the plaintiff's petition therefor, and that there is no cause why such attachment should be allowed; and pending the determination of this motion the defendant prays that the plaintiff be directed to return to the clerk of this court the special precept heretofore issued for such attachment."

The defendant contends that, in order to warrant the issuance of the precept, the plaintiff must show some cause for the attachment other than mere want of security for payment of the judgment to be recovered; such cause, for example, as nonresidence of the defendant, or his concealment of property. The plaintiff contends, on the other hand, that mere want of security is sufficient cause for the issuance of the special precept, which issues as matter of course if this security is wholly wanting or insufficient.

Attachment on mesne process as security for the judgment to be recovered is authorized in general by the law of Massachusetts, and the section above quoted has been construed by the state courts to permit in effect an attachment at any time during the continuance of the suit. If the attachment is excessive, the defendant may be relieved in the same manner, whether the attachment be made at the beginning of the suit or by special precept.

The practice of the state courts has been the practice of this court so far as occasion has arisen. That practice will be followed until it has been held illegal by a higher court.

Motion denied.

END OF CASES IN VOL 143.